INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2023

Public sitting
held on Wednesday, 13 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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Vice-President Tomas Heidar  
Judges José Luís Jesus  
Stanislaw Pawlak  
Shunji Yanai  
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David Joseph Attard  
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Kathy-Ann Brown  
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List of delegations:

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Mr Jesse Clarke, General Counsel (International Law), Office of International Law, Attorney-General's Department
Ms Lauren Burke, Principal Legal Officer, Office of International Law, Attorney-General's Department
Mr Stephen Donaghue KC, Solicitor-General
Ms Kate Parlett, Counsel
Mr Greg French, Ambassador to the Kingdom of the Netherlands; Permanent Representative to the Organisation for the Prohibition of Chemical Weapons

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Ms Tania Freiin von Uslar-Gleichen, Legal Adviser, Federal Foreign Office
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Saudi Arabia
Ms Ahlam Abdulrahman Yankssar
Ms Noorah Mohammed S. Algethami
Mr Abdullah Emad Alsahef
Mr Mohammed Saleh M. Albarrak
Ms Eman Abdullah H. Aman
THE PRESIDENT: Please be seated.

Good morning. Today we will continue the hearing in the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.

At the outset, I wish to note that due to traffic disruptions affecting the delegation of Germany, the schedule of this morning’s sitting has been slightly revised.

As a result, we will hear oral statements from the delegations in the following order: Australia, Germany and Saudi Arabia.

I now give the floor to the representative of Australia, Mr Clarke, to make his statement.

You have the floor, Sir.

MR CLARKE: Good morning, Mr President, distinguished members of the Tribunal. It is a privilege to appear before you on behalf of Australia.

Given the centrality of the United Nations Convention on the Law of the Sea to this proceeding, Australia wishes to place on the record the significance of that Convention as setting out the comprehensive legal framework within which all activities in the oceans and the seas must be carried out. Australia signed UNCLOS on the very first day it opened for signature, 10 December 1982. Australia continues to be committed to the proper interpretation and implementation of UNCLOS, including in respect of the protection and preservation of the marine environment. The international organizations and institutions established by UNCLOS, including this Tribunal, have played a critical role in ensuring the success of that Convention.

The marine environment plays an essential role in regulating our climate and providing for energy, economic and food security needs. A healthy and sustainable marine environment is essential not only for all States but for all life on this planet. Australia places particular importance on the protection, preservation, conservation and sustainable use of the oceans, and recognizes the important and ongoing role of the oceans for our region.

Australia is committed to strong oceans governance and robust regimes to ensure the protection and preservation of the marine environment. To that end, Australia recently welcomed the adoption of the new legally binding international instrument, under UNCLOS, on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. This agreement, commonly known as the “BBNJ”, delivers significant environmental benefits at a time when our oceans need them most. It is a timely example of the true value of both the UNCLOS framework and international cooperation in oceans governance.

Australia recognizes the leadership of our Pacific neighbours in global oceans governance, and the important role of Pacific island States in sustainable management and use of the oceans, and responding to its environmental needs.
Indeed, Australia acknowledges the importance of the oceans as part of the Pacific identity.

In that context, it is all the more important to recognize that small island States are on the frontline of the adverse impacts of climate change, as powerfully demonstrated by the co-chairs of COSIS on Monday. Those impacts have never been felt so strongly. Australia acknowledges the longstanding leadership of small island States, in particular Pacific island States, on global responses to climate change.

Australia is taking urgent and ambitious climate action – to reduce anthropogenic greenhouse gas emissions, decarbonize its economy and strengthen national resilience to the impacts of climate change. Global cooperation is critical to delivering an effective response to climate change. Australia is resolutely committed to achieving the objective of the United Nations Framework Convention on Climate Change and the goals of the Paris Agreement. It is supporting global efforts to accelerate decarbonization and enhance adaptation and resilience, particularly across our Indo-Pacific region, which is home to some of the world’s most climate-vulnerable countries.

Australia’s participation in these proceedings reflects its ongoing commitment to address the existential threat of climate change, including in respect of the protection of the marine environment.

Australia was encouraged to see that, on key aspects of the questions before the Tribunal, there are many areas of broad agreement among the participants in these proceedings.

In particular, there is broad consensus that anthropogenic greenhouse gas emissions are a threat to the marine environment, with the result that the obligations of States Parties under Part XII of UNCLOS to protect and preserve the marine environment include obligations with respect to such emissions.

Australia was also encouraged to see that, consistently with its own written submissions, written statements of participants in these proceedings highlight that the international community is pursuing a collective response to the immense challenge of climate change through the UNFCCC and the Paris Agreement, and

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1 ITLOS/PV.23/C31/1, p. 6, lines 14-19 (Browne) and p. 10, lines 20-22 (Natano).
2 Throughout Australia's oral submissions, any reference to greenhouse gas emissions, or GHGs, is a reference to anthropogenic greenhouse gas emissions, consistently with the scope of the questions referred to the Tribunal.
3 See, for example, written statement of Australia, [30]-[31], written statement of Egypt, [26], written statement of the European Union, [22] and [47], written statement of Mozambique, [3.19] and [3.49(a)], written statement of New Zealand, [46] and [79], written statement of Rwanda, [216], written statement of the United Kingdom, [42].
4 See, for example, written statement of Canada [32], [37], [40], written statement of France, [120], [123], written statement of New Zealand, [66]-[67], written statement of Singapore, [57], written statement of the United Kingdom, [7], [79].
that these instruments are highly relevant to interpreting and meeting the obligations arising under Part XII of UNCLOS in relation to climate change.\(^5\)

By way of outline of Australia’s submissions:

I will be followed by the Solicitor-General of Australia, Dr Stephen Donaghue, who will address you on obligations under UNCLOS to protect and preserve the marine environment, and to take measures to prevent, reduce and control pollution of the marine environment.

He will be followed by Dr Kate Parlett, who will address you on the obligations under UNCLOS to cooperate, and to adopt and enforce relevant national laws with respect to pollution of the marine environment.

Mr President, that concludes my opening remarks, and I ask you to give the floor to Dr Donaghue.

THE PRESIDENT: Thank you, Mr Clarke. I now give the floor to Mr Donaghue. You have the floor, Sir.

MR DONAGHUE: Mr President, distinguished members of the Tribunal, it is an honour to appear before you today.

As Australia’s representative has just pointed out, there is a clear consensus as to the relevance of the UNFCCC and the Paris Agreement to the questions before the Tribunal. For reasons that I will develop this morning, Australia submits that Part XII of UNCLOS should not be interpreted as imposing obligations with respect to greenhouse gas emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement.

That submission reflects the fact that UNCLOS is a framework agreement.\(^6\) Its framework nature, which has placed UNCLOS at the centre of the legal order of the seas and the oceans, has allowed it to continue to be fit for purpose as distinct and unforeseen challenges have arisen over time. It achieves that by quite deliberately leaving the development of specific rules and standards on particular topics for the future, including by imposing obligations on States Parties to adopt and enforce laws and regulations,\(^7\) and to agree and establish international instruments, rules, standards, practices and procedures,\(^8\) to give effect to the generalized obligations and objectives set out in Part XII.

\(^5\) See, for example, written statement of Canada, [22]-[23], [33], [37], written statement of the European Union, [26], [28]-[29], written statement of France, [98], written statement of the Republic of Korea, [20], written statement of the Republic of Latvia [19], written statement of The Republic of Mauritius, [40], [42], written statement of Singapore, [37]-[39], written statement of the United Kingdom, [51], [68]-[69].

\(^6\) Australia’s statement, paras. 21-23.

\(^7\) UNCLOS, articles 213-222.

\(^8\) UNCLOS, articles 207-212.
Of particular significance, article 197 mandates cooperation between States, including through international organizations, in formulating and elaborating international rules, standards, recommended practices and procedures for the protection and preservation of the marine environment. Climate change is a paradigm example of an issue that can be addressed only through a cooperative response of the kind that article 197 envisages.

Mr President, members of the Tribunal, Australia's submission is that the framework nature of UNCLOS has important consequence for answering the questions that are the subject of the present request for an advisory opinion, because those questions concern the "specific obligations" of States Parties under UNCLOS, including in particular Part XII.

The Tribunal is therefore asked to identify specific obligations by interpreting the generalized obligations and objectives in Part XII that provide or constitute the framework for more specific agreements or regulations concerning the protection and preservation of the marine environment that one then sees in Part XII.

The framework nature of UNCLOS strongly supports an interpretation of Part XII that does not cut across or undermine the subsequent agreements of States – which were themselves the product of close negotiation and careful compromise – directed to the particular threat to the environment posed by greenhouse gas emissions.

Australia is resolutely committed to the objective of the UNFCCC and the goals of the Paris Agreement. The obligations of States under those agreements form a core of the specialized international climate law regime, which the preambular language of both treaties describes as "a common concern of humankind".9

In particular, these agreements, having attracted the support of nearly 200 Parties, reflect the response of the international community to the need for individual and cooperative action to address the particular challenges of greenhouse gas emissions. They create a specific framework and process for State cooperation and collective action in response to climate change. Under those agreements, States have an obligation to progressively increase their ambition, as is reflected in the annual meetings at Conferences of the Parties.

The ultimate objective of the UNFCCC, as described in article 2, is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".10 The "climate system" is broadly defined to include the hydrosphere, and therefore clearly encompasses the marine environment.11

In the Paris Agreement, States have agreed to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" and to pursue "efforts to limit the temperature increase to 1.5°C above pre-industrial levels".12 The cooperative efforts necessary to achieve that collective goal are to be achieved

9 UNFCCC, preambular paragraph 1; and Paris Agreement, preambular paragraph 11.
10 UNFCCC, article 2.
11 UNFCCC, article 1(3).
12 Paris Agreement, article 2(1)(a).
through the preparation, communication and maintenance of nationally determined
contributions (or NDCs), which are targets for the reduction of emission of
greenhouse gases by each State Party. Each successive NDC is required to reflect
a State’s highest possible ambition. In issuing its advisory opinion, in our
submission the Tribunal should not assume that States will not give effect to these
commitments.

The UNFCCC and the Paris Agreement focus on States Parties reducing
greenhouse gas emissions over time. Further, given the delicate balances involved,
the Paris Agreement does not prescribe particular action that must be taken to
control or reduce emissions, instead focusing on an obligation to pursue efforts to
achieve the overall agreed collective goal. It is a matter for States as to how they
achieve reductions of greenhouse gas emissions, with it being open to different
States to adopt different approaches, consistent with the ultimate objective of article
2 of preventing dangerous anthropogenic interference with the climate system.

Australia agrees with COSIS that the interpretation of UNCLOS must be informed by
the global climate regime I have just summarized. Specifically, Australia submits
that the UNFCCC and the Paris Agreement are relevant to the questions before the
Tribunal in three complementary ways, each of which we will develop.

First, for the purpose of articles 192 and 194 of UNCLOS, they reflect the measures
that the international community has agreed are “necessary” to prevent, reduce and
control pollution of the marine environment arising from greenhouse gas emissions,
and they provide a mechanism for identifying the “capability” of each State, using the
best practicable means at its disposal, to achieve that prevention, reduction and
control.

Second, they constitute the international rules or standards that States Parties to
UNCLOS are encouraged to cooperate to formulate and elaborate, and which are
required to be taken into account in adopting laws and regulations, and
implemented, in order to prevent, reduce and control pollution of the marine
environment.

Third, they are the outcome of the cooperative process mandated by article 197 in
order to meet the objective of the protection and preservation of the marine
environment in respect of greenhouse gas emissions.

I will address the first of those matters, while Dr Parlett will address the second and
third.

I turn, then, first to article 192, which underpins the overarching legal framework
established by Part XII, and which exemplifies the framework character of Part XII.
As is stated in its title, article 192 imposes a “general obligation” on States in relation to the protection and preservation of the marine environment. Like many other States, Australia considers that the content of that general obligation can only be determined having regard to the other provisions of UNCLOS and other applicable rules of international law, including, of course, such further rules as emerge from compliance with the duty to cooperate under article 197. That interpretation of article 192 is supported by leading commentators, and it also reflects the evident intent of the drafters of UNCLOS, who understood that the general obligation in article 192 was to be given content by subsequent provisions, including article 194, and by other, more detailed provisions, rules and standards which then might be agreed within the framework of UNCLOS.

In the context of greenhouse gas emissions, Australia’s submission is, therefore, that the UNFCCC and the Paris Agreement specify the standards against which compliance with the general obligation imposed by article 192 must be assessed. For that reason, the Tribunal should not interpret article 192 as imposing “specific obligations” to protect and preserve the marine environment, over and above those that apply under the UNFCCC and the Paris Agreement. Any “specific obligations” under UNCLOS must be found elsewhere.

Turning next, then, to article 194, it imposes an obligation to take measures to prevent, reduce and control pollution of the marine environment. Australia agrees with the general consensus reflected in the written statements to this Tribunal that greenhouse gas emissions are a source of “pollution of the marine environment” within the definition in article 1(1)(4) of UNCLOS, and therefore that the obligations imposed by article 194 are centrally relevant to the questions before the Tribunal.

That said, like the rest of UNCLOS, article 194 clearly was not drafted with a view to addressing pollution in the nature of greenhouse gas emissions in particular. Rather, it is apparent that article 194 was formulated to address more conventional cases of pollution. That is clear from the references in article 194(3) to pollution from vessels, installations and devices, or from “the release of toxic, harmful or noxious substances” from land-based sources or through the atmosphere.

It is also clear from article 194(2), which is addressed to the conventional case of transboundary pollution. Greenhouse gas emissions present a new and different type of challenge to these conventional cases, not least because of the diffuse

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20 See, for example, written statement of Egypt, [84], written statement of the European Union, [23]-[24], written statement of France, [141]-[142], written statement of Rwanda, [176], written statement of Singapore, [65].
22 Written statement of Bangladesh, [29]-[30], written statement of the European Union, [42]-[43], written statement of the Republic of Mauritius, [72], written statement of Nauru, [40], written statement of the United Kingdom, [30], [42].
23 Written statement of the European Union, [47], written statement of the Republic of Mauritius, [72], written statement of Nauru, [37]-[39], written statement of the United Kingdom, [30], [42].
temporal and geographic sources of such emissions, the cumulative nature of their impact and the fact that the environmental impacts may occur in locations far removed from the source of the emissions that contribute to those impacts.

For all of those reasons, whilst greenhouse gas emissions are a form of pollution to which article 194 applies, Australia submits that it would be a serious error to analyse the obligations arising under article 194 with respect to such emissions as if what was involved was an ordinary case of transboundary harm. At a minimum, that would fail to account for the extremely complex questions of causation that would arise, which are such as to render notions of individual State responsibility entirely inapt in the context of damage to the marine environment that results from greenhouse gas emissions.

That, Mr President, members of the Tribunal, brings me to the first of four points Australia emphasizes with respect to the text and effect of paragraph (1) of article 194.

The first point is that article 194(1) requires States to take certain measures “individually or jointly as appropriate”. The word “jointly” is of particular significance in the context of greenhouse gas emissions, because, for the reasons already mentioned, climate change is a global challenge that requires States to cooperate in pursuit of collective solutions. The obligation that is imposed by article 194(1) concerning pollution of the marine environment resulting from greenhouse gas emissions is perhaps the paradigm example of an obligation that it is “appropriate” to be discharged by States “jointly”, because the environmental consequences of such emissions result from a complex and diffuse causal chain, the links in which comprise not just the actions of many different States and private actors spread all over the globe, but those actions that have occurred over a period of many decades. The result is that it is only through joint action that global levels of greenhouse gas emissions in the atmosphere, and pollution of the marine environment, can be prevented, reduced and controlled. The importance of joint action in the operation of article 194(1) is underlined by the final phrase in article 194(1), which requires States to use their “best efforts” in an “endeavour to harmonize their policies” to prevent, reduce and control pollution of the marine environment.

The second point in relation to article 194(1) is that the obligation to “take … measures” is an obligation of conduct rather than result. That follows because article 194(1) gives content to States’ obligations by reference to the practicability of conduct directed to achieving the specified result, rather than by reference to the achievement of the result itself. Thus, article 194(1) refers to States using “the best practicable means at their disposal and in accordance with their capabilities”. That is also consistent with article 194(3)(a) which, in seeking to give specific content to article 194(1), directs attention to articles 207(1) and 212(1), both of which plainly create obligations of conduct rather than result.

Where an international obligation is an obligation of conduct rather than result, compliance with that obligation is assessed against the standard of due diligence. As the Seabed Disputes Chamber of this Tribunal has previously observed, an

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24 See Chagos Marine Protected Area Arbitration, [539].
obligation of due diligence is not “an obligation to achieve … Rather, it is an
obligation to deploy adequate means, to exercise best possible efforts, to do the
utmost, to obtain this result.”25 Those observations were endorsed by the Tribunal in
its advisory opinion to the Sub-Regional Fisheries Commission.26 Similarly, the
International Court of Justice considered in Pulp Mills that an obligation of due
diligence requires a State to adopt appropriate rules and measures, and to exercise
guardian vigilance in enforcing those rules and measures within its jurisdiction.27

The content of the standard of due diligence is variable and context-dependent.
That, too, was recognized by the Seabed Disputes Chamber of the Tribunal in its
advisory opinion in Responsibilities and obligations of States with respect to activities
in the Area, which described due diligence as a “variable concept” and said that
“[t]he content of ‘due diligence’ obligations may not easily be described in precise
terms”.28

My third point concerns the type of measures that are contemplated by
article 194(1). That paragraph contains a single obligation to take measures directed
towards three interrelated ends. By providing that States must take measures to
prevent, reduce and control pollution, article 194(1) reflects an understanding that it
may not be practically possible to prevent all pollution all the time. It recognizes the
fact that pollution of some types, at some points in time, may occur, and requires
States to mitigate its impact if it does occur. It also reflects the fact that because
UNCLOS is a framework agreement, specific rules and standards will be
continuously developed over time, through coordination and cooperation between
States, to address new and unforeseen challenges, including those for which the
best available science continues to evolve.

Greenhouse gas emissions being, as almost all the written statements agree, a form
of pollution of the marine environment, article 194(1) requires States Parties to take
measures to prevent, reduce and control those emissions, provided such measures
are possible and practicable. Under the auspices of the UNFCCC and the Paris
Agreement, States have committed to take increasingly ambitious measures to
address climate change in respect of greenhouse gas emissions. But those
measures, of course, focus on the reduction and control of greenhouse gas
emissions.

That is entirely consistent with article 194(1) which, by imposing an obligation to take
measures to “prevent, reduce and control” pollution of the marine environment,
requires States to take measures to reduce and to control such pollution as has not

25 Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)
(Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No 17, 1 February
2011) 41 [110].
26 Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory
27 Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), ICJ Rep 2010, [197].
28 Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)
(Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No 17, 1 February
2011) 43, [117]. See also Request for an Advisory Opinion submitted by the Sub-Regional Fisheries
Commission (Advisory Opinion) (International Tribunal for the Law of the Sea, Case No 21, 2 April
2015) 41 [132].
been prevented. The reduction and control aspects of article 194(1) would have no content unless UNCLOS is interpreted as reflecting an understanding that, in particular periods in time and for some forms of pollution, States are required take measures to reduce and control pollution that has not been prevented. That interpretation of the reduction and control aspects of article 194(1) plainly aligns with the commitments that States have made under the Paris Agreement. 

Mr President, distinguished members of the Tribunal, that is not to deny the present significance of the prevention aspect of article 194(1). It is merely to say that the interpretation of article 194(1) must recognize – as the Paris Agreement recognizes – that the pathway to prevention of pollution by greenhouse gas emissions is for States to exercise best possible efforts within their capacity to reduce and control those emissions until that pollution is prevented. In that way, UNCLOS accommodates the reality that underpins the Paris Agreement: that, at present, the global economy (including food and energy infrastructure) is structured in such a way that it is not currently practicable nor within the capacity of States entirely to prevent further emissions. As such, the prevention aspect of article 194(1) requires States jointly to exercise best possible efforts to reduce and control greenhouse gas emissions, using the best practicable means at their disposal and in accordance with their capabilities, until the prevention of pollution of the marine environment from that source is achieved.29

It follows that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under article 194 of UNCLOS to take measures to prevent, reduce and control pollution of the marine environment arising from greenhouse gas emissions.

My fourth and final point in relation to article 194(1) is that the scope of the due diligence obligation it imposes is informed by the specific terms of article 194(1). That article imposes an obligation on States to take “all measures … necessary” to prevent, reduce and control pollution, using “the best practicable means at their disposal and in accordance with their capabilities”. Those words explicitly recognize that the standard of conduct required to prevent, reduce and control marine pollution varies between States Parties. It also varies over time, with the measures that are “necessary” and “practicable” being informed by a range of factors, including relevant scientific, technical and economic considerations, as well as an ongoing requirement to re-evaluate those measures in light of new scientific, technical and economic information. The standard of conduct required is further informed by the evolving circumstances of the individual State over time, which will, of course, have a bearing on the capabilities of the State to prevent, reduce or control greenhouse gas emissions. Article 194(1) therefore involves a dynamic and variable standard, which is informed by evolving circumstances and capacities within each State.

Drawing those points together, Australia’s submission is that article 194(1) imposes a specific obligation on States to exercise due diligence in order to prevent, reduce and control pollution of the marine environment arising from greenhouse gas emissions, the content of that obligation varying between States Parties, and over

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29 Transcript, [Day 2, Thouvenin, paras. 24-25].
time, depending on the capabilities of individual States and the best practicable
means at their disposal.

In practice, the content of that obligation is best identified through the comprehensive
and evolving framework of obligations imposed by the UNFCCC and the Paris
Agreement, pursuant to which States have agreed upon the measures “necessary”
to address environmental impacts arising from greenhouse gas emissions, including
with respect to the pollution of the marine environment. That process is based on a
global collective and evolving understanding of the science relevant to climate
change. In particular, as I have already noted, article 2(1)(a) of the Paris Agreement
provides that States will collectively hold the increase in global temperatures to well
below 2°C above pre-industrial levels and pursue efforts to limit temperature
increases to 1.5°C above pre-industrial levels, recognizing that this would
significantly reduce the risks and impacts of climate change. That is all directed to
giving effect to the ultimate objective identified in article 2 of the UNFCCC, being the
stabilization of atmospheric concentrations of greenhouse gases “at a level that
would prevent dangerous anthropogenic interference with the climate system”. There
is no disagreement as to that objective. But the global climate regime recognizes that
the path to achieving that objective will differ from State to State. The temperature
goal from Paris should not be imported into UNCLOS in a way that eliminates the
choice of means as to the specific measures to be taken to achieve the agreed goal.
That choice of means is central to the Paris Agreement and it cannot be bypassed in
the interpretation of UNCLOS.

The very variability in the obligations of different States, which is inherent in the
terms of article 194(1) itself, is also recognized in the UNFCCC and the Paris
Agreement. In particular, the Paris Agreement contains a carefully negotiated
mechanism, the product of which should be understood, for the purposes of
article 194(1), as identifying what individual States must do to prevent, reduce or
control greenhouse gas emissions, having regard to the best practicable means at
their disposal and in accordance with their capacities.

Article 4 of the Paris Agreement, as the Tribunal has heard, provides for States to
prepare, communicate and maintain successive NDCs, and provides that “[e]ach
Party’s successive nationally determined contribution will represent a progression
beyond the Party’s then current nationally determined contribution”. Further, the
progression required of States under the Paris Agreement will be informed by the
global stocktake that takes place under the framework of the Paris Agreement, which
will inform States as they update and enhance their actions and support for climate
action.

The provisions of the Paris Agreement that I have just described allow States, taking
into account scientific, technical and economic factors which underscore the problem
of reducing greenhouse gas emissions, to identify the measures that, using the best
practical means available at their disposal, are within “their capacities” to “prevent,
reduce and control” greenhouse gas emissions. That being so, the Tribunal should
answer Question (b) by holding that, in the case of States that are party to the Paris
Agreement and that have achieved their NDCs under that Agreement, such
compliance also satisfies the standard of due diligence required to comply with the
specific obligation that arises from article 194(1). It is not suggested that the mere
publication of an NDC would discharge a State’s obligation under article 194(1);\(^{30}\) a State must pursue with due diligence the achievement of its NDC.

Turning now, and much more briefly, to article 194(2), it is apparent from the terms of this provision that it was formulated by reference to a conventional case of transboundary pollution. It is directed to minimizing the extent to which activities within the jurisdiction of one State cause damage to “other States and their environment” (rather than to “pollution of the marine environment” more generally). It also requires States to ensure that pollution arising from activities within their jurisdiction or control does not spread to areas beyond national jurisdiction.

Mr President, members of the Tribunal, having regard to the length of time that greenhouse gas emissions remain in the atmosphere, and to the fact that article 194(1), and, indeed, the Paris Agreement, requires States to take measures to reduce or control greenhouse gas emissions rather than to prevent them entirely at the present point in time, article 194(2) cannot sensibly be interpreted as requiring States to ensure that such emissions do not “spread” to the territory of another State or on to the high seas. If it were interpreted in that way, article 194(2) would impose an obligation with which it would be impossible for any State to comply, given that greenhouse gas emissions emitted from the territory of one State will contribute to volume of emissions in the atmosphere for decades to come. For that reason, Australia’s primary submission is that greenhouse gas emissions are not activities of the kind to which article 194(2) is directed.

If the Tribunal considers that article 194(2) does capture greenhouse gas emissions, Australia submits that the measures necessary to “ensure” that such emissions do not cause damage to the environments of other States, and that pollution does not spread beyond national jurisdiction, go no further than the measures necessary to prevent, reduce or control pollution pursuant to article 194(1). That follows because, like that article, article 194(2) imposes an obligation of conduct, compliance with which is assessed against a standard of due diligence, the content of which is variable and context-specific.

Further, the interpretation of article 194(2) must accommodate the practical reality that the diffusion of greenhouse gas emissions does not respect national boundaries and cannot be made to do so. For that reason, the acts and omissions of any one individual State can only reasonably be judged by reference to the totality of steps that it takes in pursuit of the global temperature goal, in cooperation with other States, and over time. In those circumstances, in the case of States that are parties to the Paris Agreement and that have achieved their NDCs under that Agreement, such compliance also satisfies the standard of due diligence required to comply with any specific obligation that arises from article 194(2) with respect to greenhouse gas emissions. Of course, this does not in any way diminish Australia’s recognition of the impact greenhouse gas emissions may have on other States. Rather it is our submission that, due to the nature of greenhouse gas emissions, the most appropriate way for States to ensure that such emissions do not cause damage to the environment of other States is by addressing that pollution at the source.

\(^{30}\) Cf. [transcript reference to Day 2, Amirfar, paras 28 and 31].
Mr President, members of the Tribunal, that now concludes my statement. I now ask you to give the floor to Dr Parlett, to conclude Australia’s submissions.

THE PRESIDENT: Thank you, Mr Donaghue. I now give the floor to Ms Parlett to make her statement.

You have the floor, Madam.

MS PARLETT: Mr President, members of the Tribunal, it is an honour to appear before you today and a privilege to have been asked to present Australia’s submissions on Sections 5 and 6 of Part XII, and article 197.

As is anticipated by article 194(3)(a), Sections 5 and 6 of Part XII relevantly impose specific obligations with respect to pollution of the marine environment from land-based sources, and from or through the atmosphere. Australia considers that greenhouse gas emissions may fall within either category, depending on the particular factual circumstances.

By reason of articles 207(1) and 212(1), States must adopt laws and regulations at the national level to prevent, reduce and control pollution of the marine environment from land-based sources, or from or through the atmosphere. In doing so, they must “take into account” internationally agreed rules, standards and recommended practices and procedures. The UNFCCC and the Paris Agreement are particularly relevant here, as they establish rules and standards of the kind that States must “take into account” when adopting national laws and regulations to prevent, reduce and control pollution from greenhouse gas emissions.

Articles 207(1) and 212(1) allow States Parties to adopt national measures that derogate from international rules or standards; however, States must take the relevant rules or standards into account, in good faith.

Articles 207(4) and 212(3) require States Parties, acting especially through competent international organizations or diplomatic conferences, to endeavour to establish global and regional rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere. These provisions are consistent with the duty of cooperation imposed by article 197, to which I will turn shortly.

To the extent that greenhouse gas emissions fall within article 207, as pollution from land-based sources, States Parties are required to make best efforts to endeavour to harmonize their policies at the “appropriate regional level”, which in the context of greenhouse gas emissions, is necessarily global.

Again, to the extent that these emissions fall within article 207, the laws, regulations, measures and practices that States Parties are required to adopt or take by the other paragraphs of article 207, must be designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances into the marine environment, in accordance with article 207(5). In the context of greenhouse gas emissions, what is “possible” depends on the complex interplay of considerations that underpin the agreements reached in the UNFCCC and the Paris Agreement.
Thus, States Parties will comply with their obligations under article 207(5) if they adopt laws and regulations, take other measures, establish global and regional rules, standards and recommended practices and procedures that are consistent with the UNFCCC and the Paris Agreement.

Section 6 of Part XII addresses enforcement, including of laws and regulations adopted in accordance with Sections 5. Articles 213 and 222 provide that States shall enforce their national laws and regulations adopted in accordance with articles 207(1) and 212(1), and that they shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere. These provisions do not prescribe the particular means for such enforcement, and thus accord a degree of discretion to States. Australia considers that articles 213 and 222 would be satisfied where States can show that they are able to enforce their relevant national laws and regulations, and where they have adopted measures to give effect to applicable international rules and standards, in good faith. So far as the questions referred to the Tribunal are concerned, the relevant international rules and standards are the rules and standards agreed under the UNFCCC and the Paris Agreement, for the reasons we have explained.

Through these provisions, and in particular by imposing requirements to take account of relevant international rules and standards in domestic law, and for those domestic laws to be enforced, UNCLOS has a particular role to play in giving concrete effect to international obligations concerning protection of the marine environment, including in relation to greenhouse gas emissions. It effectively operates to encourage States to implement and to enforce the rules and standards that they have agreed at the international level in and through their domestic law.

UNCLOS thereby provides a bridge between international rules and standards and their enforcement at the domestic level. In this way, and given the progress that has been made at the international level to agree relevant rules and standards relating to greenhouse gas emissions, in particular through the UNFCCC and the Paris Agreement, UNCLOS assumes particular significance in relation to climate change.

Turning then to cooperation, which underscores numerous provisions of Part XII and is the particular focus of article 197. That article requires States to “cooperate on a global basis and, as appropriate, on a regional basis, … in formulating and elaborating international rules, standards and recommended practices and procedures consistent with” UNCLOS, for the protection and preservation of the marine environment.

The duty of cooperation in article 197 is reinforced by other provisions of Part XII that also contemplate that States will cooperate to prevent and control pollution of the marine environment. These provisions include articles 207(4) and 212(4), which oblige States Parties to endeavour to develop global and regional rules and standards, including through formal multilateral processes, to address marine pollution, and article 194(1), which requires States Parties to “endeavour to harmonize their policies” in connection with measures to prevent, reduce and control pollution.
The duty of cooperation in article 197 requires States to make meaningful and
substantial efforts with a view to adopting effective measures in pursuit of the goal of
protecting and preserving the marine environment. That said, a duty to cooperate
is, of its nature, one of conduct rather than result. As such, it is inherent in such a
duty that compliance is judged by reference to the efforts States make to coordinate
their actions, rather than the particular means they have chosen for doing so, or the
outcomes of those efforts.

With respect to greenhouse gas emissions, those efforts have been considerable
and they have been pursued with increasing urgency and priority. States have made,
and are continuing to make detailed, meaningful and substantial efforts to address
the full range of issues associated with such emissions and climate change impacts
under the auspices of the UNFCCC and the Paris Agreement. These include the
negotiation and adoption of rules, practices and procedures in pursuit of climate
change mitigation and adaptation, including through climate technology development
and transfer, and climate finance and capacity-building. Alongside the UNFCCC and
the Paris Agreement, States have been and are pursuing a range of cooperative
efforts through other international organizations and before international fora
addressing sector-specific greenhouse gas emissions. In Australia’s view, the steps
collectively taken in respect of these emissions meet States’ obligations under
article 197.

The conclusion that States are complying with article 197 of UNCLOS with respect to
greenhouse gas emissions goes a long way to demonstrating compliance with
Part XII more generally. Global cooperation in relation to these emissions is not only
desirable, but practically necessary, given that climate change can only be
addressed through sustained and coordinated efforts by the community of States.
The UNFCCC and the Paris Agreement reflect that reality. The very first paragraph
of the preamble of the UNFCCC acknowledges that the “adverse effects” of climate
change “are a common concern of humankind”, and its sixth paragraph
acknowledges that “the global nature of climate change calls for the widest possible
cooperation by all countries”.

The importance of cooperation in addressing environmental problems has been
emphasized both by this Tribunal and by the ICJ. In its provisional measures order in
MOX Plant, this Tribunal described the duty to cooperate as “a fundamental principle
in the prevention of pollution of the marine environment under Part XII of the
Convention and general international law”. To the same effect, the ICJ has
recognized, in relation to environmental harm generally, that “it is by co-operating
that States … can jointly manage the risks of damage to the environment.” That is
particularly true in relation to climate change, given the collective character of both
the causes and the challenges in addressing impacts of greenhouse gas emissions.

Going forward, a key aspect of the cooperation of States, in a form that meets their
specific obligations under article 197 of UNCLOS, is the Conference of the Parties,

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31 See Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion) Case No. 21, 2 April 2015, ITLOS Reports 2015, 60 [210].
32 MOX Plant (Ireland v United Kingdom) Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, [82].
33 Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), ICJ Rep 2010, [77].
or COP, that is established by article 7 of the UNFCCC.\textsuperscript{34} The COP is tasked with keeping the implementation of the UNFCCC and related instruments under regular review, and with making "the decisions necessary to promote the effective implementation of the Convention."\textsuperscript{35} It is specifically required to "[p]eriodically examine the obligations of the Parties and the institutional arrangements under the [UNFCCC], in the light of [its objective], the experience gained in its implementation and the evolution of scientific and technological knowledge".\textsuperscript{36} The COP is further required to promote and facilitate the exchange of information on measures adopted by different States;\textsuperscript{37} to facilitate the coordination of measures that have been adopted, at the request of States;\textsuperscript{38} and to assess the implementation of the Convention, the overall effects of the measures taken pursuant to it, and the extent to which progress towards the objective of the Convention is being achieved.\textsuperscript{39}

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (which is also referred to as the CMA) meets annually at the same time as the COP. In particular, the outcome of the first "global stocktake",\textsuperscript{40} which is due to take place in November and December this year, will inform Parties in updating and enhancing the actions they are taking at the national level and will, to use the language of article 14(3) of the Paris Agreement, "enhanc[e] international cooperation for climate action".\textsuperscript{41}

The principle of cooperation also underpins the mechanism in article 4 of the Paris Agreement for assessing the progress that individual States are making towards reducing their greenhouse gas emissions. Article 4 of the Paris Agreement provides for States to nominate, over time, progressively ambitious targets for the reduction of greenhouse gas emissions through NDCs.\textsuperscript{42} In communicating their NDCs, States are to provide "the information necessary for clarity, transparency and understanding".\textsuperscript{43} In this way, States have and are continuing to coordinate, with the objective of pursing their collective global temperature goal, and reducing and controlling the impact of greenhouse gas emissions, including on the marine environment.

Consistently both with its framework nature and the fact that climate change was not in the contemplation of States when UNCLOS was negotiated, UNCLOS should be interpreted as responding to the enormous challenge posed by climate change principally through its requirements for cooperation in the formulation of agreements addressing particular or future problems. Australia considers that the UNFCCC and

\textsuperscript{34} UNFCCC, article 7(1).
\textsuperscript{35} UNFCCC, article 7(2).
\textsuperscript{36} UNFCCC, article 7(2)(a).
\textsuperscript{37} UNFCCC, article 7(2)(b).
\textsuperscript{38} UNFCCC, article 7(2)(c).
\textsuperscript{39} UNFCCC, article 7(2)(e).
\textsuperscript{40} Paris Agreement, article 14(1).
\textsuperscript{41} While a report entitled "Technical dialogue of the first global stocktake" was published on 8 September, that report is not the outcome of the stocktake, but is a part of the stocktake which will conclude at COP28 in November and December 2023: see https://unfccc.int/topics/global-stocktake/about-the-global-stocktake/why-the-global-stocktake-is-a-critical-moment-for-climate-action#What-happens-next; cf ITLOS/PV.23/C31/1, p. 23, lines 10-12 (Akhavan); [transcript of day 2, Amirfar, para 29].
\textsuperscript{42} Paris Agreement, article 4(2).
\textsuperscript{43} Paris Agreement, article 4(8).
the Paris Agreement reflect agreements reached through cooperative processes that  
amply discharge the obligation imposed by article 197 to cooperate in order to meet  
the objective of the protection and preservation of the marine environment in respect  
of greenhouse gas emissions. Further, through their ongoing participation in the  
COP provided for by these agreements, States Parties to UNCLOS continue to meet  
their obligations to cooperate under Part XII of UNCLOS.

Mr President, this brings me to my concluding remarks. In summary, Australia makes  
five points to assist the Tribunal in answering the questions before it.

First: Greenhouse gas emissions are capable of constituting “pollution of the marine  
environment” within the meaning of article 1(1)(4) of UNCLOS.

Second: Article 192 of UNCLOS imposes a general obligation to protect and  
preserve the marine environment, the content of which can only be determined  
having regard to other provisions of UNCLOS, or to other applicable rules of  
international law, including, in the context of climate change, the UNFCCC and the  
Paris Agreement.

Third: Article 194(1) of UNCLOS imposes a specific obligation on States Parties to  
take measures to prevent pollution of the marine environment by exercising best  
possible efforts within their capacity to reduce and control greenhouse gas emissions  
until the prevention of pollution of the marine environment from that source is  
achieved. In the case of States that are parties to the UNFCCC and the Paris  
Agreement, compliance with those agreements satisfies the specific obligation under  
article 194 of UNCLOS.

Fourth: Sections 5 and 6 of Part XII of UNCLOS impose specific obligations in  
respect of prevention, reduction and control of pollution of the marine environment.  
They require States Parties to take into account internationally agreed rules and  
standards in domestic law, to enforce that domestic law, and to endeavour to  
establish global rules and standards. So far as the questions referred to the Tribunal  
are concerned, the relevant international rules and standards are the rules and  
standards agreed under the UNFCCC and the Paris Agreement.

Fifth: Article 197 imposes a specific obligation on States to cooperate, which requires  
them to make meaningful and substantial efforts with a view to adopting effective  
measures in pursuit of the goal of protecting and preserving the marine environment.  
Significant efforts have been made and effective measures have been adopted,  
principally through the UNFCCC and the Paris Agreement. Through those  
agreements, and through their ongoing participation in the development and  
implementation of those agreements, States have, and continue, to meet their  
specific obligation to cooperate under UNCLOS.

Mr President, distinguished members of the Tribunal, that concludes the oral  
statement of Australia in these proceedings and I thank you for your kind attention.

MR PRESIDENT: Thank you, Ms Parlett. I now give the floor to the representative of  
Germany, Ms von Uslar-Gleichen, to make a statement. I am glad that you were able  
to make it.
MS VON USLAR-GLEICHEN: Thank you. Mr President, distinguished members of
the Tribunal, it is an honour for me to appear before this Tribunal today and to
present to you the comments of the Federal Republic of Germany.

I am joined today by Professor Proelß as our counsel, and by my colleague,
Christian Schulz, Deputy Head of the Law of the Sea Division. I will start with
presenting our statement and Professor Proelß would be happy to answer any
possible questions from the Bench. Germany is of the view that this case is of high
importance for international law, both from a procedural and from a substantive
perspective.

On procedure, this is only the second request for an advisory opinion of the Tribunal
as a full court.

On substance, the questions submitted by COSIS concern a defining challenge of
our time. To specify the legal obligations of the States Parties to UNCLOS regarding
the marine environment is a crucial task in the context of the unprecedented and
grave consequences of climate change.

We have listened carefully to the remarks by the distinguished representatives of
several COSIS Member States during the first two days of these hearings. Small
island States are especially impacted by climate change and its devastating
consequences on the marine environment. It is therefore no surprise that they took
the initiative for this request.

Their request gives us the opportunity now to reflect upon and to obtain the
Tribunal’s view on how UNCLOS, the Constitution for the Ocean, must be applied
and interpreted. This is an opportunity to clarify how UNCLOS must be read in light
of our current knowledge of the adverse impacts of climate change on the ocean.
Germany is thankful for this opportunity.

As all States Parties to UNCLOS have committed to protect the marine environment,
the ocean is one of our most important allies in the fight against the climate crisis
and its protection is our common concern. Germany is therefore of the view that to
obtain the guidance sought from this Tribunal will help all States Parties to UNCLOS
to fulfil our common task.

Given the considerable weight of an advisory opinion by this Tribunal, we would like
to fully support the Tribunal in carrying out its important task: the task of giving us
guidance on how our UNCLOS obligations need to be interpreted and applied with
regard to the impacts of climate change.

Mr President, it is well known that Germany is supportive of the Tribunal’s
competence to issue advisory opinions as a full court, once the pertinent
prerequisites are met.

Germany expressed this view already in the proceedings in Case No. 21. Germany
fully endorses the Tribunal’s findings in that case. Germany agrees that article 21 of
the Statute of the Tribunal constitutes the basis for issuing an advisory opinion, if and
when such a matter is "specifically provided for in an international agreement which
confers jurisdiction on the Tribunal".

In Case No. 21, Germany also expressed its firm belief that requests for an advisory
opinion could be used more regularly. They have great potential to strengthen the
law of the sea and international law more generally. In contrast to contentious
proceedings, these are non-adversarial in character. They allow all parties to voice
their opinions on the interpretation of the Convention with a view to clarifying the
obligations arising from its provisions.

We therefore believe that this Tribunal, with its specific competence concerning
UNCLOS, will make an important contribution by issuing an advisory opinion. Please
allow me to mention that the same will be true, in our view, for the International Court
of Justice concerning the extent and status of relevant obligations of all States on the
basis of the current state of international law with regard to future development of
climate change. Germany, together with many other States, has supported and

carried forward those proceedings on the initiative of Vanuatu.

In the case before us, Germany is of the view that the requirements of article 21 of
the Statute are met. The COSIS Agreement confers advisory jurisdiction on the
Tribunal. It authorizes and empowers the Commission to request advisory opinions
from this Tribunal. The matters on which advisory opinions can be sought by COSIS
are specifically provided for in the COSIS Agreement: they are defined as "any legal
question within the scope of UNCLOS". The questions submitted to the Tribunal in
the present case are also sufficiently connected with the purposes and principles of
the COSIS Agreement.

A few States are still questioning the advisory jurisdiction of this Tribunal in general.
They affirm that they read the words "all matters" in article 21 of the Statute as
referring only to "disputes", thus expressly excluding any requests for advisory
opinions. Some quoted documents from the negotiating history of UNCLOS to
support their interpretation. Germany does not agree with those views.

As the Tribunal pointed out in its advisory opinion in Case No. 21, "all matters"
should not be interpreted as covering only "disputes". Because if that were to be the
case, article 21 of the Statute would simply have used the word "disputes".

However, article 21 speaks of "all disputes and all applications submitted [...] in
accordance with this Convention AND ALL MATTERS specifically provided for in any
other agreement which confers jurisdiction on the Tribunal." Consequently, "all
matters" must mean something more than only "disputes" and that something more
includes advisory opinions, if specifically provided for in an international agreement
which confers jurisdiction on the Tribunal.

This understanding of article 21 of the Statute is confirmed when we look at its
French and Spanish versions, which are phrased in an equally open manner, going
beyond mere disputes. The French version, for example, speaks of "toutes les fois
que cela est expressément prévu".
The objective meaning of the third alternative of article 21 of the Statute is thus quite clear and unambiguous. It cannot, in our view, be interpreted as restricting "all matters" to only disputes.

While article 21 of the Statute, together with the COSIS Agreement, constitutes a substantive legal basis for the Tribunal’s advisory opinion, article 138 of the Rules of the Tribunal furnishes the prerequisites for the Tribunal to exercise its advisory jurisdiction. Germany holds that the present request meets these prerequisites.

The questions which are presented to the Tribunal are of a legal character when measured against the standards established by the Tribunal’s 2015 Advisory Opinion.

Germany further holds that the COSIS Agreement is an “International agreement related to the purposes of the Convention” in the sense of article 138 of the Rules of the Tribunal. Its Preamble and articles 1 and 2 contain broad references to UNCLOS and to the need to take immediate action to protect and preserve the marine environment. The COSIS Agreement therefore is – at least partly – related to the purposes of UNCLOS.

Furthermore, Germany holds the view that the Tribunal should exercise its discretion pursuant to article 138, paragraph 1, of the Rules in such a manner as to admit the request for an advisory opinion submitted by the COSIS.

In fact, as the Tribunal confirmed in its 2015 Advisory Opinion, a request for an advisory opinion should not in principle be refused except for “compelling reasons”.

None of the three possible grounds to regard a request as inadmissible that were discussed in the 2015 case is relevant in the present case.

However, the present proceedings may be a good opportunity for the Tribunal to provide even more clarity as to the criteria that it will be applying when requested for an advisory opinion in the future. Germany, as a firm supporter of the competence of the Tribunal as a full court to issue advisory opinions, would welcome such a development.

Germany is of the view that the questions submitted by COSIS are neither too vague nor too unclear. They also do not require the Tribunal to act as a lawmaker instead of a judicial body. The Commission clearly seeks answers regarding the status of current international law, not future international law.

The third category of “compelling reasons” that were discussed in Case No. 21 concerned the test of whether the questions presented to the Tribunal would necessarily involve a pronunciation on the rights and obligations of third States. As far as this test is concerned, it is true that COSIS does not limit itself to seeking guidance in respect of its own actions. The request is, rather, seeking a clarification of the obligations of a much larger group of States, namely the States Parties to UNCLOS in their entirety. Germany holds, however, that this situation should not be regarded as a reason to refuse the Commission’s request for an advisory opinion.
All States are affected by climate change. And due to the fundamental role of the ocean as a carbon sink and its importance for global biodiversity and food security, also all States are affected by the decreasing state of the marine environment. To protect and preserve the marine environment has been allocated a central role under international law. The obligation codified in article 192 of UNCLOS, the “constitution for the ocean”, is applicable to all maritime zones under the international law of the sea. This legal situation is also reflected in the preamble, according to which “problems of ocean space can closely interrelate and need to be considered as a whole”.

Germany submits that this common concern of the States Parties of UNCLOS for the marine environment should indeed be considered a good reason for the Tribunal to exercise its discretionary power in favour of the requested advisory opinion. In this respect, it should also be noted that the Tribunal, as well as the ICJ, have confirmed in their jurisprudence that the consent of States not members of a body requesting an advisory opinion is not a requirement for the admissibility of a request for an advisory opinion.

Germany has full confidence that the Tribunal will continue to handle its advisory jurisdiction prudently and with utmost responsibility and conscious of the wider context, such as the parallel request by the UN General Assembly for an advisory opinion of the International Court of Justice.

Mr President, I would now like to come to the issues of applicable law.

To answer the questions submitted to it, the Tribunal will have to apply the Convention and, in particular, its Part XII on the protection and preservation of the marine environment. It will also have to apply other applicable rules of international law, to the extent that such a recourse is covered by its jurisdiction ratione materiae. This includes those rules that are explicitly or implicitly mentioned or referenced by the provisions of Part XII of UNCLOS. For the purposes of replying to the questions submitted to the Tribunal by the COSIS, the most relevant of these rules are codified in the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, to which all States Parties to UNCLOS are also Parties. These sets of applicable rules are interlinked, and their relation is key when replying to the questions submitted. My following remarks refer to this interrelation.

First, the Tribunal should, pursuant to article 293, paragraph 1 of the Convention, refer to “other rules of international law” where necessary, in order to substantiate, or inform respectively, the meaning of the terms of the Convention. This follows from the rules of interpretation codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties as well as from article 237, paragraph 1, of UNCLOS.

As far as the protection and preservation of the marine environment is concerned, the award rendered by the Annex VII Tribunal in the South China Sea arbitration can be referred to here as an illustrative example of such an integrated reading of the Convention. In the South China Sea arbitration, the Annex VII Tribunal interpreted UNCLOS in line with international agreements such as CBD and CITES.
In the present case, the UNFCCC and the Paris Agreement are the most relevant “other international agreements” that the Tribunal is called upon to make use of when interpreting the provisions of UNCLOS. The precautionary principle, as reflected notably in the Rio Declaration on Environment and Development, is another important cornerstone for the interpretation of Part XII of UNCLOS.

Secondly, where the Convention refers to, or incorporates the content of certain “external” instruments, it appears that these instruments are part of the applicable law within the meaning of article 293, paragraph 1, of the Convention. In particular, where the Convention requires domestic laws and regulations to be no less effective, or to give effect to, external rules, the Tribunal may need to determine the standards established by these rules. For example, the Convention does so with regard to marine pollution from vessels in article 211. On the other hand, in provisions like articles 207, paragraph 1, and article 212, paragraph 1, States are required to act “taking into account internationally agreed rules, standards and recommended practices and procedures”. Here, the Tribunal may need to address the legal scope of these references and of the obligations arising from them.

Germany considers that, with regard to the application and interpretation of Part XII of the Convention, the scope of the applicable law under article 293, paragraph 1, extends to all international legal rules dedicated to the protection and conservation of the marine environment. These include “special Conventions and agreements” in terms of article 237 of UNCLOS, and any rules and regulations that concern the specific source of pollution which is being governed by the relevant renvoi provisions in the Convention.

Mr President, let me now turn very briefly to the substance of the questions submitted.

As a Member State of the European Union, Germany fully endorses and aligns itself with the written statement filed by the European Union on the substance of the questions submitted to the Tribunal. I would therefore like to here merely highlight some points that are, while being reflected in the European Union’s statement, of particular importance to Germany. And as the questions put to the Tribunal reflect the language used in articles 192 and 194 of UNCLOS, my remarks are centred around those articles, beginning with the more general obligation.

Article 192 of UNCLOS contains a legal due diligence obligation of a dual nature. It entails the positive obligation to take active measures to protect and preserve the marine environment. It also contains the negative obligation not to degrade the marine environment. It has a broad character: it obliges the Parties to take measures to protect and preserve the marine environment from any kind of harm. This includes harm caused by climate change, such as ocean warming, sea-level rise and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere.

It should also be noted that article 192 of UNCLOS covers both current and future impacts on the marine environment.
Article 194 of UNCLOS lays down further and more precise obligations for States as regards the prevention, reduction and control of pollution of the marine environment. In Germany’s view, the current advisory proceedings provide an opportunity to make clear: greenhouse gas emissions should be considered as falling within the definition of “pollution of the marine environment” under article 1, paragraph 1, subparagraph 4, of UNCLOS.

I would like to highlight in this context that effects of greenhouse gas emissions introduced into the marine environment result, inter alia, in ocean acidification. Ocean acidification should clearly be considered as a “deleterious effect” for the purposes of the definition of “pollution of the marine environment” in article 1, paragraph 1, subparagraph 4, of UNCLOS.

Mr President, I will at this stage refrain from going into more detail on the substance of the questions submitted. As representative of a Member State of the EU, I will leave this to my distinguished colleagues who will speak on behalf of the European Union.

Mr President, Germany hopes that the requested advisory opinion will contribute to further strengthening international cooperation and coordination in ocean governance.

International cooperation and coordination will also be key to effectively implement the future BBNJ Agreement with a view to reaching the 2022 Kunming-Montreal Global Biodiversity Target. We are looking forward to being amongst the first signatories of the BBNJ Agreement next week in New York. Germany welcomes that the new BBNJ Agreement also contains a provision conferring advisory jurisdiction on this Tribunal.

To close, let me stress once again: Germany is supportive of the Tribunal’s competence to issue an advisory opinion. We support this competence also in the present case, which was brought before the court by the island States that are members of COSIS. The present proceedings are a welcome opportunity to further specify our obligations under UNCLOS – for the health of our ocean and of our planet.

This concludes our remarks.

Thank you very much, Mr President.

THE PRESIDENT: Thank you, Ms Von Uslar-Gleichen.

We have now reached 11:20. At this stage, the Tribunal will withdraw for a break of 30 minutes.

We will continue the hearing at 11:50.

(Short break)

THE PRESIDENT: Please be seated.
I now give the floor to the representative of Saudi Arabia, Ms Noorah Mohammed Algethami, to make a statement.

You have the floor, Madam.

**MS MOHAMMED ALGETHAMI:** Mr President, members of the Tribunal, it is an honour to appear before you, and to do so on behalf of the Kingdom of Saudi Arabia.

The Kingdom attaches great importance to a multilateral approach to the protection of the global climate system, including in relation to adverse effects of greenhouse gas emissions. In particular, the Kingdom is committed to mitigation and adaptation under the United Nations Framework Convention on Climate Change and the Paris Agreement.

Mr President, members of the Tribunal, as you know, the difficult negotiation of the UNFCCC and Paris Agreement (which I shall refer to as the "specialized regime on climate change") resulted in a highly nuanced set of treaty provisions which contain a specialized mechanism to ensure compliance with States’ climate obligations and responsibilities. It is not within the Tribunal’s advisory function to intervene in this mechanism and reach its own, autonomous interpretation of States’ climate obligations.

Mr President, as you will have seen, some written statements urge the Tribunal to conclude that, by virtue of UNCLOS, States are legally bound to achieve their Nationally Determined Contributions. Further, some seek to portray the Paris Agreement commitment of pursuing efforts to limit the temperature increase to 1.5°C or 2°C above pre-industrial levels as having somehow imposed a legally binding obligation on the part of States Parties to UNCLOS to achieve that objective. Such submissions have no basis in the law, either under the specialized climate regime or UNCLOS.

Many participants in these proceedings have rightly stressed the overwhelming importance of past and ongoing negotiations on climate change. This is another important reason for the Tribunal to exercise great caution. It will be recalled that the International Law Commission was similarly cautious when adopting guidelines on the “Protection of the atmosphere”, which I quote here, “were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein.”

Mr President, members of the Tribunal, my task this morning is to assist the Tribunal by setting out some legal considerations that, in our respectful submission, should be

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taken into account when responding to the Request from the Commission of Small Island States on Climate Change and International Law.

I say “some” of the legal considerations because the Tribunal already has the benefit of extensive written statements from States and international organizations. Some go into considerable scientific and textual detail; however, the Kingdom believes that a second round of written submissions should be allowed in this proceeding, as in the previous ITLOS proceedings which led to the Advisory Opinion of 2015.

Mr President, my statement will be in six parts: first, I shall address the role of the Tribunal in the present advisory proceedings; second, I consider the scope of the questions put by COSIS; third, I shall briefly look at the design of Part XII of UNCLOS; fourth, I shall explain the interaction between UNCLOS obligations and international obligations external to UNCLOS; fifth, having regard to the questions before the Tribunal, I shall consider how the obligations under Part XII of UNCLOS should be approached; sixth, I shall address certain issues of procedural fairness and soundness; finally, I shall offer some brief conclusions.

I turn my first statement to the Tribunal’s jurisdiction to give the advisory opinion and the propriety of doing so. The Tribunal has already held in 2015 that it has advisory jurisdiction over a request submitted under an international agreement meeting the requirements of Rule 138. The important issue in the proceeding is how the Tribunal should exercise its jurisdiction.

It will be noted that the questions we are addressing here are limited to legal questions “within the scope of the United Nations Convention on the Law of the Sea”. It does not extend to other questions.

It seems appropriate to call for the Tribunal to take this opportunity to offer clear guidance to States on what is allowed and what is not allowed under article 21 of the Statute and article 138 of the Rules.

It is also essential that the Tribunal responds to these questions with balance, within the limits of its jurisdiction as well as the four corners of UNCLOS, and faithful to its role as a specialized judicial body. In particular, as the Tribunal noted in its 2015 Advisory Opinion, and as recalled in the written statements, the Tribunal must “not take a position on issues beyond the scope of its judicial functions”.

Mr President, members of the Tribunal, I now turn to the scope of the questions put by COSIS. I shall make six observations.

First, the questions rightly concern only the obligations of States Parties to UNCLOS, and are limited to obligations under UNCLOS. This follows from the terms of the questions posed by the Commission, which limits the questions to “the specific obligations of States Parties to UNCLOS”. It also follows from the text of the COSIS Agreement, under which the Commission is authorized to request an opinion “on any

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46 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2).

legal question within the scope of [UNCLOS], consistent with article 21 of the ITLOS Statute and article 138 of its Rules.” And it follows from the Tribunal’s case law, according to which the Tribunal, being a body of UNCLOS, exercises its advisory jurisdiction in order to “contribute to the implementation of [UNCLOS]”.

Second, the questions do not extend to interpreting obligations external to UNCLOS, even if such obligations are relevant to the interpretation or implementation of UNCLOS obligations. This is especially important because, as I shall discuss later, the ICJ and other authorized climate change treaty bodies are in the process of interpreting those other obligations.

Third, the questions focus on Part XII of UNCLOS, the Part which concerns the protection and preservation of the marine environment.

Fourth, it follows that the questions cannot and do not ask the Tribunal to opine on obligations other than those found in UNCLOS, and not at all on the obligations of non-States Parties. There are, in fact, some 30 non-States, including major players in the climate change field. The Tribunal must bear this in mind, especially since the obligations under UNCLOS concern collective action and international cooperation (as may be seen in articles 194 and 197). Cooperation is central in Part XII (including the whole of its Section 3), as the Tribunal held as early as its MOX Plant Order and several times since.

Fifth, the questions ask about the law as it stands at the present: “What are the specific obligations of States Parties”, not the law as it might have been in the past, or may be in the future if States so decide?

Sixth, the questions concern substantive obligations under UNCLOS. The Tribunal is not requested to assess allegations of past or ongoing breaches of such obligations, still less to enter into questions of dispute settlement or State responsibility.

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49 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2).
50 Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10 (1 February), p. 24, para. 30; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, Judge Cot, Declaration, ITLOS Reports 2015, p. 25, para. 77.
51 Written statement of COSIS, 16 June 2023, para. 321.
53 Written statement of New Zealand, 15 June 2023, para. 60; written statement of the Republic of Sierra Leone, 16 June 2023, para. 59; written statement of the Republic of Korea, 16 June 2023, para. 11, fn.7; written statement of the Federative Republic of Brazil, 15 June 2023, para. 102, fn.86; written statement of the Republic of Mozambique, 16 June 2023, para. 4.20.
54 Written statement of France, 16 June 2023, para. 15.
In short, the Tribunal’s jurisdiction in these proceedings is limited to interpreting the obligations of States under UNCLOS.

Mr President, members of the Tribunal, I now briefly turn to the design of UNCLOS Part XII. Its basic provisions are well known. They include (1) general provisions, (2) provisions concerning the establishment of international rules and domestic legislation, and (3) provisions of enforcement.

Section 1 of Part XII is entitled “General Provisions”. It opens with the general obligation of States under article 192 “to protect and preserve the marine environment”. This must be read together with article 193, which provides that: “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”

Article 194 then sets out, in more specific but still broad terms, what might be expected of a State to protect and preserve the marine environment, including:

- an obligation to take all measures necessary to prevent, reduce, and control pollution of the marine environment,\(^{55}\) including an obligation for States to use best practical means at their disposal;\(^{56}\) an obligation for States to act in accordance with their capabilities;\(^{57}\) an obligation to endeavour to harmonize policies with other States;\(^{58}\) an obligation for States to ensure activities under their control or jurisdiction do not cause damage by pollution to other States and their environment; and\(^{59}\) an obligation to prevent pollution from spreading to areas outside of the State’s jurisdiction of control.\(^{60}\)

It will be noted that article 194(3) provides that these measures are to include measures “to minimize [releases and pollution] to the fullest possible extent”. The remaining provisions of Section 1 give more detail but remain general.

In addition to the general obligations, Part XII includes an obligation for States to act individually or jointly as appropriate.\(^{61}\) Articles 207 and 212 set out the expectation that States will establish more specific “rules” and “standards” to prevent, reduce, and control pollution. In that regard, it is necessary to consider the precise terms of UNCLOS to see how it relates to external international obligations.

Article 207 provides that: “States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.”

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\(^{55}\) UNCLOS, Art. 194(1).
\(^{56}\) UNCLOS, Art. 194(1).
\(^{57}\) UNCLOS, Art. 194(1).
\(^{58}\) UNCLOS, Art. 194(1).
\(^{59}\) UNCLOS, Art. 194(1).
\(^{60}\) UNCLOS, Art. 194(2).
\(^{61}\) UNCLOS, Arts. 197, 207(4), 212(3).
Article 212 provides: “States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures ...."

These subsequent laws and regulations thus regulate the implementation of a State’s obligation to prevent, reduce and control specific types of pollution. This is precisely what States have been doing in negotiating the specialized treaty regime on climate change.

Part XII of UNCLOS also requires that States enforce domestic laws and regulations adopted in accordance with these provisions.62

Mr President, members of the Tribunal, I now turn to the relationship between Part XII and obligations external to UNCLOS.

There seems to be some common ground among the participants in these proceedings in this respect. In particular, there is general agreement that Part XII of UNCLOS is essentially a framework agreement, such as is common in international environmental law. As a framework agreement, Part XII contemplates the subsequent development of global and regional internationally agreed standards and recommended practices and procedures. These may, and in fact have often taken the form of international or regional conventions external to UNCLOS that impose specific obligations on the parties thereto and contain their own carefully negotiated provisions for implementation and dispute settlement.

A central issue dealt with in many of the written statements63 is the interaction between obligations of States Parties under UNCLOS and other international legal obligations, in particular the UNFCCC and Paris Agreement.

This specialized treaty regime sets out the relevant “conventions and agreements” with respect to preventing, reducing and controlling pollution and protecting and preserving the marine environment as it relates to climate change. In that respect, it is lex specialis and lex posterior in respect of the obligations of States Parties under the more general provisions of UNCLOS.

UNCLOS does not seek to regulate climate change impacts on the marine environment in isolation from, or in a manner that is inconsistent with the specialized treaty regime. UNCLOS itself is silent on climate change. The drafters of UNCLOS, establishing its Part XII as a framework convention, anticipated that obligations formulated in general terms in Part XII would be specifically addressed in separate subsequent treaties and agreements to be negotiated to address specific aspects of pollution of the marine environment, the “internationally agreed rules . . . standards and recommended practices and procedures” that articles 212(1) and 222 require.

Thus, the obligations relating to climate change, like other specific aspects of pollution of the marine environment, are specifically addressed in other treaties and

62 UNCLOS, Arts. 213, 222.
agreements that were carefully negotiated subsequent to and apart from UNCLOS.  
The specialized treaty regime on climate change is what States have agreed in order 
to address their commitments, contributions and obligations on the issues before the 
Tribunal today.

However, that does not mean that the rules set forth in the specialized treaty regime 
on climate change have become part of UNCLOS.

Three processes may be noted. First, where there is a direct reference to external 
rules, their role within UNCLOS depends on the precise wording used in the specific 
provisions of UNCLOS. Second, while the rules set forth in the specialized treaty 
regime are not incorporated in UNCLOS, they may assist in the interpretation of the 
general obligations under Part XII, to the extent such rules and standards are 
already binding on other States. Third, as part of the “general rule of interpretation” 
reflected in article 31 of the Vienna Convention on the Law of Treaties and 
applicable to UNCLOS, and as stated in its paragraph 3, subsequent agreements 
and subsequent practice may, under certain circumstances, be taken into account 
together with the context when interpreting UNCLOS, as may other relevant rules of 
international law applicable in the relations between UNCLOS States Parties64 for 
the purposes of interpreting the conventional rules.

Nevertheless, as stated before Your Honour, the Tribunal is not called upon to 
interpret the obligations set forth in the specialized treaty regime. As article 293 of 
UNCLOS states, the Tribunal may apply “other rules of international law not 
incompatible with [UNCLOS]”. But the case law rightly makes clear that article 293 is 
an applicable law provision: it is not a basis for jurisdiction, or for reading into the 
Convention rules which are not contained therein.65 As the Arbitral Tribunal said in 
Arctic Sunrise, article 293 “is not a means to obtain a determination that some treaty 
other than the Convention has been violated, unless that treaty is otherwise a source 
of jurisdiction, or unless the treaty otherwise directly applies the Convention”.66

Brazil rightly explained in its written statement before the Tribunal: “The 
interpretation of UNCLOS … should be guided by the basic principles underpinning 
the multilateral climate regime. This is not to say that ITLOS should interpret the 
climate change treaties, which would go beyond its jurisdiction.”67

Canada likewise explained this important point in its written statement. I quote: “[…] 
the Tribunal does not have jurisdiction to determine the specific measures that must 
be taken under these treaties. Determinations of the content of the obligations under 
the UNFCCC and Paris Agreement, for example, would fall outside the scope of the 
Tribunal.”68

64 VCLT, Art 31.3(a), (b) and (c).
65 Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory 
Opinion, 2 April 2015, Judge Cot, Declaration, ITLOS Reports 2015, p. 27, paras. 80-84; Norstar, 
66 Written statement of the Federal Republic of Germany, 14 June 2023, fn 53; “Arctic Sunrise” (The 
Netherlands v. Russia), Case No. 22, Order (Provisional Measures), 2013 ITLOS Rep. 230 
(22 November), para. 192.
67 Written statement of the Federative Republic of Brazil, 15 June 2023, para. 2020. See also written 
statement of France, 16 June 2023, para.18.
68 Written statement of Canada, 16 June 2023, para. 61.
Some written statements make much of article 237 and article 311 of UNCLOS, which address the interaction between UNCLOS and external rules and standards. While no doubt important in their own right, these provisions say nothing about obligations under UNCLOS itself.

Article 237(1) is a “without prejudice” clause for specific obligations under certain other special conventions and agreements. As we have seen, the question put by COSIS is limited by the terms of the COSIS Agreement to legal questions “within the scope of the United Nations Convention on the Law of the Sea”. It does not extend to other legal questions, that is, other than UNCLOS. Article 237(2) of UNCLOS is a statement about the manner in which specific obligations under certain special conventions external to UNCLOS shall be carried out, that is, consistent with UNCLOS.

Likewise, article 311(2), which is also relied on in some written statements, says nothing about obligations under UNCLOS. It provides only that UNCLOS “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with [UNCLOS] and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under [UNCLOS]”.

Indeed, accepting that UNCLOS and the specialized treaty regime on climate change are separate regimes that can be interpreted to be consistent with one another, but are not part of one another, preserves the integrity both of UNCLOS and the specialized treaty regime. Doing so is also consistent with the applicable rules of treaty interpretation and ensures respect for international law.

Finally, I would recall that the ICJ is already tasked with rendering an advisory opinion on the legal obligations of a State with respect to climate change. The consensus request by the UN General Assembly to the ICJ (which my Government expressly joined as well) calls on the ICJ to have particular regard to UNCLOS, among other sources of law, in determining these obligations. Therefore, there is a material overlap between the issues already under consideration by the ICJ and the question put to ITLOS by COSIS. As the principal judicial organ of the United Nations, the ICJ is uniquely placed to advise on the correct interpretation of States’ climate-related obligations and, in particular, to the complex interaction between the specialized regime on climate change, UNCLOS and other relevant international agreements and regimes. If ITLOS were to render an advisory opinion which goes beyond the strict confines of UNCLOS, this will lead to the risk of conflicting judgments, resulting in incoherence, fragmentation and uncertainty.

I now turn to the application of the obligations of States Parties under Part XII. As I have explained, Part XII sets out for UNCLOS States Parties general obligations with respect to preventing pollution and protecting the marine environment. And it allocates States’ jurisdictional rights and obligations (to legislate and enforce) in various zones. These include land territory, the territorial sea, and the exclusive economic zone, the continental shelf and the high seas, and the powers are based on the degree to which States have sovereignty, sovereign rights, flag State or port State authority or enjoy high seas freedoms.
The UNCLOS obligations do not address greenhouse gas emissions. In this respect, they leave regulation of the duty of States to prevent, reduce and control pollution of the marine environment to the specific conventions and agreements, here, the specialized treaty regime on climate change. Nevertheless, the majority of participants, sometimes after thorough analysis,\(^69\) conclude that GHG emissions may fall within the definition of “pollution of the marine environment” in article 1 of UNCLOS. I would only note at this stage that humans introduce greenhouse gases into the marine environment when certain activities emit greenhouse gases into the atmosphere and some of those anthropogenic greenhouse gas emissions are absorbed into the ocean. A broad range of activities is involved, including the burning of fossil fuels, deforestation, livestock production, fertilization, waste management and industrial processes.\(^70\)

The obligations in Part XII are obligations of due diligence. Numerous States have noted this in their written statements, and ITLOS itself recognizes the same with respect to article 192\(^71\) and the obligation “to ensure” set out in article 194(2).\(^72\)

They are obligations of conduct rather than obligations to achieve a particular result. As explained by the Seabed Disputes Chamber, a due diligence obligation “to ensure” “is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.”\(^73\)

A due diligence obligation requires States to take measures that are “reasonably appropriate.”\(^74\) In that sense, the due diligence standard should be adjusted to the abilities of the State carrying the obligation.

While articles 192 and 194 of the Convention do not create a legal obligation to implement the specialized treaty regime on climate change, that regime is important in examining the standard and content of the due diligence obligation under the Convention in relation to climate change, as other States agree.\(^75\)

The specialized treaty regime on climate change, at its core, emphasizes a balancing of environmental protection against the need for “economic development

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\(^69\) Written statement of France, 16 June 2023, para. 96.
\(^71\) Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2015 ITLOS Rep. 1, 63 para. 219 (Apr. 2). See also The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China), PCA Case No. 2013-19, Award of 12 July 2016 paras. 956, 959, 964 (acknowledging that the obligations in Art. 192 of UNCLOS are due diligence obligations).
\(^72\) Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 2011 ITLOS Rep. 43 para. 117 (1 Feb. 2011).
\(^73\) Ibid., p. 41, para. 110.
\(^74\) ITLOS, Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 1, para. 120.
\(^75\) Written statement of the Republic of Korea, 16 June 2023, para. 16.
to proceed in a sustainable manner” and “on the basis of equity and in the context of sustainable development and efforts to eradicate poverty.”\(^{76}\)

As other States Members have recognized, the specialized treaty regime on climate change further recognizes the principles of common but differentiated responsibilities (“CBDR’’), which means that countries listed in Annex I to the UNFCCC have made a larger historical contribution to climate problems because they industrialized early, have greater resources to address climate change and, therefore, have a different responsibility to address climate change.\(^{77}\)

Accordingly, the standard of due diligence under articles 192 and 194 is not to be applied uniformly across States Parties. Rather, the standard of due diligence with respect to climate change, a standard of conduct, is fluid and requires interpretation in light of different levels of responsibility due to varying historic greenhouse gas emissions that occurred within the borders of different States, the need for economic development to be taken into account, as well as the economic status, capacity and technical capabilities of States. This must respect the principle of common but differentiated responsibilities. As affirmed by the Seabed Disputes Chamber, the due diligence obligation requires States to take measures that are “reasonably appropriate.”\(^{78}\) What measures are “reasonably appropriate” depends on the facts and circumstances.\(^{79}\)

In the context of climate change, States have operationalized the obligation of due diligence by adopting various regulations in the framework of the UNFCCC and the Paris Agreement, which provide the obligations of conduct for States in respect of GHG emissions. This framework is based on a bottom-up approach that recognizes differentiated national circumstances through Nationally Determined Contributions (NDCs).

The Paris Agreement requires States Parties to identify and publish NDCs, which are to be balanced, fair and ambitious in light of a State’s national circumstances. In its NDC, each State defines its own level of ambition towards climate change mitigation in terms of amount and means under respective national circumstances. It is through an NDC that a State articulates the extent to which the State can prevent, reduce and control pollution of the marine environment from the State’s own greenhouse gas emissions. This is because the NDC is where the State sets out its ambition to reduce greenhouse gas emissions that occur within its own national borders based on its national circumstances.\(^{80}\)

\(^{76}\) UNFCCC, Art. 2; Paris Agreement, Art. 2.2.


\(^{80}\) Lavanya Rajamani, *Due Diligence in International Climate Change Law*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 163, 169 (2020).
Further, as a consequence of careful negotiation to achieve realistic objectives, States are required to “aim” at achieving the objectives of their NDCs through domestic measures. The Paris Agreement, in its article 4(2), provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. The Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”81 In other words, States are not legally bound to meet targets or goals set forth in their NDCs.82

I have already drawn attention to article 193 of UNCLOS, which reflects General Assembly resolution 1803, declaring by consensus that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”.83

Like UNCLOS, the UNFCCC in its preamble recognizes the sovereign right of States to exploit their own resources in accordance with the Charter of the United Nations,84 which indicates the need for a flexible approach and the need to have regard to the differentiated positions of States.85

Consistent with article 193 of UNCLOS, article 4.8 of the UNFCCC requires Parties to consider actions necessary to meet the specific needs and concerns of States not listed in Annex I to the UNFCCC and affected by response measures to climate change, including States whose economies are highly dependent on fossil fuel production and export.

Article 4.15 of the Paris Agreement likewise requires the Parties to “take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.”

UNCLOS, like the specialized treaty regime on climate change, underscores that efforts to mitigate climate change must be balanced with national circumstances, ending energy poverty, geographic and resource constraints and the rights of States, and particularly States not listed in Annex I to the UNFCCC, to develop and use their natural resources and pursue sustainable development.

Your Honour, members of the Tribunal, I now turn to the fifth part of my statement. As I noted at the outset, the Tribunal ruled in 2015 that it has advisory jurisdiction where the requirements of Rule 138 are met. Nonetheless, a number of States in the current proceeding either contest the existence of the Tribunal’s advisory jurisdiction, argue that it should not be exercised in the very different circumstances of this case, or at least ask for clarification of the reasoning underlying the Tribunal’s jurisdictional holding. Jurisdictional issues occupy considerable portions of the first-round written submissions of many States.

81 Paris Agreement, Art. 4(2) (emphasis added).
84 See UNFCCC eighth preambular paragraph.
85 See e.g., UNFCCC sixth, tenth, twentieth preambular paragraphs; Arts. 3.1, 3.2, 3.3, 4.1, 4.2.
This leads me to two alternative procedures. I suggest, for the Tribunal’s consideration, one is to bifurcate these proceedings: for the Tribunal to rule first on jurisdiction, clarifying its rationale and the scope of its exercise in this case, and thereafter to invite States to weigh in on the substance of the questions presented. In this manner, States would first receive helpful guidance on the scope of the issues on which they should focus before addressing the merits, and would not waste the Tribunal’s time or their time covering irrelevant or marginal issues, while omitting or underemphasizing the most important issues. This approach would be fairer to States and sounder for the Tribunal than attempting to wrap up all the issues in a single, inadequately briefed round, in which States are not certain which issues are material.

Alternatively, the Tribunal might invite a second round of written submissions, as was done in the prior proceeding, and encourage States to focus their second-round submissions on substance, considering that issues of jurisdiction have already been extensively addressed by the States in the first round and in these oral hearings.

Either of these alternative approaches would also give States the opportunity to coordinate their second-round submissions before this Tribunal with their separate submissions in the ICJ advisory proceeding on climate change. The result would be beneficial to all concerned. The information and arguments States present to both tribunals would be more coherent and consistent, and more useful to the judges.

Mr President, members of the Tribunal, to summarize. The Tribunal has been asked to provide an advisory opinion on the specific obligations of States to UNCLOS, particularly under Part XII, in relation to preventing pollution and protecting the marine environment from climate change effects like ocean warming, sea-level rise, and ocean acidification due to anthropogenic greenhouse gas emissions.

It is to be hoped that the Tribunal will take the opportunity to provide guidance on the appropriate use of its advisory function in relation to legal matters within its purview.

If the Tribunal decides to give an opinion, it will need to approach the questions asked with considerable caution. It will need to interpret the scope of the questions asked within defined boundaries, focusing only on obligations under UNCLOS and deferring to those bodies and judicial organs with primary responsibility for determining questions of interpretation relating to the specialized regime on climate change. Its opinion must also be based on interpretation of existing law.

The specialized treaty regime on climate change (consisting of the UNFCCC and the Paris Agreement) specifically addresses States’ commitments to protect the environment from climate change caused by greenhouse gas emissions, including with respect to the marine environment.

The Paris Agreement requires States Parties to identify and publish NDCs.86 NDCs are designed to allow for differentiated treatment of States, reflecting, among other considerations, the different levels of historic greenhouse gas emissions that

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86 Paris Agreement, Art. 4(2) provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. The Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”
occurred within the borders of different States, and the position of high greenhouse
gas emitting States that industrialized early and are listed in Annex I to the UNFCCC.

If UNCLOS were to be interpreted to impose climate change-related obligations
additional to the UNFCCC and Paris Agreement (\textit{quod non}), such interpretation
could open the door to the potential of compulsory third-party dispute settlement
under UNCLOS concerning obligations under the UNFCCC and Paris Agreement,
even though States Parties to the specialized treaty regime have not consented to
compulsory third-party dispute settlement. Such an interpretation of UNCLOS would
go beyond what States Parties ratifying UNCLOS, the UNFCCC and the Paris
Agreement agreed to. It would amount not only to a significant jurisdictional
overreach, it would risk fragmentation in the international legal system, creating
incoherence and uncertainty.

Accordingly, UNCLOS could not be interpreted to include specific greenhouse gas
emissions reduction targets and certainly not those going beyond those of the
specialized treaty regime on climate change. The Kingdom is acutely aware that an
effective response to climate change will only be achieved through political
decisions. The role of courts, if they are to remain within their jurisdictional function,
is to apply the existing law to the facts. The development of a new law is a political
matter, requiring often difficult negotiations. This is especially true for effectively
combating the global phenomenon of climate change, which requires active
participation, cooperation and, thus, agreement by a substantial majority of States.
Many differentiated interests are at stake.

The obligations under UNCLOS should be interpreted so that they are consistent
with, not additional to, the obligations under the UNFCCC and the Paris Agreement.
No sound legal basis exists for imposing new obligations that go beyond those which
States have agreed to in the UNFCCC and the Paris Agreement; to do so would
undermine those instruments, and it would undermine progress in the negotiation
process that is ongoing within the framework of those instruments.

Mr President, members of the Tribunal, one final word. As we are all aware, although
advisory opinions are not binding, we believe in this important role of the Tribunal
and trust that it will take utmost care when considering the questions put to it.

Mr President, members of the Tribunal, that concludes the submissions of the
Kingdom of Saudi Arabia. I thank you for the opportunity to address you this morning
and for your kind attention.

\textbf{THE PRESIDENT:} Thank you, Ms Noorah Mohammed Algethami. And this brings us
to the end of this morning’s sitting. The hearing will resume at 3:00 p.m. The sitting is
now closed.

\textit{(Lunch break)}