INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
(CASE NO. 31)

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

AUSTRALIAN COMMENTS ON THE FURTHER RESPONSES OF COSIS AND IUCN

2 OCTOBER 2023

Introduction

1. On 25 September 2023, the Tribunal advised the State Parties and organizations participating in the oral proceedings that, by letter dated 24 September 2023, the Commission on Small Island States and International Law (COSIS) provided written responses to the question posed by Judge Kittichaisaree on 11 September 2023. The Tribunal also advised that, during the hearing on 21 September 2023, the International Union for the Conservation of Nature and Natural Resources (IUCN) provided oral responses to that same question.

2. The Tribunal advised that participating States and organizations may submit comments on the written response of COSIS and the oral response of IUCN by 2 October 2023. Australia wishes to avail itself of that opportunity.

3. The question asked for clarification as to which obligations arising under Part XII of UNCLOS are obligations of conduct and which are obligations of result, and why. For the reasons detailed in our oral statement, and expanded below, Australia considers that the substantive obligations under Part XII are obligations of conduct, and fall to be assessed under a standard of due diligence.

Submission

4. The fundamental difference between an obligation of conduct and an obligation of result is whether the obligation requires a State actually to achieve a specific outcome (an obligation of result) or whether it obliges a State to take measures towards a particular outcome, without the State being obliged to achieve that outcome in every instance (an obligation of conduct).

5. Obligations "to ensure" that activities under their jurisdiction are conducted in particular ways, or to "take … all measures … necessary … using … the best practicable means at their disposal and in accordance with their capabilities", do not oblige a State "to achieve, in each and every case" a result. Instead, they oblige a State to "exercise best possible efforts" and to "do the utmost" to achieve that result.[1] This Tribunal has explicitly recognized that such obligations are obligations of conduct, not of result.[2]

6. Consistently with the above, the Tribunal has already held that Article 194(2) is an example of an obligation of conduct.[3] As Australia submitted in its oral statement,[4] the same is also true of Article 194(1), which cannot oblige State Parties actually to achieve the result of preventing pollution of the marine environment, because if it did that obligation could not vary depending on the capabilities of States ("prevention" being a binary concept, which is either achieved or not achieved). As such variation is expressly contemplated by the text of Article 194(1), it follows that Article 194(1) is properly characterized as an obligation of conduct.

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[1] *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].

[2] *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].

[3] *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) 42 [113]. Australia does not consider that there is any distinction between the use of the term "ensure" in Article 139 and Article 194: cf COSIS Response to Judge Kittichaisaree's Question, 24 September 2023, p. 9, para. 23.

[4] Australia Oral Submissions, ITLOS/PV.23/C31/5, p 7, lines 36-44 (Donaghue).

7. In light of the above, Australia agrees with the many other States who have submitted that, broadly speaking, the substantive obligations under Part XII of UNCLOS, including Article 194(1), impose obligations of conduct and not obligations of result.[5]

8. The content of an obligation of conduct is to exercise due diligence to achieve the result; it is not an obligation to achieve the result. In its Advisory Opinion on *Responsibilities and obligations of States with respect to activities in the Area*, the Tribunal noted that "[t]he notions of obligations 'of due diligence' and obligations 'of conduct' are connected".[6] In the *SFRC Advisory Opinion*, the Tribunal held that an obligation of conduct "is a 'due diligence obligation".[7] That holding is consistent with the ICJ's approach in *Pulp Mills*, where the ICJ concluded that "[a]n obligation to adopt measures … is an obligation of conduct", which required parties "to exercise due diligence … for the necessary measures".[8] The fact that an obligation of conduct in this context may operate to prevent a State from direct, intentional acts that are contrary to the result that is sought to be achieved by the obligation of conduct does not mean that the standard of due diligence is not the appropriate measure of compliance, nor that the obligation of conduct somehow becomes an obligation of result.[9]

9. Consistently with the above submission, and with the Tribunal's previous case law, there is a high degree of common ground between States participating in these proceedings that the relevant obligations in Part XII, including Article 194, must be assessed against a standard of due diligence.[10]

Respectfully submitted,

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2 October 2023

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[5] See, for example, Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p 13, lines 44-48 (Neumann); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p 13, lines 6-11 (Paparinskis); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p 2, lines 21-26 (Yee); Timor-Leste Oral Submissions, ITLOS/PV.23/C31/14, p 15, lines 30-39 (Sthoeger); European Union Oral Submissions, ITLOS/PV.23/C31/14, p 26, lines 25-29 (Bouquet); Viet Nam Oral Submissions, ITLOS/PV.23/C31/14, p 44, line 9 (Hanh); France Oral Submissions, ITLOS/PV.23/C31/18, p 10, lines 36-38, p 11, lines 1-4 (Forteau); Kingdom of the Netherlands Oral Submissions, ITLOS/PV.23/C31/18, p 24, lines 44-50, p 25, lines 1-15 (Lefeber); United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p 33, line 1, p 35, lines 22-29 (Juratowitch).

[6] *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 [111].

[7] *SRFC Advisory Opinion*, 40 [129].

[8] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay), ICJ Rep 2010, p. 77 [187].

[9] Cf. COSIS Response to Judge Kittichaisaree's Question, 24 September 2023, pp. 4-5, paras 12-15.

[10] See COSIS Written Statement, paras 319-320 and 327; COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 10, lines 28-30 and p. 13, lines 18-20; New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 12, lines 10-11 (Skerten); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 18, lines 5-9 and 16-19 (Hwang); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 13, lines 1-11 (Paparinskis); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 5, lines 5-8 (Middleton), p. 15, lines 30-33 (Sthoeger), and p. 26, lines 11-29 (Bouquet); United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p. 35, lines 23-29 (Juratowitch). See also Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 7, lines 46-48, p. 8, lines 1-7.