INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2023

Public sitting

held on Monday, 18 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

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

List of delegations:

STATES PARTIES

Mozambique

Ms Paula da Conceição Machatine Honwana, Representative
Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson, International Law Commission
Ms Phoebe Okowa, Professor, Queen Mary University, London; Member, International Law Commission
Mr Dire D. Tladi, Professor, University of Pretoria ; former Member, Special Rapporteur and Chair, International Law Commission
Mr Andrew Loewenstein, Partner, Foley Hoag LLP
Ms Christina Hioureas, Partner, Foley Hoag LLP

Norway

Mr Andreas Motzfeldt Kravik, State Secretary, Ministry of Foreign Affairs
Ms Dagny Ås Hovind, Adviser, Ministry of Foreign Affairs

Belize

Mr Lennox Gladden, Chief Climate Change Officer, National Climate Change Office, Ministry of Sustainable Development, Climate Change and Disaster Risk Management
Mr Sam Wordsworth KC
Mr Sean Aughey

THE PRESIDENT: Good morning. Today, the Tribunal will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States and International Law*.

At the outset, I wish to note that we have been informed by Mexico that they will not be participating in the hearing. The schedule of this morning's sitting has been revised to take this into account. Belize, which was initially scheduled to speak this afternoon, will deliver an oral statement during the present sitting. Accordingly, this morning we will hear oral statements from three delegations in the following order: Mozambique, Norway and Belize. There will be no sitting this afternoon.

I now give the floor to the representative of Mozambique, Ms Machatine Honwana, to make her statement. You have the floor, Madam.

MS MACHATINE HONWANA: Good morning. Mr President, members of the Tribunal, I have the honour to appear before you today on behalf of the Republic of Mozambique in connection with the request for an advisory opinion submitted by the Commission of Small Island States. With your permission, I would like to introduce the intervention of the Republic of Mozambique.

The responsibility of rendering an advisory opinion is an important function of this Tribunal as custodian of UNCLOS. This is especially the case given the weighty and consequential matter before you: the effect of greenhouse gas emissions on the States Parties' obligations to prevent and reduce pollution of the marine environment, as well as to protect and preserve it under articles 194 and 192 of the Convention. This advisory opinion will significantly influence the operation of Part XII of the Convention going forward, which is what prompted Mozambique, as a strong supporter of UNCLOS and its institutions, to intervene.

The devastating effects of climate change have rightly become the defining issue for this generation. It is a particularly pressing issue for Mozambique which, like other African States, is paying the ultimate price for an emergency not of its making. African States are among the most affected by the climate change's damage to the marine environment, including ocean warming, acidification, stratification and deoxygenation.[1] This serious harm, if left unchecked, will gravely threaten the livelihoods and sustenance of Mozambique's population.

In fact, it is already causing damage now. We have, in the last decade alone, been at the forefront of devastating cyclones, storms and droughts in equal measure.[2] Each disaster has been worse than the last and the gap between them grows only shorter. The impacts being faced by our communities are disproportionate to our contribution to the climate crisis. Nevertheless, we remain convinced that the way forward for the international community must involve solutions that are robust and firmly rooted in the values of solidarity, sustainability and equity.

---

[1] IPCC, "Summary for Policymakers" in Hans-Otto Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) ("IPCC 2022, Summary for Policymakers"), p. 9.

[2] Written Submissions of the Republic of Mozambique dated 16 June 2023 ("Mozambique's Written Submissions"), paras. 1.6, 3.36.

At the outset, Mozambique reiterates its commitment to UNCLOS and the authority conferred on this Tribunal in matters of its interpretation. It believes very strongly that the advisory opinion will play an important role in aligning UNCLOS obligations with those under international law's broader climate change regime. It is this desire for a robust equitable solution, firmly grounded in law, and considering the differentiated impacts of climate change, that bring us here today. It is sincerely hoped that the Tribunal's opinion will carefully outline States Parties' obligations under articles 194 and 192. In doing so, the Tribunal's opinion can act as a guideline for the much needed development of local, national and regional programmes in line with commitments in UNCLOS.

Mozambique would further add, as put forward in its written submissions, that the Tribunal's opinion must take into account States Parties' common but differentiated responsibilities.[3] Where measures taken pursuant to articles 194 and 192 involve determining individual contributions necessary for limiting global temperatures to 1.5ºC above pre-industrial levels, developed States must assume a greater share of the burden. This must include economy-wide absolute emission reduction targets and providing support to developing States Parties for the implementation of their obligations under UNCLOS. Solutions reached by this Tribunal must be equitable and in light of developed States' historical responsibility for the climate emergency.

In essence, Mr President and members of the Tribunal, we come before you seeking urgent guidance on the scope of the States Parties' obligations under UNCLOS. We seek guidance on the nature of the mitigation and adaptation measures mandated by the Convention that would enable us, in cooperation with the rest of the States Parties, to jointly address this crisis.

No fewer than 53 States and organizations have joined us in providing written submissions to the Tribunal. These States and organizations all seek guidance on the proper interpretation and application of Part XII of UNCLOS. Mozambique notes with strong approval that several African States as well as the African Union are taking active part in these proceedings. This is in many ways an exceptional development given the historically low level of our participation in advisory proceedings. But this only further demonstrates the pressing importance of the issues that fall to be decided by the Tribunal, not just for African States, but for the international community.

Moving now to UNCLOS itself: Mozambique's core contention is that the Convention's drafters wisely anticipated that any interpretation of the obligations therein would not be fixed at a particular point in time; rather, the drafters deliberately left the Convention's text flexible to allow it to incorporate advancements in scientific knowledge and respond to new and evolving challenges to ocean governance. The emission of greenhouse gases and the climate change they cause is the most significant challenge presented to the Convention thus far.

The Tribunal therefore has the responsibility to ensure that its interpretation accords not just with the present scientific consensus on climate change but also with the lived experience of States since UNCLOS was adopted in 1982. This includes the

[3] Mozambique's Written Submissions, para. 3.67.

subsequent practice of States Parties, such as the ratification of the Paris Agreement. UNCLOS was negotiated and entered into force before climate change was part of public discourse. It would be myopic to ignore the profound relevance that the accepted climate change science has on an interpretation of UNCLOS conducted in the present day.

UNCLOS must therefore be interpreted in light of the overwhelming scientific evidence that greenhouse gas emissions, which are absorbed by the world's oceans, have profound deleterious effects on the marine environment and its living resources. Excessive greenhouse gas emissions into the atmosphere very clearly qualify as pollution of the marine environment within the meaning of article 1(1)(4) of UNCLOS. Mozambique's recent experience bears graphic witness to the devastating impacts that climate change has on the marine environment.

Mr President, as a State Party to the UNCLOS, Mozambique sees as its solemn responsibility to shed light on matters before the Tribunal by placing before it all relevant information that may assist in reaching a decision.

Mozambique and its marine environment are particularly vulnerable to impacts of climate change. As a low-lying coastal State, located downstream of nine major rivers, Mozambique's geography has inherent problems which have been exacerbated by climate change. In the past 35 years, we have encountered 75 natural disasters, including 13 droughts, 25 floods, 14 cyclones and 23 epidemics. As stated, these disasters only grow more common. In 2016, for example, we faced one of the most catastrophic droughts in our history due to the influence of El Niño. In 2017, Cyclone Dineo affected nearly 55 million people. In 2019, Mozambique was struck by Cyclone Idai, resulting in loss of life and infrastructure damage estimated at US$ 800 million.

On your screen is the picture of flooded homes in Mozambique in the aftermath of Cyclone Idai. The cyclone created an inland ocean of 80 miles in length and 15 miles in width. Only six weeks later, Cyclone Kenneth hit Mozambique, marking the first time in history that a country was hit by two tropical storms in one season. This map shows you the amount of cyclones that have recently threatened East Africa. In the last 12 months alone, Mozambique has endured five tropical storms and cyclones. Cyclone Gombe, which occurred in 2022, affected the lives of over one million people.

The broader adverse effects of these disasters brought on by climate change are too many to enumerate here but include loss of ecosystems, reduced food security and mass displacement of populations. These would be catastrophic for any nation, but Mozambique, in particular, relies heavily on fishing and marine resources to sustain its economy and feed its people. The introduction of greenhouse gases into the marine environment continues to threaten Mozambique's way of life and the livelihood of its people – fish stocks continue to decline due to ocean warming and ocean acidification; coastal communities, already experiencing significant hardship, are being pushed to the breaking point.

Limiting global warming to a maximum increase of 1.5ºC above pre-industrial levels, as outlined in the Paris Agreement, is not only compelling but represents the

irreducible minimum that can be expected of States Parties to UNCLOS if climate change is to be contained. This was the conclusion reached too by the IPCC in its February 2022 report when it observed that temperature increases and extreme weather events resulting from human activities are causing irreversible impacts more rapidly than our capacity to adapt to the changes.[4]

Alone, Mozambique's own efforts to reduce the impact of natural disasters is limited. Our capacity to deploy meaningful adaptation measures is impeded by high levels of poverty, as well as limited technological and infrastructure development. In many cases, we are forced to prioritize sanitation, food security and health needs over and above the benefits that may accrue from long-term adaptation measures. We know that we are not alone in facing such a situation. The experience of Mozambique and other developing States in combating climate change provides further reason for the Tribunal to recognize common but differentiated responsibilities and the concomitant obligations on developed States to provide assistance to States who need it most.

However, within the limits of our national capacity and resources, we have nevertheless made great strides in containing some of the climate change's negative effects in all aspects, including agriculture and fisheries, water resources, health, biodiversity and infrastructure. Mozambique is not asking other States Parties to do what it does not do itself. In line with our commitments under the Paris Agreement, Mozambique has devised and implemented a long-term development strategy for lowering greenhouse gas emissions. For example, Mozambique adopted the National Strategy for Climate Change in 2013, identifying adaption and reduction of climate risk as a national priority. The strategy includes not only preparation for and responses to climate change impacts but also low-carbon mitigation and development.[5]

In its updated first National Determination Report under the Paris Agreement, Mozambique proposed to carry out a series of mitigation actions aimed at significantly reducing greenhouse gas emissions by 2025, particularly when viewed against Mozambique's actual emissions per capita.[6] These actions include promoting the use of renewable energy sources and low-carbon urbanization, increasing energy efficiency, encouraging development of low-carbon agricultural practices, reducing the rate of deforestation and rehabilitating degraded ecosystems. Indeed, Mozambique is one of the first countries to successfully implement the Forest Carbon initiative of the World Bank, evidencing its commitment and effort in developing national systems for cutting emissions.[7]

To conclude, it is sincerely hoped that the Tribunal will seize this opportunity in interpreting UNCLOS to clarify the differentiated measures that must be taken to protect the marine environment of vulnerable States such as ours. We look earnestly for guidance, too, on the principles of mitigation and adaptations that must be taken

[4] IPCC 2022, Summary for Policymakers, p. 20.
[5] *See* Republic of Mozambique, National Strategy for Adaptation and Mitigation of Climate Change, 2013-2025, *available at* https://www.fao.org/faolex/results/details/en/c/LEX-FAOC185538/
[6] Republic of Mozambique, *Update of the First Nationally Determined Contribution to the United Nations Framework Convention on Climate Change: Period 2020-2025*, *available at* https://unfccc.int/sites/default/files/NDC/2022-06/NDC_EN_Final.pdf, pp. 19, 21.
[7] Ibid., p. 19.

to avert irreversible harm to the marine environment. We ask, therefore, that the Tribunal's interpretation of articles 194 and 192 be carried out with the aforementioned in mind.

I would like to now introduce the legal team appearing for Mozambique. Our advocates include Professor Phoebe Okowa of Queen Mary, University of London, Professor Charles Jalloh of Florida International University and Mr Andrew Loewenstein of Foley Hoag. The remaining members of the legal team are Professor Dire Tladi of the University of Pretoria and Ms Christina Hioureas of Foley Hoag.

I now request that you invite Professor Jalloh to the podium to present on questions of jurisdiction. I thank you.

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

MR JALLOH: Mr President, distinguished members of the Tribunal, good morning. It is an honour for me to appear before this Tribunal today. It is also equally an honour for me to be representing the Republic of Mozambique in such an historic matter.

Honourable members of this Tribunal, Mozambique's written statement comprehensively contains our submissions on the core issues before the Tribunal. Today, our presentations will only highlight key issues, and also respond to some of the written comments of other States.

Mr President, my presentation will proceed as follows. First, I will quickly address the Tribunal's jurisdiction. Second, I will then pass the podium to Professor Phoebe Okowa, who will explain Mozambique's arguments on the proper interpretation of the Convention. She will also deal with the due diligence obligation and the precautionary principle, before handing over to Mr Andrew Loewenstein for the final part of Mozambique's submission today.

Mr President, turning immediately to the threshold question of jurisdiction. In this regard, while jurisdiction was for the most part not contested by most participants in these proceedings, Mozambique submits two principal arguments for your consideration. We consider these important because there are still States that have expressed doubts about this Tribunal's advisory competence.

First, COSIS' request for an advisory opinion falls within the Tribunal's well-established jurisdiction to render advisory opinions.

Second, on the facts of this case, Mozambique considers that there are no compelling reasons why this Tribunal should decline its exercise of jurisdiction to provide an advisory opinion. We are pleased that our argument basically aligns with that of most States and international organizations that have so far participated in these historic proceedings.

Allow me to elaborate our arguments on jurisdiction and admissibility by making three points. First, article 21 of the Tribunal's Statute provides that its jurisdiction includes "all disputes and all applications submitted to it in accordance with this

Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." In the *SRFC* Advisory Opinion*,* the Tribunal confirmed that the term "all matters" in article 21 means something more than just "disputes" and includes advisory opinions where provided for in any other agreement which confers jurisdiction on the Tribunal.[1] Therefore, it is article 21 read together with article 138 of the Rules, which "constitute the substantive legal basis" for the Tribunal to provide advisory opinions.

Last week, COSIS cogently demonstrated that their request falls within the Tribunal's advisory competence. We are in full agreement. So are most States in both their written and oral statements. In fact, only three States, namely, China, Brazil and India, have submitted that the Tribunal does *not* possess advisory jurisdiction. They argue, essentially, that the reference to all matters in article 21 does not encompass non-contentious matters.[2] Mozambique believes that this proposition cannot stand in light of the Tribunal's historic decision in the *SRFC* Advisory Opinion.[3]

We acknowledge at least one State requested further clarification regarding the basis of the advisory jurisdiction in the present proceedings.[4] We would welcome such an approach. Not least because it would contribute to legal certainty for the benefit of all States Parties, including those not participating in these proceedings.

Second, accepting that the Tribunal possesses advisory competence, Mozambique further submits that all three preconditions for the exercise of the Tribunal's jurisdiction are met.[5]

Firstly, there exists an international agreement related to the purposes of the Convention providing for the submission to the Tribunal of the request for an advisory opinion. COSIS is an international organization. Under article 2(a) of the articles on the Responsibility of International Organizations, the International Law Commission defined an "international organization" to mean "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality."[6] COSIS would fall within that definition. Its founding treaty's object is directly relevant in the sense that it is to promote the rule of international law concerning climate change, including the protection and preservation of the marine environment.[7]

---

[1] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) ("*SRFC Advisory Opinion*"), para. 58.
[2] Written statement of the Federative Republic of Brazil, (16 June 2023), paras. 7-9; Written statement of the People's Republic of China, (15 June 2023), paras. 11-12.
[3] Written statement of the African Union (16 June 2023), para. 70; Written statement of the Republic of Mozambique (16 June 2023), para. 2.2.
[4] Written statement of the United Kingdom, (16 June 2023), paras. 15-16.
[5] See article 138 of the Rules of the Tribunal. See also, *SRFC Advisory Opinion*, para. 38.
[6] International Law Commission, Draft articles on the Responsibility of International Organizations, *Yearbook of the International Law Commission* (2011), vol. II, Part Two, article 2(1).
[7] COSIS was established pursuant to the 31 October 2021 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law ("COSIS Agreement") agreed to by Antigua and Barbuda, Tuvalu, Niue, Palau, Vanuatu and Saint Lucia. See COSIS Agreement, article 2(1).

Secondly, the request for an advisory opinion was also transmitted by an authorized body. COSIS is specifically authorized by its founding treaty to submit the request. It did so on 26 August 2022.[8]

Finally, the request clearly concerns a "legal question". The two questions raised by COSIS are framed in legal terms and directly call for interpretation of articles 192 and 194 of the Convention.

Before moving on, we note the argument of some States that the two COSIS questions are "framed in broad terms". We would however respond, basically in agreement with several other States,[9] that the two questions are sufficiently clear and specific. Even if the questions were to be deemed broad, Mozambique would invite this Tribunal to follow the approach of the International Court of Justice in its *Namibia* Advisory Opinion and decide that it is empowered to "give an advisory opinion on any legal question, abstract or otherwise"[10].

Mr President, and this would be my third point today, even where jurisdiction is established, its exercise is technically discretionary. This is because article 138, paragraph 1, of the Rules of the Tribunal provides that it "may" decide not to give an advisory opinion. It is true that there have not been many advisory requests to date, whether to the Seabed Disputes Chamber or the Tribunal as a whole. Nonetheless, it is evident from the Tribunal's practice not to refuse a request for an advisory opinion, "except for 'compelling reasons'".[11] In fact, to date, there exists no decision of this Tribunal finding compelling reasons not to give an advisory opinion.

This eminently sensible judicial posture is consistent with the well-settled approach of the International Court of Justice, which since 1945, has never found reason to decline its advisory competence when such advice is properly requested by competent United Nations organs pursuant to article 96 of the United Nations Charter. The ICJ, as the principal judicial organ of the United Nations under article 94 of the Charter, takes a liberal approach that recognizes the value of providing advisory opinions to the relevant UN bodies to the extent that such opinions might assist them in the discharge of their functions.

This Tribunal – as the guardian of UNCLOS which is rightly referred to as the "Constitution of the oceans", which must adapt to the changing requirements of international life – has compelling reasons to follow the ICJ's practice. It should therefore not lightly decline to provide a properly requested advisory opinion such as that of COSIS.

Indeed, in the present case, in Mozambique's view, there are no compelling reasons to not answer the two questions. To the contrary, in our respectful submission, an

[8] See articles 3(3) and 3(5) of the COSIS Agreement. The request was transmitted to the Tribunal by COSIS' Co-Chairs on 12 December 2022 pursuant to article 3(3) of the COSIS Agreement.
[9] Written statement of the Federal Republic of Germany, (14 June 2023), para. 31.
[10] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *Advisory Opinion, 1948, I.C.J. Rep* 51, 61. See also the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion [1954] *ICJ Rep* 51; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] *ICJ Rep* 27, para. 40.
[11] *SRFC* Advisory Opinion, para. 71.

advisory opinion on this vital matter is crucial for clarifying the rights and obligations of States Parties in light of the existential threat posed by climate change. This is particularly important for developing States like Mozambique and many other countries in Africa and the Global South that continue to bear the brunt of climate change not of their own making. This Tribunal's guidance is essential for States Parties regarding how to interpret and discharge their obligations in the face of the scientific consensus on the acute threats posed by climate change to the marine environment.

However, the United Kingdom urges caution because COSIS is not truly an "international body" contemplated by UNCLOS, and the advisory opinion may implicate the obligations of States not party to the COSIS Agreement or who are uninvolved in either framing the request or participating in these proceedings.[12]

With respect, these are not compelling reasons for refusing to render this much needed advisory opinion. The fact remains that the preconditions for the exercise of the Tribunal's jurisdiction have been met. It now falls to the Tribunal to interpret UNCLOS. There is no mandatory rule that international organizations require large or universal membership to act on the international plane or to make requests for advisory opinions. Further, UNCLOS also provides that, like for regional fishing matters under article 118, States Parties must "cooperate on a global basis … through competent international organizations".[13] The nature of COSIS as an international organization does not detract from this point.

Mozambique further notes the written comments of some States calling on the Tribunal to exercise caution so as to not create obligations for non-States Parties to the agreement conferring jurisdiction or to espouse on policy issues.[14] We are confident that the Tribunal, as a specialist international judicial body, will no doubt remain mindful of the wider issues and be sensitive to the impact of the advisory opinion.

Mr President, distinguished members of the Tribunal, I am grateful for your kind attention. Having now briefly dealt with the issue of jurisdiction and admissibility, and as indicated in my opening, I would respectfully request that you give the floor to my learned colleague Professor Okowa. I thank you very much.

THE PRESIDENT: Thank you, Mr Jalloh. I now give the floor to Ms Okowa to make her statement. You have the floor, Madam.

MS OKOWA: Mr President, distinguished members of the Tribunal, it is indeed an honour to be here this morning and to make this presentation on behalf of the Government and the people of Mozambique.

Mr President, we have the particular advantage of addressing the Tribunal late in this oral hearing. This has given Mozambique the opportunity to review carefully the written and oral submissions presented thus far. I should add that we are very

[12] Written statement of the United Kingdom, (16 June 2023), para. 18.
[13] UNCLOS article 197.
[14] *See, e.g.*, Written statement of the French Republic, (16 June 2023), para. 16.

grateful to COSIS for the initiative in bringing the question of climate change, a matter of profound interest to all UNCLOS members, to your attention.

The key points in Mozambique's submissions are, that UNCLOS is a living instrument that must be interpreted in light of the current state of scientific knowledge and other existing rules and principles of international law developed by States Parties. This includes the due diligence obligations contained in articles 194 and 192. The IPCC's scientific consensus on the harm presented by climate change is globally accepted. Furthermore, the Paris Agreement, ratified by almost all UNCLOS States Parties, requires States to limit global average temperature to 1.5ºC above pre-industrial levels – that's the "1.5ºC standard".

Due diligence standards under UNCLOS, therefore, must incorporate the conclusions of the IPCC and the standards set in the Paris Agreement as a minimum threshold for satisfying States Parties' obligations under articles 194 and 192.

On a holistic interpretation of UNCLOS, States Parties' due diligence obligations require them, in light of the precautionary principle, to drastically reduce their greenhouse gas emissions given that even the 1.5ºC standard presents a serious risk of irreversible harm to the marine environment.

Following my submissions, my colleague Mr Andrew Lowenstein will then further develop Mozambique's core contention that due diligence requires a differentiated regime of responsibility.

The central argument in Mozambique's submissions is that UNCLOS must be interpreted as a living instrument that is capable of responding to the constantly evolving challenges of ocean governance. The most significant challenge it has faced since it entered into force almost 30 years ago is the existential threat of climate change and how to respond to it.

There are at least four reasons in support of this interpretation:

first, the text of UNCLOS anticipates a continuous process of alignment and adaptation in light of scientific advancement;

second, the text of UNCLOS is consistent with the history of ocean governance, which has always involved the adjustment of States Parties' obligations in light of new knowledge of the world's oceans;

third, this Tribunal can therefore have recourse to subsequent developments, including relevant subsequent treaty law and custom as expressly anticipated under article 293 of the Convention, as other rules of international law not incompatible with UNCLOS and that can be taken into account in its interpretation;

fourth, the express recognition in article 237 that UNCLOS is not a self-contained regime, but that its obligations may be concretized through the development of more specific rules in other instruments.

Mr President, this an explicit recognition that UNCLOS may be interpreted by way of *renvoi t*o rules external to it and this includes the UNFCC and the Paris Agreement.

This approach should not be controversial. The story of ocean governance has always been one of continuous adaptation in light of scientific and technological change. For much of the law of the sea's history, the principle of *mare liberum* reigned supreme. It was premised on the assumption that the seas were indivisible and its resources were capable of endlessly replenishing themselves.[1]

Technological and scientific advances eventually eroded the basic premises of *mare liberum*. Fish did not endlessly replenish themselves but were being plundered by large fishing fleets that threatened biological reproduction levels. The seas were not boundless as modern technology made them capable of occupation and dominion by States.[2]

Increased public sensitivity to environmental values in the 1960s and 70s, as well as the science of ecological damage, made environmental protection of the seas a necessity. International law responded with the 1958 Convention and the Third United Nations Conference, leading to UNCLOS. What resulted was a carefully balanced and highly successful alignment of the law on ocean governance with new scientific knowledge.

Now the Tribunal is called upon to interpret UNCLOS in light of new scientific knowledge once more, so as to confront a profound challenge to ocean governance. Accordingly, in formulating the scope of States Parties' obligations under Part XII, this Tribunal must be guided by the accepted science on climate change and the steps that must be taken to avoid its adverse effects.

Mr President, contrary to some States' submissions last week, the Tribunal is not being asked to amend UNCLOS or act inconsistently with its judicial function by creating new law on climate change. While formal amendments to the Convention are possible under article 312, the process was made procedurally and politically cumbersome in the expectation that that would in all likelihood be a very rare occurrence.

You have heard a great deal already – about formal and informal processes for the evolution of obligations in UNCLOS, including through judicial interpretation. This is precisely what you are being asked to do here: to give effect to the living nature of the Convention by taking into account circumstances not foreseen at the time it was adopted.

UNCLOS effectively functions as the constitution of the world's oceans. This was first put forward in the Third Conference of the Law of the Sea,[3] whose mandate was to

[1] Hugo Grotius, *Mare Liberum* at (Ralph Van Deman Magoffin trans., 1916), p. 43 "For every one admits that if a great many persons hunt on the land or fish in a river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea."
[2] See Oscar Schachter, The New Law of the Sea, 178 *Recueil des Cours, 266 (1982)*.
[3] See Tommy Koh, A Constitution for the Oceans (6 December 1982); see, e.g., Tulio Treves, UN Audiovisual Library of International Law, UNCLOS (10 December 1982); Yoshifumi Tanaka, THE INTERNATIONAL LAW OF THE SEA (4th ed. 2023), p. 40.

adopt a convention dealing with "all matters relating to the law of the sea … bearing in mind that the problems of ocean space are closely interrelated and need to be considered a whole".[4]

Not only is the ambit of UNCLOS incredibly broad, but a large portion of its substantive provisions were explicitly designed to respond to changing circumstances. In the *Activities in the Area* Opinion, the Seabed Disputes Chamber held that UNCLOS' due diligence obligation, with respect to environmental protection, is a "variable concept" that may "change over time … in light, for instance, of new scientific or technological knowledge".[5]

The same was said by Judge Lucky in the *Sub-Regional Fisheries Commission* opinion: UNCLOS is "dynamic and … through interpretation … a court or tribunal can adhere to and give positive effect to this dynamism".[6] This is precisely what Mozambique calls on the Tribunal to do in answering the questions put to it.

Mozambique submits that to give effect to UNCLOS as a living instrument in issuing its advisory opinion, the Tribunal must arrive at an interpretation that incorporates the present scientific consensus on climate change and the harm greenhouse gas emissions cause to the marine environment.

This is contemplated by the ordinary meaning of UNCLOS' text, including articles 194 and 192. Part XII, in particular, allows for the determination of States Parties' obligations with direct reference to the current state of scientific understanding.

Article 194, for example, is premised on objective scientific assessments of, among other things, whether measures are "necessary to prevent, reduce or control" marine pollution and the extent of "best practicable means at a State's disposal".[7]

Article 192 can be understood in the same way, as States Parties have an obligation to reduce greenhouse gas emissions in accordance with the best available science to prevent climate change's harm to the marine environment.[8]

The core provisions of Part XII – articles 192 to 207 – impose a general obligation on States Parties to prevent, reduce and control pollution. And pollution is broadly defined and, pursuant to articles 194, 207 and 212, covers all airborne and land-based sources of marine pollution, which would include greenhouse gas emissions.[9]

---

[4] UN General Assembly, Resolution 3067(XXVIII), Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and Use of Their Resources in the Interests of Mankind, and Convening of the 3rd United Nations Conference on the Law of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (1973).

[5] *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February) ("Activities in the Area") 117.

[6] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) Separate Opinion of Judge Lucky, 18.

[7] Mozambique's Written Submissions, para. 3.47.

[8] Mozambique's Written Submissions, paras. 4.3-4.8.

[9] Mozambique's Written Submissions, paras. 3.7-3.19.

Article 194(3) also reiterates that measures adopted must deal with "all sources" of marine pollution, which ought also to be wide enough to include greenhouse gas emissions.[10]

This due diligence standard contained in articles 194 and 192 is, however, not devoid of content. Part XII of UNCLOS anticipates the means by which the obligations therein take normative shape.

In that regard, articles 200 to 206 create a scientific infrastructure envisaging a process of collaborative study and research by States Parties. The results of this research on the marine environment then determines the "appropriate scientific criteria" for the development of rules and standards on the prevention, reduction and control of marine pollution. This is complemented by obligations to conduct active "surveillance of any activities which they permit" and a further consideration of whether these activities are likely to cause pollution necessitating environmental impact assessments.[11]

In the present case, Mozambique submits that the relevant scientific knowledge must include the current accepted consensus on the harm caused by climate change to the marine environment. This is also borne out by an application of the general rules of treaty interpretation.

The rules of treaty interpretation are not in dispute. It is accepted by all written submissions to the Tribunal that addressed the matter that, pursuant to the Vienna Convention on the Law of Treaties, articles 194 and 192 of UNCLOS must be interpreted in good faith according to the ordinary meaning of their words, in light of UNCLOS' object and purpose.[12] Such an interpretation can include reference to other relevant parts of a treaty or its drafting history.[13] This approach accords perfectly with the arguments Mozambique has just advanced.

Additional support can be found in other rules and principles of international law, including treaties and relevant norms of customary international law, which this Tribunal is entitled to rely on in interpreting UNCLOS.[14] Accordingly, the Tribunal's interpretation of UNCLOS as a living instrument must take into account the accepted science on climate change and the obligations contained in the Paris Agreement.

Dealing first with subsequent practice of the parties: Mozambique submits that the Tribunal's advisory opinion must incorporate, at the very minimum, the 1.5ºC standard. This can be rationalized either as a necessary measure, based on scientific consensus that is necessary to control marine pollution under article 194; or that is necessary to protect and preserve the marine environment under article 192;

[10] Mozambique's Written Submissions, para. 3.14.
[11] Mozambique's Written Submissions, paras. 4.25-4.29.
[12] Mozambique's Written Submissions, para. 3.3; *Activities in the Area,* paras. 57-58.
[13] Vienna Convention on the Law of Treaties, article 32. Mozambique's Written Submissions, para. 3.3.
[14] Mozambique's Written Submissions, para. 3.85. *See* Vienna Convention on the Law of Treaties, article 31(3)(c) ("There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the Parties").

or as a relevant subsequent practice within the meaning of article 31(3)(c) of the Vienna Convention.

With respect to custom, article 194 imports an obligation of due diligence and sets a very high threshold as States Parties are required to take "all measures … necessary" to prevent, reduce and control pollution of the marine environment.

Article 192 also imports a due diligence obligation.[15] But the due diligence obligation also enjoys standalone status as a customary norm, the contents of which can be relevant to an interpretation of UNCLOS. Both articles 194 and 192 cannot be read in isolation. They have to be considered with – and, as part of due diligence – other principles of environmental law such as the precautionary principle.[16]

Mr President, members of the Tribunal, in characterizing these obligations as ones of due diligence, Mozambique has deliberately avoided the binary characterization of obligations of "conduct" and of "result". In fact, in the context of UNCLOS, and international law generally, these labels are largely unhelpful as many obligations will straddle both categories. As the late Professor James Crawford pointed out, the specific measures required by an obligation are determined by that obligation's primary rule; whether or not the obligation has been performed thus turns on the interpretation of the instrument in question.[17]

With respect to UNCLOS, in some cases, such as articles 207 and 212, the obligations in Part XII require States to undertake specific measures such as enacting and implementing legislation to prevent marine pollution. In other cases, such as article 194, States are required to adopt all necessary measures – a threshold substantially higher than best efforts, which has traditionally characterized pure conduct obligations.[18]

Here Mozambique aligns itself with the analysis provided by Professor Rüdiger Wolfrum that these are "goal-oriented obligations" – obligations that neither specify the conduct or result necessary to achieve the goal.[19]

Mozambique would therefore urge the Tribunal, in interpreting the States Parties' obligations under Part XII, to do so unimpeded by the unhelpful restrictions implicit in categorizing those obligations as ones of conduct or of result.

Drawing together the strands of argument thus far: once the Tribunal has concluded that UNCLOS imposes due diligence obligations on States Parties regarding harm to

---

[15] Mozambique's Written Submissions, para. 4.16.
[16] *South China Sea (Philippines v. China*), PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 942; *Activities in the Area,* paras. 111-120.
[17] James Crawford, *The International Law Commission's articles on State Responsibility* (Cambridge University Press 2002) at p. 13, 22.
[18] Moreover, there has been considerable terminological confusion in the logical consequences of characterizing obligations as either conduct or result, as evidenced by the critical academic commentary on the jurisprudence of international courts and the work of the International Law Commission. Mozambique submits that the categories of obligations of "conduct or result" are neither sufficient nor exhaustive of the infinite variety of contexts in which international responsibility falls to be considered.
[19] Above p. 367-368.

the marine environment caused by greenhouse gas emissions and climate change, the question then becomes what the scope of the due diligence obligation is. As has been established, the normative content of articles 194 and 192 is directly informed by both scientific knowledge and subsequent practice. Mozambique's submissions will now turn to what this requires of States Parties.

Mr President, members of the Tribunal, at this point in the proceedings, we are all no doubt fully apprised of the severe damage that climate change is causing not just to the world's oceans but also to livelihoods around the globe. Mozambique is no exception. The havoc that is right now being wrought by climate change has been outlined in detail in its written submissions and by the representative of Mozambique earlier.

To further assist the Tribunal, Mozambique notes in summary that: as a coastal state, Mozambique is particularly vulnerable to the effects of climate change on its coastal environment and infrastructure;[20] that increased ocean temperatures also contribute to more frequent and violent cyclones. In the past 12 months, Mozambique has suffered no less than five tropical storms or cyclones.

Mozambique is also at particular risk of coral bleaching caused by increased ocean temperatures. If the significant increase in greenhouse gas emissions is not curtailed, then coral bleaching events will threaten a significant portion of Mozambique's reefs with extinction.[21]

The above have knock-on effects on the health of Mozambique's fisheries, on which its people depend for their sustenance and livelihoods. Fisheries are responsible for at least 3 per cent of Mozambique's GDP and 4 per cent of its national exports.[22] Marine foods are also responsible for 18-23 per cent of its population's nutrition.[23]

Finally, over 60 per cent of Mozambique's population lives in locations that are at risk of flooding and damage caused by sea-level rise.[24] This is not including the population that is dependent on agriculture, also primarily in areas threatened by sea-level rise.

The dire effects on Mozambique constitute local manifestations of the global phenomena described in the IPCC's research, which has also been cited several times in the proceedings thus far.[25] It is this reality, supported by the clearest scientific evidence, that the Tribunal must incorporate into its interpretation of States Parties' due diligence obligations under UNCLOS.

Applying the scientific consensus on climate change to articles 194 and 192, then, in Mozambique's submission, results in the following conclusions: it is accepted that all

[20] Mozambique's Written Submissions, para. 3.30.
[21] Mozambique's Written Submissions, para. 3.37.
[22] Mozambique's Written Submissions, para. 3.39.
[23] Mozambique's Written Submissions, para. 3.39.
[24] Mozambique's Written Submissions, para. 3.40.
[25] See, generally, IPCC, "Summary for Policymakers" in Hans-Otto Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022).

necessary measures under UNCLOS require a high threshold of due diligence in order for States Parties to discharge their obligations; the best available science confirms that failure to adhere to the 1.5ºC standard in the Paris Agreement will result in marine pollution;[26] the 1.5ºC standard must therefore function as the absolute minimum of what is required of States Parties under articles 194 and 192 of UNCLOS.

Mozambique further submits that the 1.5ºC standard is the start, but not the end point, of the scope of States Parties' obligations under UNCLOS. Mozambique argues that this Tribunal should find that all necessary measures pursuant to UNCLOS' due diligence standard requires States to reduce their greenhouse gas emissions such as to bring global average temperatures below the 1.5ºC standard. In this regard, Mozambique expresses its support for, and is in full agreement with, the submissions of the African Union in these proceedings.

Mozambique adds that reducing greenhouse gas emissions below the 1.5ºC standard is also in line with the precautionary principle, which is a relevant customary norm in the interpretation of UNCLOS. This was accepted by the Seabed Disputes Chamber in the *Activities in the Area* Advisory Opinion. The Chamber held that the principle is an "integral part" of States' due diligence obligations, and that it mandates that due diligence be taken even "where scientific evidence concerning the scope and potential negative impact of [the conduct in question is] insufficient".[27]

The precautionary principle does not permit States to wait for serious or irreversible damage to the environment to occur before mandating that necessary measures be taken. Mr President, members of the Tribunal, the picture provided by the scientific evidence is stark and the outlook is grim. Three examples will suffice.

Concerning ocean acidification – the IPCC has concluded that, even following the 1.5ºC standard – will result in impacts to "a wide range of marine organisms and ecosystems, as well as sectors such as aquaculture and fisheries".[28]

As regards ocean warming, the rate of ocean warming across the world is actually increasing, with higher temperatures threatening to cause knock-on effects across the food chain.[29] This will still occur with global temperatures kept at the 1.5ºC standard.

Warmer temperatures also lead to ocean deoxygenation, which causes severe impacts to aquatic species who need to absorb oxygen to survive. The IPCC

[26] Mozambique's Written Submissions, para. 3.65.
[27] *Activities in the Area,* para. 117.
[28] IPCC, "Technical Summary" in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018), p. 37.
[29] IPCC 2014, "The Ocean" in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) Table 30-1, p. 1667.

concluded that it is “virtually certain” that ocean deoxygenation will increase as warming continues, even at the 1.5ºC standard.[30]

The scientific evidence establishes that even at the 1.5ºC standard, climate change presents serious and potentially irreversible harm to the marine environment. It follows from the legal principles consistent across the submissions of all States Parties that the level of marine pollution and harm to the marine environment at the 1.5ºC standard would still trigger States Parties’ due diligence obligations under articles 192 and 194.

It then becomes incumbent on States Parties to reduce greenhouse gas emissions below the 1.5ºC standard until the harm they pose is no longer serious or irreversible. The assessment of when harm is no longer serious or irreversible should be carried out on a case-by-case basis.

Mr President, members of the Tribunal, this concludes my presentation on the interpretation of UNCLOS and the due diligence requirement. I thank you for your kind attention, and I now request that you invite Mr Andrew Loewenstein to the podium to present the final part of Mozambique’s oral submission. Thank you for your attention.

MR PRESIDENT: Thank you, Ms Okowa. I note that it would appear that your delegation have taken up the time allotted for you to speak, so I don’t know whether Mr Loewenstein will be able to complete his presentation within the next five minutes. Can I have an indication from your delegation, please?

MS OKOWA: Mr President, may we request that you indulge our delegation by giving us 10 minutes?

THE PRESIDENT: Yes, okay. We will give you 10 minutes, but please, I would urge you to keep within that time limit. We have to be fair to all parties and we have granted them all the same amount of time, so please.

MS OKOWA: Much appreciated.

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

MR LOEWENSTEIN: Mr President, members of the Tribunal, good morning. It is an honour to appear before you on behalf of the Republic of Mozambique and to do so in a case of such fundamental importance. I will continue Mozambique’s submissions on the obligation of due diligence and will address three aspects of that obligation.

But before proceeding, Mr President, on my discussion over those aspects of due diligence, I hope you will permit me to pay tribute to Professor Alan Boyle, with

[30] IPCC, “Impacts of 1.5°C Global Warming on Natural and Human Systems” in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018) p. 224.

whom I had the privilege of working, including on cases where due diligence lay at the core, and had the even greater privilege of learning from him.

Mr President, I begin by pausing to explain why Mozambique considers these facets of due diligence that I will address to have particular importance in the context of protecting and preserving the marine environment. The questions that are directed to the Tribunal ask it to describe the "specific obligations" of States Parties to UNCLOS regarding the two questions that are the subject of these proceedings.

As indicated by the specificity called for by the request, it does not seek abstract or theoretical answers; it calls upon the Tribunal to provide *concrete guidance.* Mozambique welcomes this approach and respectfully submits that it is essential that the Tribunal provide answers that will inform States as to what concrete measures they must undertake, especially in view of the liability regime established in article 235.

Professor Okowa addressed one aspect of that concreteness when she showed that, for the specific context of greenhouse gas emissions, the due diligence obligations codified in Part XII required States to undertake effective action to ensure that the global temperature rise does not exceed 1.5ºC. I will address Mozambique's views as to *how* States must concretely fulfill that obligation.

In doing so, I begin by noting that while every State Party to UNCLOS must discharge its due diligence obligations, bearing in mind the paramount objective of limiting temperature rise to 1.5ºC, that does not suggest that the *means* by which the obligation is discharged is the same for all States. It is not.

To the contrary, developing States like Mozambique, which bear little responsibility for having created the present environmental crisis and which are not themselves significant emitters of greenhouse gases, are not required to assume the same burden as the developed States that contributed the most to the situation in which we now find ourselves.

In that regard, the drafters of the Convention chose to weave the common but differentiated responsibilities principle into the fabric of the environmental obligations set out in Part XII. Indeed, the principle animates the Convention as a whole. This is reflected in the Preamble, which immediately, after recognizing the desirability of establishing through the Convention a legal order that promotes, among other things, the protection and preservation of the marine environment, notes the "special interests and needs of developing States."[1]

And it can be seen in article 194(1), which not only establishes the general obligation that States must take "all measures consistent with" the Convention that are "necessary to prevent, reduce and control pollution," it qualifies the directive by stipulating that States are to use "for this purpose the best practicable means at their disposal" and are to act "in accordance with their capabilities."[2]

[1] United Nations Convention on the Law of the Sea ("UNCLOS") (entered into force 16 November 1994), Preamble, paras. 4-5.
[2] UNCLOS, art. 194(1).

The fact that the due diligence obligation is informed by the common but differentiated responsibilities principle is confirmed by other provisions of Part XII. Article 207 concerns the regulation of pollution from *land-based sources*, which are, of course, among the most significant contributors to greenhouse gas emissions.[3] It establishes that States Parties, in adopting laws and regulations to prevent, reduce and control pollution from such land-based sources, must "tak[e] into account internationally agreed rules, standards and recommended practice."[4] And the same is true with respect to the obligation to prevent, reduce and control pollution from the *atmosphere* in article 212.

The common but differentiated responsibilities principle plainly qualifies as an internationally agreed upon rule, standard or recommended practice. Indeed, it is an important one, especially in the climate change context. More than three decades ago, Principle 7 of the Rio Declaration referred to the fact that "States have common but differentiated responsibilities". [5]

Moreover, the relevant instruments concerning climate change – which, as Professor Okowa explained, must be taken into account when interpreting Part XII of the Vienna Convention – likewise reflects the common but differentiated responsibilities principle. And the same is true with respect to article 2(2) of the Paris Agreement.

Similarly, article 3(1) of the UNFCCC – another instrument to which all UNCLOS States Parties are also parties – records, as the first of its guiding principles, that "[t]he Parties should protect the climate system … on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[6]

The upshot is clear: while all States must take effective action to ensure that global temperature rise is limited to no more than 1.5ºC, the provisions of the Convention which establish that obligation do not mandate uniformity into how it is to be accomplished.

So what are the differentiated responsibilities? The answer can be found in the Paris Agreement, which for the reasons we have seen, must be taken into account.

Specifically, the Paris Agreement, while acknowledging that what due diligence requires may depend on a State's particular "national circumstances",[7] sets out a tripartite scheme of differentiated responsibilities.

Developed States bear the greatest responsibility. Why? Because they have greater capabilities, as that term is used in the Paris Agreement in article 194(1) of UNCLOS itself. Put simply, they have the scientific, technical and financial means to do more,

[3] UNCLOS, art. 207.
[4] UNCLOS, art. 207(1).
[5] UN General Assembly, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Rio de Janeiro, 3-14 June 1992), Annex I ("Rio Declaration"), Principle 7.
[6] United Nations Framework Convention on Climate Change ("UNFCCC") (entered into force 21 March 1994), art. 3(1).
[7] Paris Agreement, art. 2(2).

and they continue to host industrial facilities that remain significant contributors to greenhouse gas emissions. Due diligence therefore requires that they do more.

Mr President, the fact that developed States must do more is deeply rooted in international environmental law. Principle 7 of the Rio Declaration records the acknowledgement by developed countries of the "responsibility" they "bear … in view of the pressures their societies place on the global environment."[8]

And developed and developing States alike accept this. And the Paris Agreement sets it out in concrete terms. You can see this in article 3(1) in the UNFCCC[9] and in article 4(4) of the Paris Agreement, which specify that in undertaking a leadership role, developed States should undertake economy-wide absolute emission reduction targets in a manner designed to limit the increase in temperature to no more than 1.5ºC.[10]

With respect to developing countries, the same provision of the Paris Agreement imposes a lesser but equally important responsibility. In recognition of their vulnerability, developing countries are directed to "continue enhancing their mitigation efforts" and "encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."[11]

Mr President, as these provisions of the Paris Agreement make clear, mitigation of and adaptation to threats posed to the marine environment are of central importance, particularly for vulnerable developing States like Mozambique. Indeed, as the ICJ recognized in the *Certain Activities* case, mitigation is fundamental to the discharge of a due diligence obligation.[12]

Mozambique, like many African States, such as Sierra Leone, is doing its utmost to develop and implement such strategies, including by adopting a National Strategy for Climate Change Adaptation and Mitigation. But the stark reality is that the impact of such efforts is likely to remain limited unless developed States engage in robust efforts to assist. There is thus an urgent need for the Tribunal to clarify that the duty to cooperate obligates States to provide such assistance.[13]

The Tribunal emphasized in *MOX Plant* case that the "duty to cooperate is a fundamental principle in the prevention of pollution under both Part XII of the Convention and general international law."[14] International law ascribes the same importance to cooperation in connection with mitigation and adaptation. This is

---

[8] Rio Declaration on Environment and Development (1992), Principle 7.
[9] United Nations Framework Convention on Climate Change ("UNFCCC") (entered into force 21 March 1994), art. 3(1).
[10] Paris Agreement, art. 4(4).
[11] *Ibid.*
[12] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665 at p. 724, para. 168.
[13] UNCLOS, arts. 123, 197, 266, 275-277.
[14] *MOX Plant (Ireland v. United Kingdom) Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 82).

codified in numerous provisions of the Convention, including article 197, articles 200 and 201, 202, 203 and in Part XIV.

Mr President, this concludes my presentation. I thank you for your kind attention.

THE PRESIDENT: Thank you very much, Mr Loewenstein. I now give the floor to the representative of Norway, Mr Kravik, to make his statement. You have the floor, Sir.

MR KRAVIK: Mr President, honourable members of the Tribunal, it is an honour to appear before you on behalf of the Kingdom of Norway.

Imagine for a moment, that you are floating in space. You turn your gaze to see a distant pale blue dot. You look closer and realize that this object is in fact our own planet. Seen from this vantage point, it seems obvious that we live on a blue planet. As Norwegian author Morten Strøksnes writes: "It has been said that our planet's name shouldn't be Earth. It would be more appropriate to call it Ocean."[1]

Mr President, members of the Tribunal, the climate crisis is grave, acute and unfolding as we speak. It represents an existential threat to both present and future generations. To counter, mitigate and adapt to climate change – in short, to protect the atmosphere and prevent environmental disasters – a strong and robust global response is required, comprising our combined and coordinated efforts.

As a coastal State and a seafaring nation with strong maritime ties, Norway fully recognizes that our oceans and seas, the blue of our planet, are both at risk and represent potential solutions in the face of climate change.

First, the marine environment is at severe risk from the effects of climate change, through ocean warming, ocean acidification and sea-level rise.[2] Although impacting on all of us and transcending all borders, there is no doubt that coastal States and communities, and in particular, Small Island Developing States, are especially vulnerable.

Second, changes in the marine environment due to climate change – resulting in loss of biodiversity amongst other things – impact on and must be taken into full account in future management of living resources.

Third, and at the same time, it has been clearly demonstrated by many, and in particular by the High-Level Panel for a Sustainable Ocean Economy, that ocean-based climate action represents a fundamental part of a sustainable and effective global response to climate change.[3]

We consider marine resources, rights, freedoms and obligations of the UNCLOS system to be key to enable the critical provisions of food, energy, critical raw materials and value chains necessary to accomplish the green and blue transitions.

[1] Strøksnes, Morten (2017), "Shark Drunk. The Art of Catching a Large Shark from a Tiny Rubber Dinghy in a Big Ocean".
[2] E.g., IPCC (2021), "Sixth Assessment Report Working Group 1: The Physical Science Basis".
[3] High Level Panel for a Sustainable Ocean Economy (2019), "The Ocean as a Solution to Climate Change: Five Opportunities for Action".

As an example, in order to provide for electrification of ferries, which is a process well underway in Norway, you need access to electricity and critical minerals. Thus, the sovereign rights of coastal States and the high seas freedoms enshrined in UNCLOS are necessary components of combating climate change and responding to key needs of humanity. The sea and UNCLOS are our allies in this struggle.

Norway considers it imperative to acknowledge, further study and develop all these linkages between climate change and the ocean. This is not a theoretical exercise; it's an unfolding reality that requires reaction. It is in this context that Norway makes its oral observations before this Tribunal.

Let me briefly present the outline of our statement: first, I will present a few general observations on the questions of jurisdiction and admissibility; second, I will turn to the UN Convention of the Law of the Sea (UNCLOS) and ascertain the Convention's general character and whether the provisions Norway consider to be more important in the present case also address climate change and its effects; third I will provide some concluding remarks.

My objective with this intervention is not to replicate Norway's written statement. Instead, I will attempt to make a few overarching remarks that I believe can give guidance to the Tribunal as it deals with the task at hand.

I will first begin with a few short observations on the questions of jurisdiction and admissibility. Before responding to the questions addressed to it, the Tribunal must assess whether it has jurisdiction to provide an advisory opinion on the matter before it. If this is so, the Tribunal must, as a second step, assess whether there are convincing reasons to provide or refrain from giving an advisory opinion. In this regard, Norway recalls the wording of article 138(1) of the Rules of the Tribunal, which provides that "[t]he Tribunal may give an advisory opinion". Whether to give an advisory opinion is thus a discretionary decision on the part of the Tribunal.

Norway will not address the question of the legal parameters around the Tribunal's advisory jurisdiction. Regardless of its decision, it seems imperative from our vantage point, that the Tribunal seize this opportunity and provide further clarity on this issue. In Norway's view, this should entail elucidating the Tribunal's understanding of its Statute,[4] in light of the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law,[5] as well as the Tribunal's own previous conclusions in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, while at the same time recognizing that the circumstances of that case might differ in certain respects from the one at bar.

Additionally, the questions posed by the Commission are broadly formulated and potentially wide-ranging. Therefore, Norway also encourages the Tribunal to use its discretion to frame the questions in a way that will enable the Tribunal to answer them in a manner that can provide practical guidance on the interpretation of the Convention.

[4] Statute of the International Tribunal for the Law of the Sea, article 21.
[5] Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, article 2 (2).

I will now, as my second point, turn to the UN Convention on the Law of the Sea.

As is well established, the means of treaty interpretation are based on the relevant provisions of the Vienna Convention on the Law of Treaties, widely considered to reflect existing international customary law.[6] Consequently, these rules should form the basis for the Tribunal's Interpretation of UNCLOS.

With regard to the legal framework, Norway wishes to make three points, relating to: (1) the character of the Law of the Sea Convention; (2) the nature of its provisions and whether they also address climate change and its effects; and (3) the specific nature of its articles 192 and 194, which Norway considers central to the present case.

To the first point: a key characteristic of UNCLOS is that it establishes a set of maritime zones and allocates rights, obligations and jurisdiction of coastal States, flag States and other States within, across and beyond these different zones.

Thus, UNCLOS constitutes a coherent and unified legal order for the oceans and seas, which in the words of the Convention's Preamble, "will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." The Tribunal plays an important role in this regard, as a guardian of this legal order.

The Convention has also proven itself as a highly practical instrument. As confirmed numerous times by the United Nations General Assembly, the Convention "sets out the legal framework within which all activities in the oceans and seas must be carried out". In practice, the Convention constitutes the relevant parameters for States when ascertaining what activities can be undertaken and what measures implemented in the different maritime areas.

The Convention is a carefully negotiated package. Its text represents a true balancing act. Each part and provision represent a carefully agreed compromise. The Norwegian UNCLOS chief negotiator, Ambassador and later Judge at the International Court of Justice, Jens Evensen, was keen to recall how the Law of the Sea draft articles were carefully conceived among expert colleagues from all over the world and across geographical groups. Remarkably, consensus on the constitutive instrument of what would become the "Constitution of the Oceans" was, in large part, developed through active exchanges in downtown New York diners, with deliberations over thin coffee and greasy pancakes.

As regards the outcome of these efforts, this was described recently by the International Court of Justice in *Nicaragua* v. *Colombia* in the following terms:

> As recognized in the preamble to the Convention, 'the problems of ocean space are closely [inter]related and need to be considered as a whole'. The method of negotiation at the Conference was designed against this background and had the aim of achieving consensus through a series of

[6] Vienna Convention on the Law of Treaties, articles 31-33.

> provisional and interdependent texts on the various questions at issue that resulted in a comprehensive and integrated text forming a package deal.[7]

As the Court continued, the outcome was a Convention that amounted to an "integrated" instrument.[8]

Mr President, honourable members of the Tribunal, my previous reference to pancakes in New York, of course, should not be seen as an attempt to dictate what the members of the Tribunal should consume while deliberating – although Hamburg pfannekuchen are no doubt most delicious – but this paints an accurate picture of the communal spirit across delegations that helped produce a balanced and universally applicable text.

The Convention is truly one of the most significant and successful multilateral instruments of the twentieth century. The more than 400 articles of the text and of the nine annexes that are an integral part of it are the most extensive and detailed product of codification activity States have ever attempted and successfully concluded under the auspices of the United Nations. It is therefore vital that the Convention's integrity, what the International Court calls its "integrated character",[9] is preserved.

Norway considers that this is a relevant backdrop for the interpretation of the specific provisions of the Convention.

Turning to my second point regarding UNCLOS and climate change: it has been argued that UNCLOS does not apply to climate change because the term "climate change" does not appear in the text itself.

Norway respectfully submits that this is not decisive. We consider that the relevant exercise for the Tribunal to apply the rules of treaty interpretation in good faith to the relevant terms used in the Convention. UNCLOS is a framework convention. As such, its terms are of a general nature. It regulates rights, obligations and activities. Norway considers that UNCLOS does not, in itself, exclude climate change and its effects from its regulatory scope. To the contrary, the terms used in UNCLOS' provisions on the protection and preservation of the marine environment are broad enough, in their ordinary meaning, to encompass climate change and its effects.

In this regard, Norway wishes to draw the Tribunal's attention to the fact that an important part of UNCLOS' object and purpose is "the protection and preservation of the marine environment", seemingly irrespective of the sources of pollution or impact. To take an example, article 194 requires States to take measures to prevent, reduce and control pollution from "any source". Any source.

Even if the Tribunal should find that climate change impacts do not easily fall within the definition of "pollution" in UNCLOS article 1(4), Norway would remind the

---

[7] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, Judgment of 13 July 2023, para. 48.
[8] *Ibid.*, para. 49.
[9] Ibidem.

Tribunal that the general obligation to protect and preserve the marine environment would remain relevant.

Turing to my third point on articles 192 and 194: Norway considers that the questions posed by the Commission first and foremost invoke articles 192 and 194 of the Convention. In fact, the two questions posed to the Tribunal seem to mirror these two provisions specifically.

Norway submits that both the obligation to protect and preserve the marine environment (article 192) and the obligation to prevent, reduce and control pollution (article 194) are general obligations. In addition to the general nature of their wording, this is confirmed by their immediate context, as they are both situated in Part XII, Section 1, titled “General Provisions”. The title of article 192 as “General Obligation” further confirms its role as the overarching obligation pertaining to Part XII.

Norway further submits that articles 192 and 194 contain obligations of a due diligence nature. The Tribunal has itself confirmed this as regards article 192 in the *SRFC* advisory opinion from 2015.[10] With respect to article 194, Norway considers that this can be deduced from its wording, which obliges States to “take all measures necessary” and “using for this purpose the best practicable means at their disposal” “in accordance with their capabilities” and “to the fullest possible extent”.

The practical effect of the due diligence nature of these provisions entails that marine activities, including the way exploration and exploitation of living and non-living resources are carried out, and the way maritime transport are conducted, require environmental awareness. This is a fundamental part of Norway’s marine policies, including zoning planning, science-based environmental impact assessments, and open, transparent and democratic debate based on active and inclusive stakeholder consultations.

An example is related to the comprehensive debates pertaining to how best to reduce demand for petroleum, promote offshore wind as a source of energy and provide effective incentives to promote protection of the atmosphere and biodiversity. This is exemplified by our emphasis within the WTO on the need to remove subsidies for the use of fossil fuels in fishing activities.

This latter example brings me to a key point: a careful assessment of the relevant provisions of UNCLOS reveals the importance of collective action to be taken within the competent international organizations, whether at the global or regional level. Standard setting and action plans in such fora are key to remove a frequent obstacle invoked for national reforms, namely, the need for a level playing field and common norms to avoid economic and societal disruptions. Norway would thus invite the Tribunal to highlight, in particular, the contributions that are already being made and that can be furthered and advanced in such key regional fora.

[10] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC), Case Nº 21, Advisory Opinion of 2 April 2015, para. 219.

Returning to the legal meaning of articles 192 and 194, Norway considers that the precise content of these obligations is informed by other and complementary sources. First, they are immediately informed by the subsequent more detailed provisions of UNCLOS part XII.[11] As an example, Section 5 develops the general obligation under article 194 in relation to specific sources of pollution.

Second, the general provisions of UNCLOS Part XII have recently been complemented by more detailed rules for the conservation and sustainable use of biodiversity beyond national jurisdiction. Among other elements, the new BBNJ Treaty contains more precise rules and stringent requirements for the use of environmental impact assessments in relation to activities and enables States to enact different area-based management tools, including marine protected areas. As a member of the high-ambition coalition advancing a robust and effective agreement, Norway warmly welcomes the adoption of this vital new part of the law of the sea framework. The treaty will be signed by Norway's Prime Minister, Jonas Gahr Støre, in New York later this week.

Third, Norway agrees with the argument that has been made that, according to article 293 of UNCLOS, certain fundamental principles of human rights law, such as the principle that "in no case may a people be deprived of its own means of subsistence", represent applicable law in these proceedings. As such, that principle necessarily informs the provisions of Part XII, such as articles 192 and 194.

The principle is an example of what this Tribunal has called "elementary considerations of humanity", which "must apply in the law of the sea, as they do in other areas of international law".[12] The Tribunal has a long tradition of elementary considerations of humanity informing the interpretation of UNCLOS.

As Rolf Einar Fife has explained in general terms, "[t]his pronouncement of the International Tribunal on the Law of the Sea reflects the relevance of elementary considerations of humanity as a general principle of international law, and therefore as a source of law in its own right."[13]

The principle in question here – that in no case may a people be deprived of its own means of subsistence – has, in various formulations, found application in the law of the sea. One example is the *Fisheries* case, a judgment Norway is always pleased to highlight, where the International Court referred to and placed emphasis on "the vital needs of the population of Norway".[14]

---

[11] Part XII, *inter alia*, sets out requirements for States to cooperate in formulating international rules to achieve their obligations, to provide technical assistance to developing States, monitor and assess the effects of any activities they permit or control, to enact national legislation to give effect to international rules on these issues, as well as laying out rules on the enforcement by different States with respect to pollution.

[12] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v*. Guinea), ITLOS Reports 1999*, p. 10, 62; *M/V "Virginia G" (Panama/Guinea-Bissau), ITLOS Reports 2014*, p. 101, para. 359; *The "Enrica Lexie" (Italy* v*. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 204, para. 133.

[13] R.E. Fife, 'The Duty to Render Assistance at Sea: Some Reflections after *Tampa*' in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill 2003) 470, 482.

[14] *Fisheries, I.C.J. Reports 1951*, p. 142; also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 342, para. 237.

Fourth, UNCLOS Part XII must be understood with due regard for other relevant rules of international law applicable in the relations between the parties. This follows directly from the rules of treaty interpretation contained in VCLT article 31(3)(c). It is also evident from the fact that specific provisions of Part XII explicitly oblige States of "taking into account internationally agreed rules, standards and recommended practices and procedures". The Convention's references to other conventions and regimes compatible with the Convention further confirm this.[15]

Norway submits that the UN Framework Convention on Climate Change and, in particular, the Paris Agreement, is the most relevant source of law informing the interpretation of relevant UNCLOS provisions. This is because the Paris Agreement, with its almost universal participation, constitutes the primary instrument prescribing the current and specific obligations on States in relation to climate change. The Paris Agreement represents the primary forum for increasing global climate ambitions and implementation through its carefully negotiated provisions. Norway would argue that the Paris Agreement as the primary legal vehicle for tackling global climate change must serve as a fundamental precondition for the Tribunal's assessment.

Mr President, honourable members of the Tribunal, it is time for me to conclude these observations on behalf of Norway.

I embarked by emphasizing the grave nature of the climate crisis and the urgent need to collectively tackle it by increased efforts to mitigate emissions and adapt to the changes that we cannot prevent. I then confirmed that Norway recognizes the important links between ocean health and climate change, as well as the vital role of ocean-based solutions in solving the climate crisis.

I proceeded to making the following three points in relation to the Convention.

One, UNCLOS is a "comprehensive and integrated text forming a package deal"; it is a framework convention. It is a truly successful practical instrument for the governing of all ocean space. It is vital that its integrity is preserved. This is an important backdrop to the Tribunal's assessment of the questions posed by the Commission.

Second, seeing as it is a framework convention, the fact that the text itself does not mention climate change does not mean that the Convention excludes *a priori* climate change and its impacts from its scope. Rather, the question requires a good faith legal interpretation based on generally recognized principles of treaty interpretation as enshrined in the VCLT. In Norway's view the terms of the Convention, in their ordinary meaning, are wide enough to cover climate change and its impacts.

Three, the obligations to protect and preserve the marine environment (article 192) and to prevent, reduce and control pollution (article 194) are general obligations of a due diligence nature. Their more precise content must be interpreted in light of other relevant rules that can inform their construction. In relation to climate change, the Paris Agreement is the relevant source of law for this assessment.

[15] See UNCLOS articles 237 and 311.

I will end these observations by returning to the words of Norwegian author Morten Strøksnes. In his sonnet to the sea, he concludes: "The sea will do just fine without us. We [on the other hand] cannot survive without the sea."[16]

Acknowledging this simple fact, our dependence on the sea and our collective responsibility to ensure its health and resilience is crucial and cannot be ignored. Norway certainly considers it a task of existential importance to protect and preserve the marine environment and take effective measures to prevent, reduce and control pollution of the marine environment, as well as combatting climate change. It is no less than a generational responsibility.

Mr President, honourable members of the Tribunal, that concludes Norway's observations. On behalf of Norway's delegation, myself and my colleague Dagny Hovind, I thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Kravik. We have now reached 11:40 am. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 12:10.

(*Pause*)

THE PRESIDENT: I now give the floor to the representative of Belize, Mr Gladden, to make his statement. You have the floor, Sir.

MR GLADDEN: Mr President, honourable members of the Tribunal, Madam Registrar, it is a great privilege to appear before you today on behalf of Belize, especially in proceedings of such profound importance to Belize and to the international community as a whole.

Belize is a State with a marine environment of exceptional and, indeed, international importance. The Belize Barrier Reef Reserve System is the world's second largest system of reefs. It has been recognized as a UNESCO World Heritage Site.

As recorded by UNESCO:

> The coastal area of Belize is an outstanding natural system consisting of the largest barrier reef in the northern hemisphere, offshore atolls, several hundred sand cays, mangrove forests, coastal lagoons and estuaries. The system's seven sites illustrates the evolutionary history of reef development and are a significant habitat for threatened species, including marine turtles, manatees and the American marine crocodile.
>
> The Belize Barrier Reef Reserve System (BBRRS), inscribed as a UNESCO World Heritage Site in 1996, is comprised of seven protected areas. … The largest reef complex in the Atlantic- Caribbean region, it represents the second largest reef system in the world.

The Government of Belize recognizes anthropogenic climate change as the country's most serious threat to sustainable development.

[16] See supra note 1.

Belize ranks as the third country most at risk for natural hazards among small developing States and fifth most at risk from progressive climate change.

As a result of the adverse impacts of climate change, in particular ocean acidification, ocean warming and sea-level rise, Belize's marine environment, including its systems of coral reefs, mangrove forests, coastal lagoons and estuaries, is confronted by an existential threat.

In November 2021, at COP26, Belize's Prime Minister, the Honourable John Briceño, made a statement underscoring the threats which climate change poses to Belize's marine areas and, in particular, its fragile reef system. He stated:

> Belize is the proud custodian of the Belize Barrier Reef Reserve System. … But here is the sad reality. The reef is under siege. Coral bleaching stress doubled from 1.7 in the period 1985-2014 to severe Level 3 between 2014-2017. The reef is dying and may be beyond the point of full restoration. Its loss will be irreversible. For Belize, the Barrier Reef is more than a global beauty; it also underpins our culture and our tourism industry which contributes approximately 40 percent to our gross domestic product. Without the reefs, Belize's economy could crumble. Our people's lives will be forever changed.[1]

Belize also considers that it has an important voice before this Tribunal. This is not just because of its exceptional and exceptionally vulnerable barrier reef system; the country of Belize acts as an important sink of greenhouse gas emissions, including due to the significant carbon storage in Belize's extensive forested areas. Belize has been proactive on the international plane, including as a member of the Alliance of Small Island States, and Belize's action within the domestic sphere demonstrates its commitment to addressing the threats posed by climate change.

As explained at COP25, Belize has expanded its no-take zones from 4 per cent to 11.6 per cent of its seas and has legislated that its maritime economy will follow a green development pathway, through the banning of offshore oil exploration.[2]

Belize has also been a pioneer in climate finance: in November 2021, it entered into the largest blue bond transaction ever executed – a debt-for-marine conservation transaction valued at over US$ 360 million.[3] Belize's actions are consistent with its words.

Belize remains staunchly committed to the cause of combating climate change. Like other low-lying coastal States, Belize is "on the frontline of a climate crisis for which

[1] Statement of the Hon. John Briceño, Prime Minister of Belize, at COP26, 1 November 2021, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop26cmp16cma3_HLS_EN.pdf, pp. 1–2.
[2] Statement of the Hon. Omar Figueroa, Minister of Agriculture, Fisheries, Forestry, the Environment, Sustainable Development and Immigration of Belize, at COP25, December 2019, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop25cmp15cma2_HLS_EN.pdf, p. 3.
[3] Statement of the Hon. John Briceño, Prime Minister of Belize, at COP26, 1 November 2021, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop26cmp16cma3_HLS_EN.pdf, p. 3.

they are not responsible".[4] Belize is of the firm view that this Tribunal can play an important role in clarifying the specific obligations of States Parties to UNCLOS in responding to this crisis. Belize is therefore proud to be participating in the present proceedings.

Mr President, two members of Belize's counsel team will address you today. I will be followed by Mr Sean Aughey, who will address the Tribunal on the role played by the specialized conventions on climate change, under the United Nations Framework Convention on Climate Change and the Paris Agreement, in answering the question on which advisory opinion has been requested. Mr Sam Wordsworth KC will then present Belize's submissions on the obligation of assessment under article 206 of the Convention, as well as touching on the obligations of due diligence under article 194.

Mr President, honourable members of the Special Chamber, that concludes Belize's opening statement. I now ask that you give the floor to Mr Aughey.

MR PRESIDENT: Thank you, Mr Gladden. I now give the floor to Mr Aughey to make his statement. You have the floor, Sir.

MR AUGHEY: Mr President, members of the Tribunal, it is a privilege to appear before you and an honour to present the submissions of Belize on the role played by the specialized conventions on climate change in answering the questions on which an advisory opinion has been requested.

This is an important area of some disagreement in the written and oral submissions before the Tribunal.

The Tribunal's task, as delimited by the precise terms of the questions asked, is to identify "the specific obligations of States Parties to UNCLOS, including under Part XII".

The questions are focused on and limited to UNCLOS. The Tribunal is not being asked to exercise its advisory jurisdiction to define the specific obligations of States Parties (or non-States Parties) under any other separate independent international instrument, such as the specialized conventions on climate change – a request that would fall outside of its competence. Rather, the Tribunal is being asked to do no more than to interpret the relevant provisions of UNCLOS, including Part XII, in accordance with the usual rules on treaty interpretation.

There is a large measure of agreement among participants that anthropogenic greenhouse gas emissions fall squarely within the definition of "pollution" in article 1(1)(4) and that, as other participants have shown in detail, it is scientifically established that such emissions are already causing significant harm to the marine environment and that further emissions will cause extreme harm. Thus, Part XII of UNCLOS is engaged.

[4] Statement of the Hon. John Briceño, Prime Minister of Belize, to United Nations General Assembly, 24 September 2021, available at https://estatements.unmeetings.org/estatements/10.0010/20210924/ajen3uMeQSDH/nu5mhB5LlnlY_en.pdf.

This inevitable conclusion is consistent with the fact that, in a series of resolutions on "The Ocean and the Law of the Sea", the United Nations General Assembly has repeatedly noted "with satisfaction" that "States [have] recognized that"

> the Convention [that is, UNCLOS] provides the legal framework for the conservation and sustainable use of the oceans and their resources, and stressed the importance of the conservation and sustainable use of the oceans and seas and of their resources for sustainable development, including through their contributions to poverty eradication, sustained economic growth, food security and creation of sustainable livelihoods and decent work, while at the same time protecting biodiversity and the marine environment and addressing the impacts of climate change.[1]

Most recently, this statement was included in the recitals to United Nations General Assembly resolution 77/248, which was adopted on 30 December 2022 by 159 to 1, with 3 abstentions. Every State that has submitted a written statement in these proceedings voted in favour of that resolution.[2] In doing so, they endorsed the commonsense understanding that UNCLOS itself, as the legal framework for the conservation and sustainable use of the marine environment, has an important role to play in addressing the impacts of climate change on the environment.

In the present proceedings, however, an important area of disagreement has emerged as to the scope of the specific obligations of States Parties in this context, particularly the obligations under articles 194 and 212 to take all necessary measures to prevent, reduce and control pollution of the marine environment.

The submissions of some States, skillfully developed through two broad lines of argument, ultimately boil down to the proposition that the specialized conventions on climate change represent the present limits of the specific obligations of States Parties to UNCLOS in this context.

The argument is this: the obligations to preserve and protect the marine environment under article 192, and to take measures that are "necessary" to prevent, reduce and control pollution of the marine environment arising from anthropogenic greenhouse gas emissions under articles 194, 207 and 212, require nothing more than the undertaking and, perhaps, the good faith implementation of whatever commitments States have made under the United Nations Framework Convention and the Paris Agreement. In other words, you are told: "Go no further than Paris."

[1] See e.g. United Nations General Assembly 77/248 'Oceans and the law of the sea' (30 December 2022), UN Doc. A/RES/77/248 (9 January 2023), preamble (emphasis added); United Nations General Assembly 76/72 'Oceans and the law of the sea' (9 December 2021), UN Doc. A/RES/76/72 (20 December 2021), preamble (emphasis added); United Nations General Assembly 75/239 'Oceans and the law of the sea' (31 December 2020), UN Doc. A/RES/75/239 (5 January 2021), preamble (emphasis added); United Nations General Assembly 74/19 'Oceans and the law of the sea' (10 December 2019), UN Doc. A/RES/74/19 (20 December 2019), preamble (emphasis added); United Nations General Assembly 73/124 'Oceans and the law of the sea' (11 December 2018), UN Doc. A/RES/73/124 (31 December 2018), preamble (emphasis added).

[2] A/77/PV.56 (Resumption 1), pp. 6–7.

Whilst it may suit some States to seek to neutralize UNCLOS so that it adds nothing to the commitments, such as they are, under the UN Framework Convention and the Paris Agreement, that approach does not take account of the ordinary meaning of the plain words of Part XII according to the usual rules of treaty interpretation.

First, certain proponents of the neutralization objective seek to reframe the interpretation question before you as a question of compliance with the specific obligations under UNCLOS, and then reason backwards. Take, for example, Australia's position that, "[i]n 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".[3]

Similarly, the European Union submits that "the open-ended and evolutionary obligations under the Paris Agreement are broad enough to provide for the level of due diligence which is necessary and appropriate to comply with articles 192 and 194 of UNCLOS".[4]

But the Tribunal's present task of interpreting the specific obligations of Parties is separate, and logically prior, to any consideration of their compliance with those specific obligations. As a matter of interpretation, it is not possible for the Tribunal to state in the abstract whether the due diligence obligation in article 194, variable as it is between States and across time,[5] would be satisfied by compliance with any particular commitment made under the Paris Agreement.

Indeed, the International Court of Justice has held that "the notion of 'due diligence' … calls for an assessment *in concreto*".[6] The question before you also does not require consideration of the operation of articles 237 or 311 of UNCLOS with respect to specialized conventions on climate change.

Second, proponents of the neutralization objective also attempt to elevate the significance of the specialized climate change conventions so that they become the determinative and limiting factor in interpreting UNCLOS. Take Australia's submission that "Part XII of UNCLOS should not be interpreted as imposing obligations with respect to greenhouse gas emissions that are inconsistent with, or go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement."[7]

For a more specific variant of this argument, see, for example, the United Kingdom's submission that "[t]he measures that are 'necessary' for the purpose of articles 194

[3] ITLOS/PV.23/C31/5, p. 16, lines 24–26 (Parlett). See also p. 9, lines 23–26; p. 10, lines 46–50; p. 11, lines 39–42 (Donaghue). See similarly European Union, Written statement, paras. 28, 65 and n. 65.
[4] European Union, Written statement, para. 69.
[5] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 at p. 43, para. 117.
[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007*, p. 43 at p. 221, para. 430.
[7] ITLOS/PV.23/C31/5, p. 3, lines 26–35 (Donoghue).

and 212 must be determined by reference to those carefully negotiated treaties that are specific to control of anthropogenic greenhouse gas emissions."[8]

Invoking article 31(3)(c) of the Vienna Convention, the submission asks the Tribunal to pay "particularly careful regard" to the "primary importance" of the climate change treaties which, we are reminded, are "the product of protracted negotiations and careful compromise". It is almost as if UNCLOS wasn't. I will come back to article 31(3)(c), but, first, it is instructive to note the arguments on interpretation not being advanced by the United Kingdom.

First, it is not suggested by the United Kingdom that the ordinary meaning of the word "necessary", read in context and in light of the object and purpose of UNCLOS, directs the interpreter specifically and only to the specialized conventions on climate change. Plainly, it does not. The obligation is not one to take such measures as individual States Parties consider to be necessary in order to discharge different commitments under a different treaty, and all the more so where that different treaty is (unlike UNCLOS) not specifically concerned with the preservation and protection of the marine environment, and the prevention, reduction and control of pollution of the marine environment.

Rather, in identifying what measures are necessary (that is, according to the ordinary meaning of the term, indispensable), it is obvious that the Tribunal must have regard to the best available science regarding the impacts of greenhouse gas emissions on the marine environment, the threat of further extreme harm and the steps that must be taken to mitigate the risk to acceptable levels. The best available science is not merely, as the United Kingdom appears to suggest, "a relevant factor for States to consider in making their assessment of potential measures".[9]

The assessment of what measures are objectively necessary is a separate, prior, exercise, and one which is itself driven by the best available science. In this case, the need for urgent measures of prevention, reduction and control could not be better established given the works of the IPCC. As a separate stage of the analysis, having identified what measures are in fact "necessary", the specific obligation on States Parties under article 194(1) is to take those measures using the best practical means at their disposal and in accordance with their capabilities.

Additionally, the context shows that where States Parties wished to establish a specific obligation to take "measures necessary to implement" internationally agreed rules and standards established through competent international organizations or diplomatic conference, they did so expressly, as in articles 213 and 222. The specific obligations under articles 194, 207 and 212 to take all measures necessary to prevent, reduce and control pollution are framed in much broader terms, independent of the question of the implementation of any internationally agreed rules and standards.

The context also shows that there is no assumption that the measures that are necessary to implement internationally agreed rules and standards will constitute the

[8] United Kingdom, Written statement, para. 68(a).
[9] United Kingdom, Written Statement, para. 68(b).

limit of the measures that are necessary to prevent, reduce and control pollution. The obligation under article 207(4) and 212(3) is to "endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution".

It is not to endeavour to establish agreement on the limits of the measures that are necessary to prevent, reduce and control pollution, and it should not automatically be assumed that any internationally agreed rules and standards represent the limits of what is necessary. Consistent with this, articles 213 and 222 establish independent specific obligations with respect to the enforcement of these two, potentially different, categories of measures.

Ultimately, the careful formulation of the specific obligations in Part XII appears to reflect the common sense appreciation that, since it would be necessary to achieve consensus for their adoption, internationally agreed rules and standards might reflect compromises and might only contribute to, rather than secure, the ultimate objective of ensuring that States Parties take measures that are, in fact, necessary to prevent, reduce and control pollution of the marine environment from any given source.

Third, because UNCLOS and the specialized climate change conventions establish separate independent obligations, it cannot be suggested by the United Kingdom that the specialized conventions amount to subsequent practice establishing agreement between the States Parties to UNCLOS as to the meaning of the term "necessary" in the context of climate change. While the UNFCCC refers to the importance of marine ecosystems as sinks and reservoirs of greenhouse gases,[10] and the Paris Agreement refers in general terms to the "oceans",[11] neither instrument contain any reference to UNCLOS or to the "marine environment" within the meaning of UNCLOS.

I turn then to article 31(3)(c), which I understand to be the principal basis on which the UK says that "[t]he measures that are 'necessary' for the purposes of articles 194 and 212 must be determined by reference to" the specialized conventions.[12] UNCLOS is, of course, not to be interpreted in a vacuum, but article 31(3)(c) requires only that the Tribunal shall "take into account" such external rules, no less but no more.

Importantly, relevant rules applicable in the relations between the Parties constitute just one element that is to be thrown into the crucible together with the ordinary meaning of the text of UNCLOS, the context, the object and purpose and so on.[13] Such rules do not displace or modify the ordinary meaning of the words of Part XII.[14] It is the interaction between the various elements that produces the legally relevant interpretation.

[10] UNFCCC, preamble.
[11] Paris Agreement, preamble.
[12] United Kingdom, Written statement, para. 68(a).
[13] Vienna Convention on the Law of Treaties, Article 31(1)–(3); International Law Commission, Draft articles on the Law of Treaties, with commentaries, *Yearbook of the International Law Commission* (1966), Vol. II, at pp. 219–220 (commentary to draft articles 27–28, para 8).
[14] Vienna Convention on the Law of Treaties, article 31(1).

This is what is required by the usual rules and the careful application of article 31 VCLT will be sufficient to meet the United Kingdom's concern that the Tribunal performs its role "fully conscious of the broader context of the global climate change regime".[15] The global regime falls for consideration only in that it has a certain role to play in interpreting the provisions of UNCLOS. Nothing in the Convention operates to incorporate these external rules so that they become part of UNCLOS.

What, then, is the relevance to the interpretation of Part XII of the non-binding commitments under the Paris Agreement that States have assumed in the gradual pursuit of the temperature goal?

It is important to recall not only that the NDCs are not rules of international law applicable in the relations between the Parties for the purpose of article 31(3)(c), but also that these commitments, such as they are, fall far short of what is necessary to prevent, reduce and control pollution of the marine environment, as could not be clearer from the words of the IPCC.

For example, the IPCC's Special Report on the Ocean and Cryosphere, with specific reference to the specialized conventions, including the UNFCCC and the Paris Agreement, stated: "Existing international instruments do not adequately address climate change challenges for the open ocean and coastal seas".[16] That, of course, includes Belize's coral reefs and mangrove ecosystems.

The science could not be clearer that a great deal more is needed, and it follows from this that the interpretation of the specific obligations under Part XII to take all the measures that are "necessary" to prevent, reduce and control pollution in this context cannot be limited by reference to the modest measures that States have separately and independently committed to take under the Paris Agreement.

To conclude, the Tribunal's task is to interpret the provisions of Part XII of UNCLOS in a manner that gives real meaning and effect to, rather than neutralizes, those provisions. The question of what measures are "necessary" to prevent, reduce and control pollution of the marine environment is not to be interpreted solely or primarily by reference to the separate and independent commitments under the specialized conventions on climate change. While any true obligations under those specialized conventions are to be taken into account, this in no way precludes the Tribunal from going beyond Paris. You must go further.

Mr President, members of the Tribunal, I thank you for your kind attention and ask that you call Mr Wordsworth KC to the podium.

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

MR WORDSWORTH: Mr President, members of the Tribunal, it is a privilege to appear before you for Belize, and I wish to start by taking a moment to look at the

[15] United Kingdom, Written Statement, para. 7.

[16] IPCC, "The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change" (2022), Table 5.9 ("Ocean Governance and Climate Change: Major Issues"), p. 541.

dynamic currently unfolding before this Tribunal, including in the presentations that we have just heard this morning, and, in doing so, to recall the myth of Sisyphus.

Sisyphus, of course, was condemned by the Greek gods to roll a large boulder up the side of a mountain for all eternity. Whenever he reached the crest of the mountain, the boulder would escape from his grip and roll back down to the bottom, ready for an endless and dispiriting repeat.

The analogy is tolerably clear. At each COP, all States have an interest in reducing the emission of greenhouse gases and are willing work together to a certain point, to push this boulder of existential importance some distance up the mountain towards a goal of the meaningful and binding obligations that are necessary to reduce emissions.

But the closer the boulder gets to the summit, the more the disparities appear between, on the one hand, the States that are the most adversely affected and impacted by climate change, including those most exposed to sea-level rise and most dependent on a healthy marine environment; and, on the other hand, there are those States with less pressing or even opposing interests, mainly more developed or oil-producing States.

And, so, little if anything is agreed in terms of the hard-edged legal obligations needed to make concrete reductions in emissions. The boulder rolls back down the mountainside, and not too distant from its original starting point, while ever more severe adverse impacts are registered on land and sea, including in severe harm to Belize's precious coral reefs.

And this Tribunal is now confronted by the same conflicting interests but as reflected in the two broad lines of argument being put before it, which Mr Aughey has just summarized. And to emphasize, the "Go no further than Paris" argument is conveyed with great skill and can appear to give real meaning and effect to the provisions of Part XII.

For example, France accepts that the measures adopted pursuant to Part XII must be "effective". But it then says: "In this respect countries should intensify the ambition of their greenhouse gas mitigation policies to place themselves on the trajectory to limit greenhouse gases, as set out in article 2 of the Paris Agreement and in line with the Glasgow Pact".[1]

Thus, the hard-edged legal obligations under Part XII are elegantly merged into the language of endeavour and ambition, where the endpoint is not the concrete enforcement of the obligation to prevent, reduce and control of pollution to the marine environment, but some undefined and unenforceable location along a trajectory. And so the boulder comes crashing back down the mountainside.

The counterargument is that the provisions of Part XII say what they say and must be interpreted according to the usual rules, which afford some relevance to the UNFCCC and the Paris Agreement, but do not remove or obscure the independent

[1] France, Written Statement, para. 112.

legal existence and meaning of what States and other parties were able to agree to in the specific context of the law of the sea. Intuitively, and as just follows from the more developed points that Mr Aughey has just made, only this second line of argument can be correct. In short, this is the Tribunal for the Law of the Sea being asked to interpret provisions of the Convention of the Law of the Sea.

And because anthropogenic greenhouse gases unquestionably meet the Convention's definition of pollution, the Tribunal has the jurisdiction and the tools accorded to it by the 168 States and other parties to UNCLOS to make, through its advisory opinion, a hugely important contribution to the protection and preservation of the marine environment. Sisyphus need not, and must not, within this context of UNCLOS, be sent back to the bottom of the mountain with nothing to show for his labours.

Now, against this backdrop, I wish to focus on the obligation of assessment under article 206, including its interplay with articles 192 and 194. Thus far, article 206 has received surprisingly little attention, despite its very real importance to the protection and preservation of the marine environment.

As to articles 192 and 194, I refer the Tribunal to Belize's written statement,[2] and note the broad consensus that these establish what are primarily obligations of due diligence, but of a particularly elevated nature – as follows, of course, from the treaty language and the extreme magnitude of the threat to the marine environment posed by greenhouse gas emissions.[3]

There are various helpful authorities to assist the Tribunal in this regard, including the advisory opinions on *Activities in the Area* and the *SRFC,* although it is to be emphasized that the reasoning of those decisions was focused on provisions that are less demanding,[4] and, in particular, do not impose the stringent obligation to take "all necessary measures".

Now, due diligence in this context naturally requires monitoring and assessment of risk,[5] and Section 4 of Part XII gives concrete form to this. Within this section, articles 204 and 205 deal respectively with "monitoring of the risks or effects of pollution" and "publication of reports", while article 206 concerns the obligations of assessment. Section 4 is thus concerned with obtaining and disseminating knowledge, and plays a critical role in ensuring the State's compliance with its obligations under articles 192 and, in particular, 194. As the precursor to taking all necessary measures, the State must first inform itself of the relevant risks and what is needed to prevent, reduce and control.

---

[2] Belize's written statement, paras. 55-71.

[3] As to magnitude of risk, see e.g. International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two at p. 155, para. 18.

[4] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 at pp. 38–40, paras. 126–129; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 at p. 41, paras. 110–112.

[5] See e.g., *Pulp Mills on the River Uruguay*, *Judgment, I.C.J. Reports 2010*, p. 14 at pp. 82–83, para. 204.

The obligation to assess can be seen as procedural in nature because taken in isolation – that is, leaving to one side for the moment the interplay with articles 192 and 194 – the State is not obliged to act in a particular way by reference to the knowledge acquired through the particular assessment, other than to ensure publication. However, that in no sense impacts on the binding nature and importance of article 206.

As correctly identified by the tribunal in the *Chagos Marine Protected Area Arbitration*, procedural obligations – and here, it had in mind obligations of environmental impact assessment – "may, indeed, be of equal or even greater importance than the substantive standards existing in international law".[6]

If oil producer X is going to develop a new field that is going to lead to Y greenhouse gas emissions, and consequent harm to the marine environment, the relevant figures must be quantified and also identified in terms of the likely harm, and then published as required by article 205. And this really matters. Ultimately, well-informed public pressure may well be one of the most important tools leading to the protection and preservation of the marine environment.

Turning to the details, article 206 breaks down into three basic elements: first, the trigger for its application; then, the actual obligation of assessment; and, finally, the obligation of publicity.

Starting with the first of these, the trigger for application, the obligation to assess is engaged "[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment".

Whilst citing and seemingly approving the description of article 206 in the Nordquist Commentary as an "essential part of a comprehensive environmental management system" and as a "particular application of the obligation on States, enunciated in Article 194(2)", the Tribunal in the *South China Sea Arbitration* saw the term "reasonable" as giving an element of discretion to the States concerned.[7]

If this is so, then any discretion can only exist within the confines of what is and is not reasonable, which is plainly a matter for objective determination.[8] And to emphasize, what triggers the obligation of assessment is the objective perception of risk of pollution or harm, not actual pollution or harm, as follows from the formulation "may cause pollution or significant and harmful changes".

There has been a debate as to how the two thresholds interact – and specifically over whether an activity that does not risk "substantial pollution" may nonetheless

[6] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 322.
[7] *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 948, referring to S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV (M. Nordquist, gen. ed., 2002), para. 206.6(b).
[8] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, para. 146 .

meet the threshold of "significant and harmful change".[9] It might be thought that the use of the disjunctive "or" provided the straightforward answer in this debate, but in any event, in the current context the question falls to be answered in light of the reports of the IPCC, from which it is self-evident that anthropogenic greenhouse gas emissions cause both "substantial pollution" and "significant and harmful changes" to the marine environment.

It is important also to emphasize that the trigger under article 206 centres around "planned activities" under a State's jurisdiction or control, which is a notably broad formulation.

Most obviously, this includes all activities that meet the thresholds that are planned by a developer or contractor. But the term "planned activities under their jurisdiction or control" will also include a State's intention to permit activities, including activities in a particular economic area, such as a plan to allow the exploitation of a particular area of oil or coal reserves, or to invest in energy production from fossil fuels. Thus, the State will be able to understand both individual and cumulative impacts of all planned activities and take these impacts into full consideration at an early stage of policy- and decision-making.

Of course, such decision-making may already take place within a framework of environmental or strategic impact assessment; we are not talking about article 206 imposing a massive burden. But article 206, correctly interpreted and applied, ensures a focus on adverse effects of anthropogenic greenhouse gas emissions specifically to the marine environment, and regardless of whether the proposed development is within a maritime zone.[10]

Moving, then, to the obligation of assessment: and this is of course cast in mandatory terms – "they shall … assess" – while the words "as far as practicable" allow for the possibility that there may be differential requirements as between developed and developing States.[11] The required assessment is then formulated in clear and straightforward language: the obligation to "assess the potential effects of such activities on the marine environment".

There are four points to make.

First, the words "as far as practicable" do not operate as an escape valve for States that are able to commit, but do not wish to commit, resources to a meaningful assessment. What is "practicable" must be determined by reference to context, and the context here is one of high risk of very significant harm, predicted by the IPCC as a matter of "high confidence".

[9] Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary (2017)*, p. 1375, para. 11, considering Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008).
[10] See also, e.g., *MOX Plant (Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 110, para. 82, p. 111, dispositif para. 1(c).
[11] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 at p. 54, para. 160.

With specific regard to “unique and threatened systems”, such as Belize’s coral reefs, the IPCC has moreover identified “increasing numbers of systems at potential risk of severe consequences at global warming of 1.5°C above preindustrial levels”,[12] and of course the impacts will only be much, much worse if 1.5°C figure is exceeded.[13]

Second, although no details are prescribed in article 206 as to the nature of the assessment, at a minimum, this will have to meet the criteria established in the domestic law of the relevant State,[14] and must contain an evaluation of the possible harmful impact of the planned activities on the marine environment.

As explained in the ILC’s commentary to article 7 of the Draft Articles on Prevention of Transboundary Harm, which likewise does not specify what the content of the risk assessment should be: “Obviously, the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead.”[15] In this respect, the inherent features of any meaningful EIA have been helpfully drawn out in the separate opinion of Judge *ad hoc* Dugard in the ICJ *Case concerning Certain Activities and Construction of a Road*.[16]

Third, I note that France in its written statement refers to the BBNJ in this context and it says: “The BBNJ Agreement also includes a section on environmental impact assessment to operationalize and give concrete form to the obligation set out in article 206 of the Convention.”[17]

But article 206 has no need to be operationalized and given concrete form. States may agree to elaborate on their obligations of assessment, but it would be quite wrong to suggest that article 206 does not already have hard-edged legal content.

As the Seabed Disputes Chamber aptly “stressed” in the *Activities in the Area* Opinion, “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention”.[18]

Fourth, in this respect it is also puzzling to see a passage in the Proelss Commentary deducing from the outcome of *Pulp Mills* and the *MOX Plant* case, that “it seems reasonable to presume that international tribunals are – in the absence of

[12] IPCC, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems, Special Report: Global Warming of 1.5ºC (2018), p. 253.
[13] IPCC, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems, Special Report: Global Warming of 1.5ºC (2018), pp. 179, 229–230 (Box 3.4).
[14] *Pulp Mills on the River Uruguay*, *Judgment, I.C.J. Reports 2010*, p. 14 at pp. 83–84, para. 205.
[15] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two at p. 158 (commentary to Article 7, para. 6, and see also para. 7).
[16] *Case concerning Certain Activities and Construction of a Road (Costa Rica v Nicaragua)*, *Judgment, I.C.J. Reports 2015*, p. 665 at p. 849, para. 18 (Separate Opinion of Judge *ad hoc* Dugard).
[17] France, Written Statement, para. 124.
[18] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 at p. 50, para. 145.

precise treaty requirements – unlikely to find breaches of the duty except in cases where no EIA is conducted or the EIA carried out was evidently inadequate".[19]

There is simply no basis for this, either in the language of article 206 or in the reasoning or outcome of those two cases. It is perhaps useful to recall that the decision in *MOX Plant* concerned provisional measures alone, contained no reasoning on article 206 and was decided chiefly by reference to the fact that there would be no export from the MOX plant for a considerable time, i.e., not until after constitution of an Annex VII tribunal.

So there was no urgency, although "prudence and caution" required that there be an order for cooperation in exchanging information concerning risks or effects of the operation of the MOX plant.[20] There is not a hint in the order of the Tribunal of it taking a less-than-stringent approach to the marine environment pursuant to Part XII; to the contrary.

If I may, I note in passing that this was a case on which I had the privilege to work with our dear and departed friend, Alan Boyle.

As to the final element of article 206, a State is obliged to "communicate reports of the results of such assessments in the manner provided in article 205", that is, to publish the reports itself or to provide them to the competent international organizations.

Pulling these strands together, I make two final points.

First, as Belize explained in its written statement,[21] if the marine environment is to be protected and preserved from the severe harms caused by anthropogenic greenhouse gas emissions, and if pollution from such emissions is to be prevented, reduced and controlled, it appears essential that the meaningful assessment of their environmental impacts becomes a form of reflex for planned activities within article 206, with the reports of such environmental assessments then being publicized.

Thus, not only the State concerned, but all States and, more broadly, the public become fully informed as to potential impacts, and this, I note, could be taken as reflecting an element of obligation of result.

Second, and picking up on this last point, there has been some focus before the Tribunal on the characterization of article 194(1) and whether this is to be seen as an "obligation of conduct" as opposed to an "obligation of result". And Judge Kittichaisaree has, of course, also asked a broader question on this, looking for categorization of the relevant provisions of the Convention into obligations of conduct or of result.

---

[19] Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 1375, para. 11, considering Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008).

[20] *The MOX Plant Case (Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at pp. 109–110, paras. 72–89.

[21] Belize Written Statement, para. 81.

Now, for Belize, this is not an issue with an easy answer, and it is to be recalled that the ILC elected not to include this distinction in the 2001 Articles on State Responsibility, explaining that:

> Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its … character". In practice, various classifications of international obligations have been adopted.
>
> For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive, and it does not seem to bear specific or direct consequences as far as the present articles are concerned.[22]

So, does the distinction assist the Tribunal in its current task of interpretation, where it is not seeking to ascertain whether a breach has occurred? Suppose the Tribunal were faced with a concrete case, where an environmental assessment under article 206 revealed that a given planned activity would inevitably lead to a massive release of methane gas and consequent adverse impact to the marine environment.

The obligations of due diligence under article 194 would likely require not merely conduct, but also a specific result in the form of a decision that the planned activity could not proceed as proposed. So we would not see this issue of characterization that is capable of a straightforward answer and respectfully query how much it could assist the Tribunal in the abstract.

To conclude, Mr President, members of the Tribunal; the entirety of Part XII is of the greatest importance in the current emergency and must be recognized as such if the endless torment of Sisyphus is to be cut short so far as concerns the marine environment.

And for Belize, it is critical that the Tribunal pay close attention to, and identify in its advisory opinion, the specific obligations under article 206 and interpret these in a way that gives them their true meaning and effect.

That concludes the oral submissions of Belize, and I thank you, Mr President, members of the Tribunal, for your attention.

THE PRESIDENT: Thank you, Mr Wordsworth.

This brings us to the end of this morning. The Tribunal will sit again tomorrow morning at 10 a.m. when it will hear oral statements from the Philippines and Sierra Leone.

This sitting is now closed.

[22] International Law Commission, Articles on State Responsibility with Commentaries, 2001, at p. 56, para. (11).