

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Wednesday, 13 September 2023, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Albert J. Hoffmann presiding

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

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

<i>Present:</i>	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

Australia

Mr Jesse Clarke, General Counsel (International Law), Office of International Law, Attorney-General's Department

Ms Lauren Burke, Principal Legal Officer, Office of International Law, Attorney-General's Department

Mr Stephen Donaghue KC, Solicitor-General of Australia

Ms Kate Parlett, member of the Bar of England and Wales, Twenty Essex

Mr Greg French, Ambassador to the Kingdom of the Netherlands; Permanent Representative to the Organisation for the Prohibition of Chemical Weapons

Ms Christine Ernst, member of the Bar of New South Wales, Australia, Tenth Floor Chambers, Sydney

Germany

Ms Tania Freiin von Uslar-Gleichen, Legal Adviser, Federal Foreign Office

Ms Wiebke Rückert, Director for Public International Law, Federal Foreign Office

Ms Miriam Wolter, Head of Division 504 (Law of the Sea, Antarctica, Aerospace Law)

Mr Christian Schulz, Deputy Head of Division 504 (Law of the Sea, Antarctica, Aerospace Law)

Mr Alexander Proelß, Professor, University of Hamburg

Saudi Arabia

Ms Ahlam Abdulrahman Yankssar

Ms Noorah Mohammed S. Algethami

Mr Abdullah Emad Alsahaf

Mr Mohammed Saleh M. Albarrak

Ms Eman Abdullah H. Aman

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

4
5 At the outset, I wish to note that due to traffic disruptions affecting the delegation of
6 Germany, the schedule of this morning's sitting has been slightly revised.

7
8 As a result, we will hear oral statements from the delegations in the following order:
9 Australia, Germany and Saudi Arabia.

10
11 I now give the floor to the representative of Australia, Mr Clarke, to make his
12 statement.

13
14 You have the floor, Sir.

15
16 **MR CLARKE:** Good morning, Mr President, distinguished members of the Tribunal.
17 It is a privilege to appear before you on behalf of Australia.

18
19 Given the centrality of the United Nations Convention on the Law of the Sea to this
20 proceeding, Australia wishes to place on the record the significance of that
21 Convention as setting out the comprehensive legal framework within which all
22 activities in the oceans and the seas must be carried out. Australia signed UNCLOS
23 on the very first day it opened for signature, 10 December 1982. Australia continues
24 to be committed to the proper interpretation and implementation of UNCLOS,
25 including in respect of the protection and preservation of the marine environment.
26 The international organizations and institutions established by UNCLOS, including
27 this Tribunal, have played a critical role in ensuring the success of that Convention.

28
29 The marine environment plays an essential role in regulating our climate and
30 providing for energy, economic and food security needs. A healthy and sustainable
31 marine environment is essential not only for all States but for all life on this planet.
32 Australia places particular importance on the protection, preservation, conservation
33 and sustainable use of the oceans, and recognizes the important and ongoing role of
34 the oceans for our region.

35
36 Australia is committed to strong oceans governance and robust regimes to ensure
37 the protection and preservation of the marine environment. To that end, Australia
38 recently welcomed the adoption of the new legally binding international instrument,
39 under UNCLOS, on the conservation and sustainable use of marine biological
40 diversity in areas beyond national jurisdiction. This agreement, commonly known as
41 the "BBNJ", delivers significant environmental benefits at a time when our oceans
42 need them most. It is a timely example of the true value of both the UNCLOS
43 framework and international cooperation in oceans governance.

44
45 Australia recognizes the leadership of our Pacific neighbours in global oceans
46 governance, and the important role of Pacific island States in sustainable
47 management and use of the oceans, and responding to its environmental needs.
48 Indeed, Australia acknowledges the importance of the oceans as part of the Pacific
49 identity.

1 In that context, it is all the more important to recognize that small island States are
2 on the frontline of the adverse impacts of climate change, as powerfully
3 demonstrated by the co-chairs of COSIS on Monday.¹ Those impacts have never
4 been felt so strongly. Australia acknowledges the longstanding leadership of small
5 island States, in particular Pacific island States, on global responses to climate
6 change.

7
8 Australia is taking urgent and ambitious climate action – to reduce anthropogenic
9 greenhouse gas emissions,² decarbonize its economy and strengthen national
10 resilience to the impacts of climate change. Global cooperation is critical to delivering
11 an effective response to climate change. Australia is resolutely committed to
12 achieving the objective of the United Nations Framework Convention on Climate
13 Change and the goals of the Paris Agreement. It is supporting global efforts to
14 accelerate decarbonization and enhance adaptation and resilience, particularly
15 across our Indo-Pacific region, which is home to some of the world’s most climate-
16 vulnerable countries.

17
18 Australia’s participation in these proceedings reflects its ongoing commitment to
19 address the existential threat of climate change, including in respect of the protection
20 of the marine environment.

21
22 Australia was encouraged to see that, on key aspects of the questions before the
23 Tribunal, there are many areas of broad agreement among the participants in these
24 proceedings.

25
26 In particular, there is broad consensus that anthropogenic greenhouse gas
27 emissions are a threat to the marine environment, with the result that the obligations
28 of State Parties under Part XII of UNCLOS to protect and preserve the marine
29 environment include obligations with respect to such emissions.³

30
31 Australia was also encouraged to see that, consistently with its own written
32 submissions, written statements of participants in these proceedings highlight that
33 the international community is pursuing a collective response to the immense
34 challenge of climate change through the UNFCCC and the Paris Agreement,⁴ and
35 that these instruments are highly relevant to interpreting and meeting the obligations
36 arising under Part XII of UNCLOS in relation to climate change.⁵

¹ ITLOS/PV.23/C31/1, p. 6, lines 14–19 (Browne) and p. 10, lines 20–22 (Natano).

² Throughout Australia’s oral submissions, any reference to greenhouse gas emissions, or GHGs, is a reference to anthropogenic greenhouse gas emissions, consistently with the scope of the questions referred to the Tribunal.

³ See, for example, Written Statement of Australia, paras. 30–31, Written Statement of Egypt, para. 26, Written Statement of the European Union, paras. 22 and 47, Written Statement of Mozambique, paras. 3.19, 3.49(a), Written Statement of New Zealand, paras. 46 and 79, Written Statement of Rwanda, para. 216, Written Statement of the United Kingdom, para. 42.

⁴ See, for example, Written Statement of Canada, paras. 32, 37, 40, Written Statement of France, paras. 120, 123, Written Statement of New Zealand, paras. 66–67, Written Statement of Singapore, para. 57, Written Statement of the United Kingdom, paras. 7, 79.

⁵ See, for example, Written Statement of Canada, paras. 22–23, 33, 37, Written Statement of the European Union, paras. 26, 28–29, Written Statement of France, para. 98, Written Statement of the Republic of Korea, para. 20, Written Statement of the Republic of Latvia, para. 19, Written Statement of The Republic of Mauritius, paras. 40, 42, Written Statement of Singapore, paras. 37–39, Written Statement of the United Kingdom, paras. 51, 68–69.

1
2 By way of outline of Australia's submissions:

3
4 I will be followed by the Solicitor-General of Australia, Dr Stephen Donaghue, who
5 will address you on obligations under UNCLOS to protect and preserve the marine
6 environment, and to take measures to prevent, reduce and control pollution of the
7 marine environment.

8
9 He will be followed by Dr Kate Parlett, who will address you on the obligations under
10 UNCLOS to cooperate, and to adopt and enforce relevant national laws with respect
11 to pollution of the marine environment.

12
13 Mr President, that concludes my opening remarks, and I ask you to give the floor to
14 Dr Donaghue.

15
16 **THE PRESIDENT:** Thank you, Mr Clarke. I now give the floor to Mr Donaghue. You
17 have the floor, Sir.

18
19 **MR DONAGHUE:** Mr President, distinguished members of the Tribunal, it is an
20 honour to appear before you today.

21
22 As Australia's representative has just pointed out, there is a clear consensus as to
23 the relevance of the UNFCCC and the Paris Agreement to the questions before the
24 Tribunal. For reasons that I will develop this morning, Australia submits that Part XII
25 of UNCLOS should not be interpreted as imposing obligations with respect to
26 greenhouse gas emissions that are inconsistent with, or that go beyond, those
27 agreed by the international community in the specific context of the UNFCCC and
28 the Paris Agreement.

29
30 That submission reflects the fact that UNCLOS is a framework agreement.¹ Its
31 framework nature, which has placed UNCLOS at the centre of the legal order of the
32 seas and the oceans, has allowed it to continue to be fit for purpose as distinct and
33 unforeseen challenges have arisen over time. It achieves that by quite deliberately
34 leaving the development of specific rules and standards on particular topics for the
35 future, including by imposing obligations on State Parties to adopt and enforce laws
36 and regulations,² and to agree and establish international instruments, rules,
37 standards, practices and procedures,³ to give effect to the generalized obligations
38 and objectives set out in Part XII.

39
40 Of particular significance, article 197 mandates cooperation between States,
41 including through international organizations, in formulating and elaborating
42 international rules, standards, recommended practices and procedures for the
43 protection and preservation of the marine environment. Climate change is a
44 paradigm example of an issue that can be addressed only through a cooperative
45 response of the kind that article 197 envisages.

46

¹ Australia's statement, paras. 21–23.

² UNCLOS, articles 213–222.

³ UNCLOS, articles 207–212.

1 Mr President, members of the Tribunal, Australia’s submission is that the framework
2 nature of UNCLOS has important consequence for answering the questions that are
3 the subject of the present request for an advisory opinion, because those questions
4 concern the “specific obligations” of State Parties under UNCLOS, including in
5 particular Part XII.
6

7 The Tribunal is therefore asked to identify specific obligations by interpreting the
8 generalized obligations and objectives in Part XII that provide or constitute the
9 framework for the more specific agreements or regulations concerning the protection
10 and preservation of the marine environment that one then sees in Part XII.
11

12 The framework nature of UNCLOS strongly supports an interpretation of Part XII that
13 does not cut across or undermine the subsequent agreements of States – which
14 were themselves the product of close negotiation and careful compromise – directed
15 to the particular threat to the environment posed by greenhouse gas emissions.
16

17 Australia is resolutely committed to the objective of the UNFCCC and the goals of
18 the Paris Agreement. The obligations of States under those agreements form the
19 core of the specialized international climate law regime, which the preambular
20 language of both treaties describes as “a common concern of humankind”.⁴
21

22 In particular, these agreements, having attracted the support of nearly 200 Parties,
23 reflect the response of the international community to the need for individual and
24 cooperative action to address the particular challenges of greenhouse gas
25 emissions. They create a specific framework and process for State cooperation and
26 collective action in response to climate change. Under those agreements, States
27 have an obligation to progressively increase their ambition, as is reflected in the
28 annual meetings at Conferences of the Parties.
29

30 The ultimate objective of the UNFCCC, as described in article 2, is the “stabilization
31 of greenhouse gas concentrations in the atmosphere at a level that would prevent
32 dangerous anthropogenic interference with the climate system”.⁵ The “climate
33 system” is broadly defined to include the hydrosphere, and therefore clearly
34 encompasses the marine environment.⁶
35

36 In the Paris Agreement, States have agreed to hold “the increase in the global
37 average temperature to well below 2°C above pre-industrial levels” and to pursue
38 “efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.⁷ The
39 cooperative efforts necessary to achieve that collective goal are to be achieved
40 through the preparation, communication and maintenance of nationally determined
41 contributions (or NDCs), which are targets for the reduction of emission of
42 greenhouse gases by each State Party.⁸ Each successive NDC is required to reflect
43 a State’s highest possible ambition.⁹ In issuing its advisory opinion, in our

⁴ UNFCCC, preambular paragraph 1; and Paris Agreement, preambular paragraph 11.

⁵ UNFCCC, article 2.

⁶ UNFCCC, article 1(3).

⁷ Paris Agreement, article 2(1)(a).

⁸ Paris Agreement, article 4(2).

⁹ Paris Agreement, article 4(3).

1 submission the Tribunal should not assume that States will not give effect to these
2 commitments.

3
4 The UNFCCC and the Paris Agreement focus on State Parties reducing greenhouse
5 gas emissions over time. Further, given the delicate balances involved, the Paris
6 Agreement does not prescribe particular action that must be taken to control or
7 reduce emissions, instead focusing on an obligation to pursue efforts to achieve the
8 overall agreed collective goal. It is a matter for States as to how they achieve
9 reductions of greenhouse gas emissions, with it being open to different States to
10 adopt different approaches, consistent with the ultimate objective of article 2 of
11 preventing dangerous anthropogenic interference with the climate system.

12
13 Australia agrees with COSIS that the interpretation of UNCLOS must be informed by
14 the global climate regime I have just summarized.¹⁰ Specifically, Australia submits
15 that the UNFCCC and the Paris Agreement are relevant to the questions before the
16 Tribunal in three complementary ways, each of which we will develop.

17
18 *First*, for the purpose of articles 192 and 194 of UNCLOS, they reflect the measures
19 that the international community has agreed are “necessary” to prevent, reduce and
20 control pollution of the marine environment arising from greenhouse gas emissions,
21 and they provide a mechanism for identifying the “capability” of each State, using the
22 best practicable means at its disposal, to achieve that prevention, reduction and
23 control.

24
25 *Second*, they constitute the international rules or standards that State Parties to
26 UNCLOS are encouraged to cooperate to formulate and elaborate,¹¹ and which are
27 required to be taken into account in adopting laws and regulations,¹² and
28 implemented,¹³ in order to prevent, reduce and control pollution of the marine
29 environment.

30
31 *Third*, they are the outcome of the cooperative process mandated by article 197 in
32 order to meet the objective of the protection and preservation of the marine
33 environment in respect of greenhouse gas emissions.

34
35 I will address the first of those matters, while Dr Parlett will address the second and
36 third.

37
38 I turn, then, first to article 192, which underpins the overarching legal framework
39 established by Part XII, and which exemplifies the framework character of Part XII.¹⁴
40 As is stated in its title, article 192 imposes a “*general obligation*” on States in relation
41 to the protection and preservation of the marine environment. Like many other
42 States,¹⁵ Australia considers that the content of that general obligation can only be

¹⁰ ITLOS/PV.23/C31/2, p. 31, lines 11-13 (Mbenge).

¹¹ UNCLOS, articles 197, 207(4), 212(3).

¹² UNCLOS, articles 207(1), 212(1).

¹³ UNCLOS, articles 213, 222.

¹⁴ Written Statement of Australia, paras. 42–44.

¹⁵ See, for example, Written Statement of Egypt, para. 84, Written Statement of the European Union, paras. 23–24, Written Statement of France, paras. 141–142, Written Statement of Rwanda, para. 176, Written Statement of Singapore, para. 65.

1 determined having regard to the other provisions of UNCLOS and other applicable
2 rules of international law, including, of course, such further rules as emerge from
3 compliance with the duty to cooperate under article 197. That interpretation of article
4 192 is supported by leading commentators, and it also reflects the evident intent of
5 the drafters of UNCLOS, who understood that the general obligation in article 192
6 was to be given content by subsequent provisions, including article 194, and by
7 other, more detailed provisions, rules and standards which then might be agreed
8 within the framework of UNCLOS.¹⁶

9
10 In the context of greenhouse gas emissions, Australia’s submission is, therefore, that
11 the UNFCCC and the Paris Agreement specify the standards against which
12 compliance with the general obligation imposed by article 192 must be assessed.
13 For that reason, the Tribunal should not interpret article 192 as imposing “specific
14 obligations” to protect and preserve the marine environment, over and above those
15 that apply under the UNFCCC and the Paris Agreement. Any “specific obligations”
16 under UNCLOS must be found elsewhere.

17
18 Turning next, then, to article 194, it imposes an obligation to take measures to
19 prevent, reduce and control pollution of the marine environment. Australia agrees
20 with the general consensus reflected in the written statements to this Tribunal that
21 greenhouse gas emissions are a source of “pollution of the marine environment”
22 within the definition in article 1(1)(4) of UNCLOS,¹⁷ and therefore that the obligations
23 imposed by article 194 are centrally relevant to the questions before the Tribunal.¹⁸

24
25 That said, like the rest of UNCLOS, article 194 clearly was not drafted with a view to
26 addressing pollution in the nature of greenhouse gas emissions in particular. Rather,
27 it is apparent that article 194 was formulated to address more conventional cases of
28 pollution. That is clear from the references in article 194(3) to pollution from vessels,
29 installations and devices, or from “the release of toxic, harmful or noxious
30 substances” from land-based sources or through the atmosphere.

31
32 It is also clear from article 194(2), which is addressed to the conventional case of
33 transboundary pollution. Greenhouse gas emissions present a new and different
34 type of challenge to these conventional cases, not least because of the diffuse
35 temporal and geographic sources of such emissions, the cumulative nature of their
36 impact and the fact that the environmental impacts may occur in locations far
37 removed from the source of the emissions that contribute to those impacts.

¹⁶ See, for example, Alan Boyle, “Litigating Climate Change under Part XII of the LOSC” (2019) 34 *International Journal of Marine and Coastal Law* 458, 464, and Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982, Volume IV: A Commentary* (Martinus Nijhoff Publishers, 1991) 43 (“It is clear from the Convention as a whole (and not merely from Part XII) that the obligation of article 192 and with it the right of article 193 is always subject to the specific rights and duties laid down in the Convention”).

¹⁷ Written Statement of Bangladesh, paras. 29–30, Written Statement of the European Union, paras. 42–43, Written Statement of the Republic of Mauritius, para. 72, Written Statement of Nauru, para. 40, Written Statement of the United Kingdom, paras. 30, 42.

¹⁸ Written Statement of the European Union, para. 47, Written Statement of the Republic of Mauritius, para. 72, Written Statement of Nauru, paras. 37–39, Written Statement of the United Kingdom, paras. 30, 42.

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

9
10 That, Mr President, members of the Tribunal, brings me to the first of four points
11 Australia emphasizes with respect to the text and effect of paragraph (1) of
12 article 194.

13
14 The *first* point is that article 194(1) requires States to take certain measures
15 “individually or jointly as appropriate”. The word “jointly” is of particular significance in
16 the context of greenhouse gas emissions, because, for the reasons already
17 mentioned, climate change is a global challenge that requires States to cooperate in
18 pursuit of collective solutions. The obligation that is imposed by article 194(1)
19 concerning pollution of the marine environment resulting from greenhouse gas
20 emissions is perhaps the paradigm example of an obligation that it is “appropriate” to
21 be discharged by States “jointly”, because the environmental consequences of such
22 emissions result from a complex and diffuse causal chain, the links in which
23 comprise not just the actions of many different States and private actors spread all
24 over the globe, but those actions that have occurred over a period of many decades.
25 The result is that it is only through joint action that global levels of greenhouse gas
26 emissions in the atmosphere, and pollution of the marine environment, can be
27 prevented, reduced and controlled. The importance of joint action in the operation of
28 article 194(1) is underlined by the final phrase in article 194(1), which requires States
29 to use their “best efforts”¹⁹ in an “endeavour to harmonize their policies” to prevent,
30 reduce and control pollution of the marine environment.

31
32 The second point in relation to article 194(1) is that the obligation to “take ...
33 measures” is an obligation of conduct rather than result. That follows because
34 article 194(1) gives content to States’ obligations by reference to the practicability of
35 conduct directed to achieving the specified result, rather than by reference to the
36 achievement of the result itself. Thus, article 194(1) refers to States using “the best
37 practicable means at their disposal and in accordance with their capabilities”. That is
38 also consistent with article 194(3)(a) which, in seeking to give specific content to
39 article 194(1), directs attention to articles 207(1) and 212(1), both of which plainly
40 create obligations of conduct rather than result.

41
42 Where an international obligation is an obligation of conduct rather than result,
43 compliance with that obligation is assessed against the standard of due diligence. As
44 the Seabed Disputes Chamber of this Tribunal has previously observed, an
45 obligation of due diligence is not “an obligation to achieve ... Rather, it is an
46 obligation to deploy adequate means, to exercise best possible efforts, to do the

¹⁹ See *Chagos Marine Protected Area Arbitration*, para. 539.

1 utmost, to obtain this result.”²⁰ Those observations were endorsed by the Tribunal in
2 its advisory opinion to the Sub-Regional Fisheries Commission.²¹ Similarly, the
3 International Court of Justice considered in *Pulp Mills* that an obligation of due
4 diligence requires a State to adopt appropriate rules and measures, and to exercise
5 vigilance in enforcing those rules and measures within its jurisdiction.²²

6
7 The content of the standard of due diligence is variable and context-dependent.
8 That, too, was recognized by the Seabed Disputes Chamber of the Tribunal in its
9 advisory opinion in *Responsibilities and obligations of States with respect to activities*
10 *in the Area*, which described due diligence as a “variable concept” and said that
11 “[t]he content of ‘due diligence’ obligations may not easily be described in precise
12 terms”.²³

13
14 My third point concerns the type of measures that are contemplated by
15 article 194(1). That paragraph contains a single obligation to take measures directed
16 towards three interrelated ends. By providing that States must take measures to
17 prevent, reduce and control pollution, article 194(1) reflects an understanding that it
18 may not be practically possible to prevent all pollution all the time. It recognizes the
19 fact that pollution of some types, at some points in time, may occur, and requires
20 States to mitigate its impact if it does occur. It also reflects the fact that because
21 UNCLOS is a framework agreement, specific rules and standards will be
22 continuously developed over time, through coordination and cooperation between
23 States, to address new and unforeseen challenges, including those for which the
24 best available science continues to evolve.

25
26 Greenhouse gas emissions being, as almost all the written statements agree, a form
27 of pollution of the marine environment, article 194(1) requires States Parties to take
28 measures to prevent, reduce and control those emissions, provided such measures
29 are possible and practicable. Under the auspices of the UNFCCC and the Paris
30 Agreement, States have committed to take increasingly ambitious measures to
31 address climate change in respect of greenhouse gas emissions. Those measures,
32 of course, focus on the reduction and control of greenhouse gas emissions.

33
34 That is entirely consistent with article 194(1) which, by imposing an obligation to take
35 measures to “prevent, reduce and control” pollution of the marine environment,
36 requires States to take measures to reduce and to control such pollution as has not
37 been prevented. The reduction and control aspects of article 194(1) would have no
38 content unless UNCLOS is interpreted as reflecting an understanding that, in
39 particular periods in time and for some forms of pollution, States are required take

²⁰ *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* (Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No 17, 1 February 2011) 41 [110].

²¹ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015) 38 [125], 39 [128] – 40 [129].

²² *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Rep 2010, [197].

²³ *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* (Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No 17, 1 February 2011) 43, [117]. See also *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015) 41 [132].

1 measures to reduce and control pollution that has not been prevented. That
2 interpretation of the reduction and control aspects of article 194(1) plainly aligns with
3 the commitments that States have made under the Paris Agreement.

4
5 Mr President, distinguished members of the Tribunal, that is not to deny the present
6 significance of the prevention aspect of article 194(1). It is merely to say that the
7 interpretation of article 194(1) must recognize – as the Paris Agreement recognizes
8 – that the pathway to prevention of pollution by greenhouse gas emissions is for
9 States to exercise best possible efforts within their capacity to *reduce* and *control*
10 those emissions until that pollution is *prevented*. In that way, UNCLOS
11 accommodates the reality that underpins the Paris Agreement: that, at present, the
12 global economy (including food and energy infrastructure) is structured in such a way
13 that it is not currently practicable nor within the capacity of States entirely to prevent
14 further emissions. As such, the prevention aspect of article 194(1) requires States
15 *jointly* to exercise best possible efforts to reduce and control greenhouse gas
16 emissions, using the best practicable means at their disposal and in accordance with
17 their capabilities, until the prevention of pollution of the marine environment from that
18 source is achieved.²⁴

19
20 It follows that compliance with the UNFCCC and the Paris Agreement satisfies the
21 specific obligation under article 194 of UNCLOS to take measures to prevent, reduce
22 and control pollution of the marine environment arising from greenhouse gas
23 emissions.

24
25 My fourth and final point in relation to article 194(1) is that the scope of the due
26 diligence obligation it imposes is informed by the specific terms of article 194(1).
27 That article imposes an obligation on States to take “all measures ... necessary” to
28 prevent, reduce and control pollution, using “the best practicable means at their
29 disposal and in accordance with their capabilities”. Those words explicitly recognize
30 that the standard of conduct required to prevent, reduce and control marine pollution
31 varies between States Parties. It also varies over time, with the measures that are
32 “necessary” and “practicable” being informed by a range of factors, including relevant
33 scientific, technical and economic considerations, as well as an ongoing requirement
34 to re-evaluate those measures in light of new scientific, technical and economic
35 information. The standard of conduct required is further informed by the evolving
36 circumstances of the individual State over time, which will, of course, have a bearing
37 on the capabilities of the State to prevent, reduce or control greenhouse gas
38 emissions. Article 194(1) therefore involves a dynamic and variable standard, which
39 is informed by evolving circumstances and capacities within each State.

40
41 Drawing those points together, Australia’s submission is that article 194(1) imposes
42 a specific obligation on States to exercise due diligence in order to *prevent*, *reduce*
43 and *control* pollution of the marine environment arising from greenhouse gas
44 emissions, the content of that obligation varying between States Parties, and over
45 time, depending on the capabilities of individual States and the best practicable
46 means at their disposal.

47

²⁴ ITLOS/PV.23/C31/3, p. 17, lines 27-45 and p. 18, lines 1-2 (Thouvenin)

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

21

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

29

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

38

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

1 under article 194(1);²⁵ a State must pursue with due diligence the achievement of its
2 NDC.

3
4 Turning now, and much more briefly, to article 194(2), it is apparent from the terms of
5 this provision that it was formulated by reference to a conventional case of
6 transboundary pollution. It is directed to minimizing the extent to which activities
7 within the jurisdiction of one State cause damage to “other States and their
8 environment” (rather than to “pollution of the marine environment” more generally). It
9 also requires States to ensure that pollution arising from activities within their
10 jurisdiction or control does not spread to areas beyond national jurisdiction.

11
12 Mr President, members of the Tribunal, having regard to the length of time that
13 greenhouse gas emissions remain in the atmosphere, and to the fact that
14 article 194(1), and, indeed, the Paris Agreement, requires States to take measures
15 to reduce or control greenhouse gas emissions rather than to prevent them entirely
16 at the present point in time, article 194(2) cannot sensibly be interpreted as requiring
17 States to ensure that such emissions do not “spread” to the territory of another State
18 or on to the high seas. If it were interpreted in that way, article 194(2) would impose
19 an obligation with which it would be impossible for any State to comply, given that
20 greenhouse gas emissions emitted from the territory of one State will contribute to
21 volume of emissions in the atmosphere for decades to come. For that reason,
22 Australia’s primary submission is that greenhouse gas emissions are not activities of
23 the kind to which article 194(2) is directed.

24
25 If the Tribunal considers that article 194(2) does capture greenhouse gas emissions,
26 Australia submits that the measures necessary to “ensure” that such emissions do
27 not cause damage to the environments of other States, and that pollution does not
28 spread beyond national jurisdiction, go no further than the measures necessary to
29 prevent, reduce or control pollution pursuant to article 194(1). That follows because,
30 like that article, article 194(2) imposes an obligation of conduct, compliance with
31 which is assessed against a standard of due diligence, the content of which is
32 variable and context-specific.

33
34 Further, the interpretation of article 194(2) must accommodate the practical reality
35 that the diffusion of greenhouse gas emissions does not respect national boundaries
36 and cannot be made to do so. For that reason, the acts and omissions of any one
37 individual State can only reasonably be judged by reference to the totality of steps
38 that it takes in pursuit of the global temperature goal, in cooperation with other
39 States, and over time. In those circumstances, in the case of States that are parties
40 to the Paris Agreement and that have achieved their NDCs under that Agreement,
41 such compliance also satisfies the standard of due diligence required to comply with
42 any specific obligation that arises from article 194(2) with respect to greenhouse gas
43 emissions. Of course, this does not in any way diminish Australia’s recognition of the
44 impact greenhouse gas emissions may have on other States. Rather it is our
45 submission that, due to the nature of greenhouse gas emissions, the most
46 appropriate way for States to ensure that such emissions do not cause damage to
47 the environment of other States is by addressing that pollution at the source.

48

²⁵ Cf. ITLOS/PV.23/C31/3, p. 30, lines 16-18 (Amirfar)

1 Mr President, members of the Tribunal, that now concludes my statement. I now ask
2 you to give the floor to Dr Parlett, to conclude Australia's submissions.

3
4 **THE PRESIDENT:** Thank you, Mr Donaghue. I now give the floor to Ms Parlett to
5 make her statement.

6
7 You have the floor, Madam.

8
9 **MS PARLETT:** Mr President, members of the Tribunal, it is an honour to appear
10 before you today and a privilege to have been asked to present Australia's
11 submissions on Sections 5 and 6 of Part XII, and article 197.

12
13 As is anticipated by article 194(3)(a), Sections 5 and 6 of Part XII relevantly impose
14 specific obligations with respect to pollution of the marine environment from land-
15 based sources, and from or through the atmosphere. Australia considers that
16 greenhouse gas emissions may fall within either category, depending on the
17 particular factual circumstances.

18
19 By reason of articles 207(1) and 212(1), States must adopt laws and regulations at
20 the national level to prevent, reduce and control pollution of the marine environment
21 from land-based sources, or from or through the atmosphere. In doing so, they must
22 "take into account" internationally agreed rules, standards and recommended
23 practices and procedures. The UNFCCC and the Paris Agreement are particularly
24 relevant here, as they establish rules and standards of the kind that States must
25 "take into account" when adopting national laws and regulations to prevent, reduce
26 and control pollution from greenhouse gas emissions.

27
28 Articles 207(1) and 212(1) allow States Parties to adopt national measures that
29 derogate from international rules or standards; however, States must take the
30 relevant rules or standards into account, in good faith.

31
32 Articles 207(4) and 212(3) require States Parties, acting especially through
33 competent international organizations or diplomatic conferences, to endeavour to
34 establish global and regional rules and standards to prevent, reduce and control
35 pollution of the marine environment from land-based sources and from or through
36 the atmosphere. These provisions are consistent with the duty of cooperation
37 imposed by article 197, to which I will turn shortly.

38
39 To the extent that greenhouse gas emissions fall within article 207, as pollution from
40 land-based sources, States Parties are required to make best efforts to endeavour to
41 harmonize their policies at the "appropriate regional level", which in the context of
42 greenhouse gas emissions, is necessarily global.

43
44 Again, to the extent that these emissions fall within article 207, the laws, regulations,
45 measures and practices that States Parties are required to adopt or take by the other
46 paragraphs of article 207, must be designed to minimize, to the fullest extent
47 possible, the release of toxic, harmful or noxious substances into the marine
48 environment, in accordance with article 207(5). In the context of greenhouse gas
49 emissions, what is "possible" depends on the complex interplay of considerations
50 that underpin the agreements reached in the UNFCCC and the Paris Agreement.

1 Thus, States Parties will comply with their obligations under article 207(5) if they
2 adopt laws and regulations, take other measures, establish global and regional rules,
3 standards and recommended practices and procedures that are consistent with the
4 UNFCCC and the Paris Agreement.

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

21
22 Through these provisions, and in particular by imposing requirements to take
23 account of relevant international rules and standards in domestic law, and for those
24 domestic laws to be enforced, UNCLOS has a particular role to play in giving
25 concrete effect to international obligations concerning protection of the marine
26 environment, including in relation to greenhouse gas emissions. It effectively
27 operates to encourage States to implement and to enforce the rules and standards
28 that they have agreed at the international level in and through their domestic law.

29
30 UNCLOS thereby provides a bridge between international rules and standards and
31 their enforcement at the domestic level. In this way, and given the progress that has
32 been made at the international level to agree relevant rules and standards relating to
33 greenhouse gas emissions, in particular through the UNFCCC and the Paris
34 Agreement, UNCLOS assumes particular significance in relation to climate change.

35
36 Turning then to cooperation, which underscores numerous provisions of Part XII and
37 is the particular focus of article 197. That article requires States to “cooperate on a
38 global basis and, as appropriate, on a regional basis, ... in formulating and
39 elaborating international rules, standards and recommended practices and
40 procedures consistent with” UNCLOS, for the protection and preservation of the
41 marine environment.

42
43 The duty of cooperation in article 197 is reinforced by other provisions of Part XII that
44 also contemplate that States will cooperate to prevent and control pollution of the
45 marine environment. These provisions include articles 207(4) and 212(4), which
46 oblige States Parties to endeavour to develop global and regional rules and
47 standards, including through formal multilateral processes, to address marine
48 pollution, and article 194(1), which requires States Parties to “endeavour to
49 harmonize their policies” in connection with measures to prevent, reduce and control
50 pollution.

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The duty of cooperation in article 197 requires States to make meaningful and substantial efforts with a view to adopting effective measures in pursuit of the goal of protecting and preserving the marine environment.¹ That said, a duty to cooperate is, of its nature, one of conduct rather than result. As such, it is inherent in such a duty that compliance is judged by reference to the efforts States make to coordinate their actions, rather than the particular means they have chosen for doing so, or the outcomes of those efforts.

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

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

The importance of cooperation in addressing environmental problems has been emphasized both by this Tribunal and by the ICJ. In its provisional measures order in *MOX Plant*, this Tribunal described the duty to cooperate as “a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.² To the same effect, the ICJ has recognized, in relation to environmental harm generally, that “it is by co-operating that States ... can jointly manage the risks of damage to the environment.”³ That is particularly true in relation to climate change, given the collective character of both the causes and the challenges in addressing impacts of greenhouse gas emissions.

¹ See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion) Case No. 21, 2 April 2015, ITLOS Reports 2015*, 60 [210].
² *MOX Plant (Ireland v United Kingdom) Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, [82].
³ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), ICJ Rep 2010*, [77].

1 Going forward, a key aspect of the cooperation of States, in a form that meets their
2 specific obligations under article 197 of UNCLOS, is the Conference of the Parties,
3 or COP, that is established by article 7 of the UNFCCC.⁴ The COP is tasked with
4 keeping the implementation of the UNFCCC and related instruments under regular
5 review, and with making “the decisions necessary to promote the effective
6 implementation of the Convention.”⁵ It is specifically required to “[p]eriodically
7 examine the obligations of the Parties and the institutional arrangements under the
8 [UNFCCC], in the light of [its objective], the experience gained in its implementation
9 and the evolution of scientific and technological knowledge”.⁶ The COP is further
10 required to promote and facilitate the exchange of information on measures adopted
11 by different States;⁷ to facilitate the coordination of measures that have been
12 adopted, at the request of States;⁸ and to assess the implementation of the
13 Convention, the overall effects of the measures taken pursuant to it, and the extent
14 to which progress towards the objective of the Convention is being achieved.⁹

15
16 The Conference of the Parties serving as the meeting of the Parties to the Paris
17 Agreement (which is also referred to as the CMA) meets annually at the same time
18 as the COP. In particular, the outcome of the first “global stocktake”,¹⁰ which is due
19 to take place in November and December this year, will inform Parties in updating
20 and enhancing the actions they are taking at the national level and will, to use the
21 language of article 14(3) of the Paris Agreement, “enhanc[e] international
22 cooperation for climate action”.¹¹

23
24 The principle of cooperation also underpins the mechanism in article 4 of the Paris
25 Agreement for assessing the progress that individual States are making towards
26 reducing their greenhouse gas emissions. Article 4 of the Paris Agreement provides
27 for States to nominate, over time, progressively ambitious targets for the reduction of
28 greenhouse gas emissions through NDCs.¹² In communicating their NDCs, States
29 are to provide “the information necessary for clarity, transparency and
30 understanding”.¹³ In this way, States have and are continuing to coordinate, with the
31 objective of pursuing their collective global temperature goal, and reducing and
32 controlling the impact of greenhouse gas emissions, including on the marine
33 environment.

34
35 Consistently both with its framework nature and the fact that climate change was not
36 in the contemplation of States when UNCLOS was negotiated, UNCLOS should be
37 interpreted as responding to the enormous challenge posed by climate change

⁴ UNFCCC, article 7(1).

⁵ UNFCCC, article 7(2).

⁶ UNFCCC, article 7(2)(a).

⁷ UNFCCC, article 7(2)(b).

⁸ UNFCCC, article 7(2)(c).

⁹ UNFCCC, article 7(2)(e).

¹⁰ Paris Agreement, article 14(1).

¹¹ While a report entitled “Technical dialogue of the first global stocktake” was published on 8 September, that report is not the outcome of the stocktake, but is a part of the stocktake which will conclude at COP28 in November and December 2023: see <https://unfccc.int/topics/global-stocktake/about-the-global-stocktake/why-the-global-stocktake-is-a-critical-moment-for-climate-action#What-happens-next>; cf ITLOS/PV.23/C31/1, p. 23, lines 10-12 (Akhavan); ITLOS/PV.23/C31/3, p. 30, lines 27-30 (Amirfar).

¹² Paris Agreement, article 4(2).

¹³ Paris Agreement, article 4(8).

1 principally through its requirements for cooperation in the formulation of agreements
2 addressing particular or future problems. Australia considers that the UNFCCC and
3 the Paris Agreement reflect agreements reached through cooperative processes that
4 amply discharge the obligation imposed by article 197 to cooperate in order to meet
5 the objective of the protection and preservation of the marine environment in respect
6 of greenhouse gas emissions. Further, through their ongoing participation in the
7 COP provided for by these agreements, States Parties to UNCLOS continue to meet
8 their obligations to cooperate under Part XII of UNCLOS.

9
10 Mr President, this brings me to my concluding remarks. In summary, Australia makes
11 five points to assist the Tribunal in answering the questions before it.

12
13 First: Greenhouse gas emissions are capable of constituting “pollution of the marine
14 environment” within the meaning of article 1(1)(4) of UNCLOS.

15
16 Second: Article 192 of UNCLOS imposes a general obligation to protect and
17 preserve the marine environment, the content of which can only be determined
18 having regard to other provisions of UNCLOS, or to other applicable rules of
19 international law, including, in the context of climate change, the UNFCCC and the
20 Paris Agreement.

21
22 Third: Article 194(1) of UNCLOS imposes a specific obligation on States Parties to
23 take measures to prevent pollution of the marine environment by exercising best
24 possible efforts within their capacity to reduce and control greenhouse gas emissions
25 until the prevention of pollution of the marine environment from that source is
26 achieved. In the case of States that are parties to the UNFCCC and the Paris
27 Agreement, compliance with those agreements satisfies the specific obligation under
28 article 194 of UNCLOS.

29
30 Fourth: Sections 5 and 6 of Part XII of UNCLOS impose specific obligations in
31 respect of prevention, reduction and control of pollution of the marine environment.
32 They require States Parties to take into account internationally agreed rules and
33 standards in domestic law, to enforce that domestic law, and to endeavour to
34 establish global rules and standards. So far as the questions referred to the Tribunal
35 are concerned, the relevant international rules and standards are the rules and
36 standards agreed under the UNFCCC and the Paris Agreement.

37
38 Fifth: Article 197 imposes a specific obligation on States to cooperate, which requires
39 them to make meaningful and substantial efforts with a view to adopting effective
40 measures in pursuit of the goal of protecting and preserving the marine environment.
41 Significant efforts have been made and effective measures have been adopted,
42 principally through the UNFCCC and the Paris Agreement. Through those
43 agreements, and through their ongoing participation in the development and
44 implementation of those agreements, States have met, and continue to meet their
45 specific obligation to cooperate under UNCLOS.

46
47 Mr President, distinguished members of the Tribunal, that concludes the oral
48 statement of Australia in these proceedings and I thank you for your kind attention.

1 **MR PRESIDENT:** Thank you, Ms Parlett. I now give the floor to the representative of
2 Germany, Ms von Uslar-Gleichen, to make a statement. I am glad that you were able
3 to make it.

4
5 **MS VON USLAR-GLEICHEN:** Thank you. Mr President, distinguished members of
6 the Tribunal, it is an honour for me to appear before this Tribunal today and to
7 present to you the comments of the Federal Republic of Germany.

8
9 I am joined today by Professor Proelß as our counsel, and by my colleague,
10 Christian Schulz, Deputy Head of the Law of the Sea Division. I will start with
11 presenting our statement and Professor Proelß would be happy to answer any
12 possible questions from the Bench. Germany is of the view that this case is of high
13 importance for international law, both from a procedural and from a substantive
14 perspective.

15
16 On procedure, this is only the second request for an advisory opinion of the Tribunal
17 as a full court.

18
19 On substance, the questions submitted by COSIS concern a defining challenge of
20 our time. To specify the legal obligations of the States Parties to UNCLOS regarding
21 the marine environment is a crucial task in the context of the unprecedented and
22 grave consequences of climate change.

23
24 We have listened carefully to the remarks by the distinguished representatives of
25 several COSIS Member States during the first two days of these hearings. Small
26 island States are especially impacted by climate change and its devastating
27 consequences on the marine environment. It is therefore no surprise that they took
28 the initiative for this request.

29
30 Their request gives us the opportunity now to reflect upon and to obtain the
31 Tribunal's view on how UNCLOS, the Constitution for the Ocean, must be applied
32 and interpreted. This is an opportunity to clarify how UNCLOS must be read in light
33 of our current knowledge of the adverse impacts of climate change on the ocean.
34 Germany is thankful for this opportunity.

35
36 As all States Parties to UNCLOS have committed to protect the marine environment,
37 the ocean is one of our most important allies in the fight against the climate crisis
38 and its protection is our common concern. Germany is therefore of the view that to
39 obtain the guidance sought from this Tribunal will help all States Parties to UNCLOS
40 to fulfil our common task.

41
42 Given the considerable weight of an advisory opinion by this Tribunal, we would like
43 to fully support the Tribunal in carrying out its important task: the task of giving us
44 guidance on how our UNCLOS obligations need to be interpreted and applied with
45 regard to the impacts of climate change.

46
47 Mr President, it is well known that Germany is supportive of the Tribunal's
48 competence to issue advisory opinions as a full court, once the pertinent
49 prerequisites are met.

1 Germany expressed this view already in the proceedings in Case No. 21. Germany
2 fully endorses the Tribunal's findings in that case. Germany agrees that article 21 of
3 the Statute of the Tribunal constitutes the basis for issuing an advisory opinion, if and
4 when such a matter is "specifically provided for in an international agreement which
5 confers jurisdiction on the Tribunal".
6

7 In Case No. 21, Germany also expressed its firm belief that requests for an advisory
8 opinion could be used more regularly. They have great potential to strengthen the
9 law of the sea and international law more generally. In contrast to contentious
10 proceedings, these are non-adversarial in character. They allow all parties to voice
11 their opinions on the interpretation of the Convention with a view to clarifying the
12 obligations arising from its provisions.
13

14 We therefore believe that this Tribunal, with its specific competence concerning
15 UNCLOS, will make an important contribution by issuing an advisory opinion. Please
16 allow me to mention that the same will be true, in our view, for the International Court
17 of Justice concerning the extent and status of relevant obligations of all States on the
18 basis of the current state of international law with regard to future development of
19 climate change. Germany, together with many other States, has supported and
20 carried forward those proceedings on the initiative of Vanuatu.
21

22 In the case before us, Germany is of the view that the requirements of article 21 of
23 the Statute are met. The COSIS Agreement confers advisory jurisdiction on the
24 Tribunal. It authorizes and empowers the Commission to request advisory opinions
25 from this Tribunal. The matters on which advisory opinions can be sought by COSIS
26 are specifically provided for in the COSIS Agreement: they are defined as "any legal
27 question within the scope of UNCLOS". The questions submitted to the Tribunal in
28 the present case are also sufficiently connected with the purposes and principles of
29 the COSIS Agreement.
30

31 A few States are still questioning the advisory jurisdiction of this Tribunal in general.
32 They affirm that they read the words "all matters" in article 21 of the Statute as
33 referring only to "disputes", thus expressly excluding any requests for advisory
34 opinions. Some quoted documents from the negotiating history of UNCLOS to
35 support their interpretation. Germany does not agree with those views.
36

37 As the Tribunal pointed out in its advisory opinion in Case No. 21, "all matters"
38 should not be interpreted as covering only "disputes". Because if that were to be the
39 case, article 21 of the Statute would simply have used the word "disputes".
40

41 However, article 21 speaks of "all disputes and all applications submitted [...] in
42 accordance with this Convention AND ALL MATTERS specifically provided for in any
43 other agreement which confers jurisdiction on the Tribunal." Consequently, "all
44 matters" must mean something more than only "disputes" and that something more
45 includes advisory opinions, if specifically provided for in an international agreement
46 which confers jurisdiction on the Tribunal.
47

48 This understanding of article 21 of the Statute is confirmed when we look at its
49 French and Spanish versions, which are phrased in an equally open manner, going

1 beyond mere disputes. The French version, for example, speaks of “*toutes les fois*
2 *que cela est expressément prévu*”.

3
4 The objective meaning of the third alternative of article 21 of the Statute is thus quite
5 clear and unambiguous. It cannot, in our view, be interpreted as restricting “all
6 matters” to only disputes.

7
8 While article 21 of the Statute, together with the COSIS Agreement, constitutes a
9 substantive legal basis for the Tribunal’s advisory opinion, article 138 of the Rules of
10 the Tribunal furnishes the prerequisites for the Tribunal to exercise its advisory
11 jurisdiction. Germany holds that the present request meets these prerequisites.

12
13 The questions which are presented to the Tribunal are of a legal character when
14 measured against the standards established by the Tribunal’s 2015 Advisory
15 Opinion.

16
17 Germany further holds that the COSIS Agreement is an “International agreement
18 related to the purposes of the Convention” in the sense of article 138 of the Rules of
19 the Tribunal. Its Preamble and articles 1 and 2 contain broad references to UNCLOS
20 and to the need to take immediate action to protect and preserve the marine
21 environment. The COSIS Agreement therefore is – at least partly – related to the
22 purposes of UNCLOS.

23
24 Furthermore, Germany holds the view that the Tribunal should exercise its discretion
25 pursuant to article 138, paragraph 1, of the Rules in such a manner as to admit the
26 request for an advisory opinion submitted by the COSIS.

27
28 In fact, as the Tribunal confirmed in its 2015 Advisory Opinion, a request for an
29 advisory opinion should not in principle be refused except for “compelling reasons”.

30
31 None of the three possible grounds to regard a request as inadmissible that were
32 discussed in the 2015 case is relevant in the present case.

33
34 However, the present proceedings may be a good opportunity for the Tribunal to
35 provide even more clarity as to the criteria that it will be applying when requested for
36 an advisory opinion in the future. Germany, as a firm supporter of the competence of
37 the Tribunal as a full court to issue advisory opinions, would welcome such a
38 development.

39
40 Germany is of the view that the questions submitted by COSIS are neither too vague
41 nor too unclear. They also do not require the Tribunal to act as a lawmaker instead
42 of a judicial body. The Commission clearly seeks answers regarding the status of
43 current international law, not future international law.

44
45 The third category of “compelling reasons” that were discussed in Case No. 21
46 concerned the test of whether the questions presented to the Tribunal would
47 necessarily involve a pronouncement on the rights and obligations of third States. As
48 far as this test is concerned, it is true that COSIS does not limit itself to seeking
49 guidance in respect of its own actions. The request is, rather, seeking a clarification
50 of the obligations of a much larger group of States, namely the States Parties to

1 UNCLOS in their entirety. Germany holds, however, that this situation should not be
2 regarded as a reason to refuse the Commission's request for an advisory opinion.

3
4 All States are affected by climate change. And due to the fundamental role of the
5 ocean as a carbon sink and its importance for global biodiversity and food security,
6 also all States are affected by the decreasing state of the marine environment. To
7 protect and preserve the marine environment has been allocated a central role under
8 international law. The obligation codified in article 192 of UNCLOS, the "constitution
9 for the ocean", is applicable to all maritime zones under the international law of the
10 sea. This legal situation is also reflected in the preamble, according to which
11 "problems of ocean space can closely interrelate and need to be considered as a
12 whole".

13
14 Germany submits that this common concern of the States Parties of UNCLOS for the
15 marine environment should indeed be considered a good reason for the Tribunal to
16 exercise its discretionary power in favour of the requested advisory opinion. In this
17 respect, it should also be noted that the Tribunal, as well as the ICJ, have confirmed
18 in their jurisprudence that the consent of States not members of a body requesting
19 an advisory opinion is not a requirement for the admissibility of a request for an
20 advisory opinion.

21
22 Germany has full confidence that the Tribunal will continue to handle its advisory
23 jurisdiction prudently and with utmost responsibility and conscious of the wider
24 context, such as the parallel request by the UN General Assembly for an advisory
25 opinion of the International Court of Justice.

26
27 Mr President, I would now like to come to the issues of applicable law.

28
29 To answer the questions submitted to it, the Tribunal will have to apply the
30 Convention and, in particular, its Part XII on the protection and preservation of the
31 marine environment. It will also have to apply other applicable rules of international
32 law, to the extent that such a recourse is covered by its jurisdiction *ratione materiae*.
33 This includes those rules that are explicitly or implicitly mentioned or referenced by
34 the provisions of Part XII of UNCLOS. For the purposes of replying to the questions
35 submitted to the Tribunal by the COSIS, the most relevant of these rules are codified
36 in the UN Framework Convention on Climate Change (UNFCCC) and the Paris
37 Agreement, to which all States Parties to UNCLOS are also Parties. These sets of
38 applicable rules are interlinked, and their relation is key when replying to the
39 questions submitted. My following remarks refer to this interrelation.

40
41 First, the Tribunal should, pursuant to article 293, paragraph 1 of the Convention,
42 refer to "other rules of international law" where necessary, in order to substantiate, or
43 inform respectively, the meaning of the terms of the Convention. This follows from
44 the rules of interpretation codified in articles 31 to 33 of the Vienna Convention on
45 the Law of Treaties as well as from article 237, paragraph 1, of UNCLOS.

46
47 As far as the protection and preservation of the marine environment is concerned,
48 the award rendered by the Annex VII Tribunal in the *South China Sea* arbitration can
49 be referred to here as an illustrative example of such an integrated reading of the

1 Convention. In the *South China Sea* arbitration, the Annex VII Tribunal interpreted
2 UNCLOS in line with international agreements such as CBD and CITES.

3
4 In the present case, the UNFCCC and the Paris Agreement are the most relevant
5 “other international agreements” that the Tribunal is called upon to make use of
6 when interpreting the provisions of UNCLOS. The precautionary principle, as
7 reflected notably in the Rio Declaration on Environment and Development, is another
8 important cornerstone for the interpretation of Part XII of UNCLOS.

9
10 Secondly, where the Convention refers to, or incorporates the content of certain
11 “external” instruments, it appears that these instruments are part of the applicable
12 law within the meaning of article 293, paragraph 1, of the Convention. In particular,
13 where the Convention requires domestic laws and regulations to be no less effective,
14 or to give effect to, external rules, the Tribunal may need to determine the standards
15 established by these rules. For example, the Convention does so with regard to
16 marine pollution from vessels in article 211. On the other hand, in provisions like
17 articles 207, paragraph 1, and article 212, paragraph 1, States are required to act
18 “*taking into account internationally agreed rules, standards and recommended*
19 *practices and procedures*”. Here, the Tribunal may need to address the legal scope
20 of these references and of the obligations arising from them.

21
22 Germany considers that, with regard to the application and interpretation of Part XII
23 of the Convention, the scope of the applicable law under article 293, paragraph 1,
24 extends to all international legal rules dedicated to the protection and conservation of
25 the marine environment. These include “special Conventions and agreements” in
26 terms of article 237 of UNCLOS, and any rules and regulations that concern the
27 specific source of pollution which is being governed by the relevant *renvoi* provisions
28 in the Convention.

29
30 Mr President, let me now turn very briefly to the substance of the questions
31 submitted.

32
33 As a Member State of the European Union, Germany fully endorses and aligns itself
34 with the written statement filed by the European Union on the substance of the
35 questions submitted to the Tribunal. I would therefore like to here merely highlight
36 some points that are, while being reflected in the European Union’s statement, of
37 particular importance to Germany. And as the questions put to the Tribunal reflect
38 the language used in articles 192 and 194 of UNCLOS, my remarks are centred
39 around those articles, beginning with the more general obligation.

40
41 Article 192 of UNCLOS contains a legal due diligence obligation of a dual nature. It
42 entails the positive obligation to take active measures to protect and preserve the
43 marine environment. It also contains the negative obligation not to degrade the
44 marine environment. It has a broad character: it obliges the Parties to take measures
45 to protect and preserve the marine environment from any kind of harm. This includes
46 harm caused by climate change, such as ocean warming, sea-level rise and ocean
47 acidification, which are caused by anthropogenic greenhouse gas emissions into the
48 atmosphere.

1 It should also be noted that article 192 of UNCLOS covers both current and future
2 impacts on the marine environment.

3
4 Article 194 of UNCLOS lays down further and more precise obligations for States as
5 regards the prevention, reduction and control of pollution of the marine environment.
6 In Germany's view, the current advisory proceedings provide an opportunity to make
7 clear: greenhouse gas emissions should be considered as falling within the definition
8 of "pollution of the marine environment" under article 1, paragraph 1,
9 subparagraph 4, of UNCLOS.

10
11 I would like to highlight in this context that effects of greenhouse gas emissions
12 introduced into the marine environment result, *inter alia*, in ocean acidification.
13 Ocean acidification should clearly be considered as a "deleterious effect" for the
14 purposes of the definition of "pollution of the marine environment" in article 1,
15 paragraph 1, subparagraph 4, of UNCLOS.

16
17 Mr President, I will at this stage refrain from going into more detail on the substance
18 of the questions submitted. As representative of a Member State of the EU, I will
19 leave this to my distinguished colleagues who will speak on behalf of the European
20 Union.

21
22 Mr President, Germany hopes that the requested advisory opinion will contribute to
23 further strengthening international cooperation and coordination in ocean
24 governance.

25
26 International cooperation and coordination will also be key to effectively implement
27 the future BBNJ Agreement with a view to reaching the 2022 Kunming-Montreal
28 Global Biodiversity Target. We are looking forward to being amongst the first
29 signatories of the BBNJ Agreement next week in New York. Germany welcomes that
30 the new BBNJ Agreement also contains a provision conferring advisory jurisdiction
31 on this Tribunal.

32
33 To close, let me stress once again: Germany is supportive of the Tribunal's
34 competence to issue an advisory opinion. We support this competence also in the
35 present case, which was brought before the court by the island States that are
36 members of COSIS. The present proceedings are a welcome opportunity to further
37 specify our obligations under UNCLOS – for the health of our ocean and of our
38 planet.

39
40 This concludes our remarks.

41
42 Thank you very much, Mr President.

43
44 **THE PRESIDENT:** Thank you, Ms von Uslar-Gleichen.

45
46 We have now reached 11:20. At this stage, the Tribunal will withdraw for a break of
47 30 minutes.

48
49 We will continue the hearing at 11:50.

50

1 (Short break)

2
3 **THE PRESIDENT:** Please be seated.

4 I now give the floor to the representative of Saudi Arabia, Ms Noorah Mohammed
5 Algethami, to make a statement.

6
7 You have the floor, Madam.

8
9 **MS ALGETHAMI:** Mr President, members of the Tribunal, it is an honour to appear
10 before you, and to do so on behalf of the Kingdom of Saudi Arabia.

11
12 The Kingdom attaches great importance to a multilateral approach to the protection
13 of the global climate system, including in relation to adverse effects of greenhouse
14 gas emissions. In particular, the Kingdom is committed to mitigation and adaptation
15 under the United Nations Framework Convention on Climate Change and the Paris
16 Agreement.

17
18 Mr President, members of the Tribunal, as you know, the difficult negotiation of the
19 UNFCCC and Paris Agreement (which I shall refer to as the “specialized regime on
20 climate change”) resulted in a highly nuanced set of treaty provisions which contain a
21 specialized mechanism to ensure compliance with States’ climate obligations and
22 responsibilities. It is not within the Tribunal’s advisory function to intervene in this
23 mechanism and reach its own, autonomous interpretation of States’ climate
24 obligations.

25
26 Mr President, as you will have seen, some written statements urge the Tribunal to
27 conclude that, by virtue of UNCLOS, States are legally bound to achieve their
28 Nationally Determined Contributions. Further, some seek to portray the Paris
29 Agreement commitment of pursuing efforts to limit the temperature increase to 1.5°C
30 or 2°C above pre-industrial levels as having somehow imposed a legally binding
31 obligation on the part of States Parties to UNCLOS to achieve that objective. Such
32 submissions have no basis in the law, either under the specialized climate regime or
33 UNCLOS.

34
35 Many participants in these proceedings have rightly stressed the overwhelming
36 importance of past and ongoing negotiations on climate change.¹ This is another
37 important reason for the Tribunal to exercise great caution. It will be recalled that the
38 International Law Commission was similarly cautious when adopting guidelines on
39 the “Protection of the atmosphere”, which I quote here, “were elaborated on the
40 understanding that they were not intended to interfere with relevant political
41 negotiations or to impose on current treaty regimes rules or principles not already
42 contained therein.”²

43

¹ Written statement of Australia, 16 June 2023, paras. 59-61; written statement of Canada, 16 June 2023, paras. 51-52; written statement of the Republic of Chile, 16 June 2023, para. 59; written statement of France, 16 June 2023, para. 27; written statement of Japan, 15 June 2023, para. 2; written statement of the Republic of Korea, 16 June 2023, para. 31; written statement of the United Kingdom, 16 June 2023, para. 7.

² UN General Assembly resolution 76/112 of 9 December 2021; ILC Annual Report 2021 (A/76/10), pp. 13, 20, Guidelines, eighth preambular paragraph and commentary (10).

1 Mr President, members of the Tribunal, my task this morning is to assist the Tribunal
2 by setting out some legal considerations that, in our respectful submission, should be
3 taken into account when responding to the Request from the Commission of Small
4 Island States on Climate Change and International Law.

5
6 I say “some” of the legal considerations because the Tribunal already has the benefit
7 of extensive written statements from States and international organizations. Some go
8 into considerable scientific and textual detail; however, the Kingdom believes that a
9 second round of written submissions should be allowed in this proceeding, as in the
10 previous ITLOS proceedings which led to the Advisory Opinion of 2015.

11
12 Mr President, my statement will be in six parts: first, I shall address the role of the
13 Tribunal in the present advisory proceedings; second, I consider the scope of the
14 questions put by COSIS; third, I shall briefly look at the design of Part XII of
15 UNCLOS; fourth, I shall explain the interaction between UNCLOS obligations and
16 international obligations external to UNCLOS; fifth, having regard to the questions
17 before the Tribunal, I shall consider how the obligations under Part XII of UNCLOS
18 should be approached; sixth, I shall address certain issues of procedural fairness
19 and soundness; finally, I shall offer some brief conclusions.

20
21 I turn my first statement to the Tribunal’s jurisdiction to give the advisory opinion and
22 the propriety of doing so. The Tribunal has already held in 2015 that it has advisory
23 jurisdiction over a request submitted under an international agreement meeting the
24 requirements of Rule 138. The important issue in the proceeding is how the Tribunal
25 should exercise its jurisdiction.

26
27 It will be noted that the questions we are addressing here are limited to legal
28 questions “within the scope of the United Nations Convention on the Law of the
29 Sea”.³ It does not extend to other questions.

30
31 It seems appropriate to call for the Tribunal to take this opportunity to offer clear
32 guidance to States on what is allowed and what is not allowed under article 21 of the
33 Statute and article 138 of the Rules.

34
35 It is also essential that the Tribunal responds to these questions with balance, within
36 the limits of its jurisdiction as well as the four corners of UNCLOS, and faithful to its
37 role as a specialized judicial body. In particular, as the Tribunal noted in its 2015
38 Advisory Opinion, and as recalled in the written statements,⁴ the Tribunal must “not
39 take a position on issues beyond the scope of its judicial functions”.

40
41 Mr President, members of the Tribunal, I now turn to the scope of the questions put
42 by COSIS. I shall make six observations.

43
44 First, the questions rightly concern only the obligations of States Parties to UNCLOS,
45 and are limited to obligations under UNCLOS. This follows from the terms of the
46 questions posed by the Commission, which limits the questions to “the specific
47 obligations of States Parties to UNCLOS”. It also follows from the text of the COSIS

³ Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2).

⁴ Written statement of the Republic of Guatemala, 16 June 2023, para. 21.

1 Agreement, under which the Commission is authorized to request an opinion “on any
2 legal question within the scope of [UNCLOS], consistent with article 21 of the ITLOS
3 Statute and article 138 of its Rules.”⁵ And it follows from the Tribunal’s case law,
4 according to which the Tribunal, being a body of UNCLOS, exercises its advisory
5 jurisdiction in order to “contribute to the implementation of [UNCLOS]”.⁶
6

7 Second, the questions do not extend to interpreting obligations external to UNCLOS,
8 even if such obligations are relevant to the interpretation or implementation of
9 UNCLOS obligations. This is especially important because, as I shall discuss later,
10 the ICJ and other authorized climate change treaty bodies are in the process of
11 interpreting those other obligations.
12

13 Third, the questions focus on Part XII of UNCLOS, the Part which concerns the
14 protection and preservation of the marine environment.
15

16 Fourth, it follows that the questions cannot and do not ask the Tribunal to opine on
17 obligations other than those found in UNCLOS, and not at all on the obligations of
18 non-States Parties. There are, in fact, some 30 non-Parties, including major players
19 in the climate change field. The Tribunal must bear this in mind, especially since the
20 obligations under UNCLOS concern collective action and international cooperation
21 (as may be seen in articles 194 and 197).⁷ Cooperation is central in Part XII
22 (including the whole of its Section 3), as the Tribunal held as early as its *MOX Plant*
23 *Order*⁸ and several times since.⁹
24

25 Fifth, the questions ask about the law as it stands at the present: “What are the
26 specific obligations of States Parties”, not the law as it might have been in the past,
27 or may be in the future if States so decide?¹⁰
28

⁵ Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2).

⁶ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, *ITLOS Reports 2011*, 10 (1 February), p. 24, para. 30; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, Judge Cot, Declaration, *ITLOS Reports 2015*, p. 25, para. 77.

⁷ Written statement of COSIS, 16 June 2023, para. 321.

⁸ *MOX Plant (Ireland v United Kingdom)*, *Provisional Measures*, Order of 3 December 2001, *ITLOS Reports 2001*, para. 82; see also written statement of the Republic of Sierra Leone, 16 June 2023, para. 59; written statement of the United Kingdom, 16 June 2023, para. 82; written statement of France, 16 June 2023, para. 155; written statement of New Zealand, 15 June 2023, para. 60; written statement of the International Union for Conservation of Nature and Natural Resources – World Commission on Environmental Law Ocean Law Specialist Group (“written statement of IUCN”), 13 June 2023, para. 131; written statement of the Republic of Mozambique, 16 June 2023, para. 4.20; written statement of the Republic of Mauritius, 16 June 2023, para. 76; written statement of Australia, 16 June 2023, para. 57; written statement of the Republic of Korea, 16 June 2023, para. 11, fn. 7; statement of the Federative Republic of Brazil, 15 June 2023, para. 102; written statement of COSIS, 16 June 2023, para. 316.

⁹ Written statement of New Zealand, 15 June 2023, para. 60; written statement of the Republic of Sierra Leone, 16 June 2023, para. 59; written statement of the Republic of Korea, 16 June 2023, para. 11, fn.7; written statement of the Federative Republic of Brazil, 15 June 2023, para. 102, fn.86; written statement of the Republic of Mozambique, 16 June 2023, para. 4.20.

¹⁰ Written statement of France, 16 June 2023, para. 15.

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

4
5 In short, the Tribunal's jurisdiction in these proceedings is limited to interpreting the
6 obligations of States under UNCLOS.

7
8 Mr President, members of the Tribunal, I now briefly turn to the design of UNCLOS
9 Part XII. Its basic provisions are well known. They include (1) general provisions,
10 (2) provisions concerning the establishment of international rules and domestic
11 legislation, and (3) provisions of enforcement.

12
13 Section 1 of Part XII is entitled "General Provisions". It opens with the general
14 obligation of States under article 192 "to protect and preserve the marine
15 environment". This must be read together with article 193, which provides that:
16 "States have the sovereign right to exploit their natural resources pursuant to their
17 environmental policies and in accordance with their duty to protect and preserve the
18 marine environment."

19
20 Article 194 then sets out, in more specific but still broad terms, what might be
21 expected of a State to protect and preserve the marine environment, including:

22
23 an obligation to take all measures necessary to prevent, reduce, and control pollution
24 of the marine environment,¹¹ including an obligation for States to use best practical
25 means at their disposal;¹² an obligation for States to act in accordance with their
26 capabilities;¹³ an obligation to endeavour to harmonize policies with other States;¹⁴
27 an obligation for States to ensure activities under their control or jurisdiction do not
28 cause damage by pollution to other States and their environment; and¹⁵ an obligation
29 to prevent pollution from spreading to areas outside of the State's jurisdiction of
30 control.¹⁶

31
32 It will be noted that article 194(3) provides that these measures are to include
33 measures "to minimize [releases and pollution] to the fullest possible extent". The
34 remaining provisions of Section 1 give more detail but remain general.

35
36 In addition to the general obligations, Part XII includes an obligation for States to act
37 individually or jointly as appropriate.¹⁷ Articles 207 and 212 set out the expectation
38 that States will establish more specific "rules" and "standards" to prevent, reduce,
39 and control pollution. In that regard, it is necessary to consider the precise terms of
40 UNCLOS to see how it relates to external international obligations.

41
42 Article 207 provides that: "States shall adopt laws and regulations to prevent, reduce
43 and control pollution of the marine environment from land-based sources, including

¹¹ UNCLOS, Art. 194(1).

¹² UNCLOS, Art. 194(1).

¹³ UNCLOS, Art. 194(1).

¹⁴ UNCLOS, Art. 194(1).

¹⁵ UNCLOS, Art. 194(1).

¹⁶ UNCLOS, Art. 194(2).

¹⁷ UNCLOS, Arts. 197, 207(4), 212(3).

1 rivers, estuaries, pipelines and outfall structures, taking into account internationally
2 agreed rules, standards and recommended practices and procedures.”

3
4 Article 212 provides: “States shall adopt laws and regulations to prevent, reduce and
5 control pollution of the marine environment from or through the atmosphere,
6 applicable to the air space under their sovereignty and to vessels flying their flag or
7 vessels or aircraft of their registry, taking into account internationally agreed rules,
8 standards and recommended practices and procedures”

9
10 These subsequent laws and regulations thus regulate the implementation of a
11 State’s obligation to prevent, reduce and control specific types of pollution. This is
12 precisely what States have been doing in negotiating the specialized treaty regime
13 on climate change.

14
15 Part XII of UNCLOS also requires that States enforce domestic laws and regulations
16 adopted in accordance with these provisions.¹⁸

17
18 Mr President, members of the Tribunal, I now turn to the relationship between
19 Part XII and obligations external to UNCLOS.

20
21 There seems to be some common ground among the participants in these
22 proceedings in this respect. In particular, there is general agreement that Part XII of
23 UNCLOS is essentially a framework agreement, such as is common in international
24 environmental law. As a framework agreement, Part XII contemplates the
25 subsequent development of global and regional internationally agreed standards and
26 recommended practices and procedures. These may, and in fact have often taken
27 the form of international or regional conventions external to UNCLOS that impose
28 specific obligations on the parties thereto and contain their own carefully negotiated
29 provisions for implementation and dispute settlement.

30
31 A central issue dealt with in many of the written statements¹⁹ is the interaction
32 between obligations of States Parties under UNCLOS and other international legal
33 obligations, in particular the UNFCCC and Paris Agreement.

34
35 This specialized treaty regime sets out the relevant “conventions and agreements”
36 with respect to preventing, reducing and controlling pollution and protecting and
37 preserving the marine environment as it relates to climate change. In that respect, it
38 is *lex specialis* and *lex posterior* in respect of the obligations of States Parties under
39 the more general provisions of UNCLOS.

40
41 UNCLOS does not seek to regulate climate change impacts on the marine
42 environment in isolation from, or in a manner that is inconsistent with the specialized
43 treaty regime. UNCLOS itself is silent on climate change. The drafters of UNCLOS,
44 establishing its Part XII as a framework convention, anticipated that obligations
45 formulated in general terms in Part XII would be specifically addressed in separate
46 subsequent treaties and agreements to be negotiated to address specific aspects of
47 pollution of the marine environment, the “internationally agreed rules . . . standards

¹⁸ UNCLOS, Arts. 213, 222.

¹⁹ Written statement of the Federative Republic of Brazil, 15 June 2023, para. 20; written statement of Canada, 16 June 2023, para. 61; written statement of France, 16 June 2023, para. 18.

1 and recommended practices and procedures” that articles 212(1) and 222 require.
2 Thus, the obligations relating to climate change, like other specific aspects of
3 pollution of the marine environment, are specifically addressed in other treaties and
4 agreements that were carefully negotiated subsequent to and apart from UNCLOS.
5 The specialized treaty regime on climate change is what States have agreed in order
6 to address their commitments, contributions and obligations on the issues before the
7 Tribunal today.

8
9 However, that does not mean that the rules set forth in the specialized treaty regime
10 on climate change have become part of UNCLOS.

11
12 Three processes may be noted. First, where there is a direct reference to external
13 rules, their role within UNCLOS depends on the precise wording used in the specific
14 provisions of UNCLOS. Second, while the rules set forth in the specialized treaty
15 regime are not incorporated in UNCLOS, they may assist in the interpretation of the
16 general obligations under Part XII, to the extent such rules and standards are
17 already binding on other States. Third, as part of the “general rule of interpretation”
18 reflected in article 31 of the Vienna Convention on the Law of Treaties and
19 applicable to UNCLOS, and as stated in its paragraph 3, subsequent agreements
20 and subsequent practice may, under certain circumstances, be taken into account
21 together with the context when interpreting UNCLOS, as may other relevant rules of
22 international law applicable in the relations between UNCLOS States Parties²⁰ for
23 the purposes of interpreting the conventional rules.

24
25 Nevertheless, as stated before Your Honour, the Tribunal is not called upon to
26 interpret the obligations set forth in the specialized treaty regime. As article 293 of
27 UNCLOS states, the Tribunal may apply “other rules of international law not
28 incompatible with [UNCLOS]”. But the case law rightly makes clear that article 293 is
29 an applicable law provision: it is not a basis for jurisdiction, or for reading into the
30 Convention rules which are not contained therein.²¹ As the Arbitral Tribunal said in
31 *Arctic Sunrise*, article 293 “is not a means to obtain a determination that some treaty
32 other than the Convention has been violated, unless that treaty is otherwise a source
33 of jurisdiction, or unless the treaty otherwise directly applies the Convention”.²²

34
35 Brazil rightly explained in its written statement before the Tribunal: “The
36 interpretation of UNCLOS ... should be guided by the basic principles underpinning
37 the multilateral climate regime. This is not to say that ITLOS should interpret the
38 climate change treaties, which would go beyond its jurisdiction.”²³

39
40 Canada likewise explained this important point in its written statement. I quote: “[...] the Tribunal does not have jurisdiction to determine the specific measures that must
41 be taken under these treaties. Determinations of the content of the obligations under
42

²⁰ VCLT, Art 31.3(a), (b) and (c).

²¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, Judge Cot, Declaration, ITLOS Reports 2015*, p. 27, paras. 80-84; *Norstar*, 2019, p. 47, para. 136.

²² Written statement of the Federal Republic of Germany, 14 June 2023, fn 53; “*Arctic Sunrise*” (*The Netherlands v. Russia*), Case No. 22, Order (Provisional Measures), *ITLOS Reports 2013*, 230 (22 November), para. 192.

²³ Written statement of the Federative Republic of Brazil, 15 June 2023, para. 2020. See also written statement of France, 16 June 2023, para.18.

1 the UNFCCC and Paris Agreement, for example, would fall outside the scope of the
2 Tribunal.”²⁴

3
4 Some written statements make much of article 237 and article 311 of UNCLOS,
5 which address the interaction between UNCLOS and external rules and standards.
6 While no doubt important in their own right, these provisions say nothing about
7 obligations under UNCLOS itself.

8
9 Article 237(1) is a “without prejudice” clause for specific obligations under certain
10 other special conventions and agreements. As we have seen, the question put by
11 COSIS is limited by the terms of the COSIS Agreement to legal questions “within the
12 scope of the United Nations Convention on the Law of the Sea”. It does not extend to
13 other legal questions, that is, other than UNCLOS. Article 237(2) of UNCLOS is a
14 statement about the manner in which specific obligations under certain special
15 conventions external to UNCLOS shall be carried out, that is, consistent with
16 UNCLOS.

17
18 Likewise, article 311(2), which is also relied on in some written statements, says
19 nothing about obligations under UNCLOS. It provides only that UNCLOS “shall not
20 alter the rights and obligations of States Parties which arise from other agreements
21 compatible with [UNCLOS] and which do not affect the enjoyment by other States
22 Parties of their rights or the performance of their obligations under [UNCLOS]”.

23
24 Indeed, accepting that UNCLOS and the specialized treaty regime on climate
25 change are separate regimes that can be interpreted to be consistent with one
26 another, but are not part of one another, preserves the integrity both of UNCLOS and
27 the specialized treaty regime. Doing so is also consistent with the applicable rules of
28 treaty interpretation and ensures respect for international law.

29
30 Finally, I would recall that the ICJ is already tasked with rendering an advisory
31 opinion on the legal obligations of a State with respect to climate change. The
32 consensus request by the UN General Assembly to the ICJ (which my Government
33 expressly joined as well) calls on the ICJ to have particular regard to UNCLOS,
34 among other sources of law, in determining these obligations. Therefore, there is a
35 material overlap between the issues already under consideration by the ICJ and the
36 question put to ITLOS by COSIS. As the principal judicial organ of the United
37 Nations, the ICJ is uniquely placed to advise on the correct interpretation of States’
38 climate-related obligations and, in particular, to the complex interaction between the
39 specialized regime on climate change, UNCLOS and other relevant international
40 agreements and regimes. If ITLOS were to render an advisory opinion which goes
41 beyond the strict confines of UNCLOS, this will lead to the risk of conflicting
42 judgments, resulting in incoherence, fragmentation and uncertainty.

43
44 I now turn to the application of the obligations of States Parties under Part XII. As I
45 have explained, Part XII sets out for UNCLOS States Parties general obligations with
46 respect to preventing pollution and protecting the marine environment. And it
47 allocates States’ jurisdictional rights and obligations (to legislate and enforce) in
48 various zones. These include land territory, the territorial sea, and the exclusive

²⁴ Written statement of Canada, 16 June 2023, para. 61.

1 economic zone, the continental shelf and the high seas, and the powers are based
2 on the degree to which States have sovereignty, sovereign rights, flag State or port
3 State authority or enjoy high seas freedoms.

4
5 The UNCLOS obligations do not address greenhouse gas emissions. In this respect,
6 they leave regulation of the duty of States to prevent, reduce and control pollution of
7 the marine environment to the specific conventions and agreements, here, the
8 specialized treaty regime on climate change. Nevertheless, the majority of
9 participants, sometimes after thorough analysis,²⁵ conclude that GHG emissions
10 may fall within the definition of “pollution of the marine environment” in article 1 of
11 UNCLOS. I would only note at this stage that humans introduce greenhouse gases
12 into the marine environment when certain activities emit greenhouse gases into the
13 atmosphere and some of those anthropogenic greenhouse gas emissions are
14 absorbed into the ocean. A broad range of activities is involved, including the burning
15 of fossil fuels, deforestation, livestock production, fertilization, waste management
16 and industrial processes.²⁶

17
18 The obligations in Part XII are obligations of due diligence. Numerous States have
19 noted this in their written statements, and ITLOS itself recognizes the same with
20 respect to article 192²⁷ and the obligation “to ensure” set out in article 194(2).²⁸

21
22 They are obligations of conduct rather than obligations to achieve a particular result.
23 As explained by the Seabed Disputes Chamber, a due diligence obligation “to
24 ensure” “is not an obligation to achieve, in each and every case, the result that the
25 sponsored contractor complies with the aforementioned obligations. Rather, it is an
26 obligation to deploy adequate means, to exercise best possible efforts, to do the
27 utmost, to obtain this result.”²⁹

28
29 A due diligence obligation requires States to take measures that are “reasonably
30 appropriate.”³⁰ In that sense, the due diligence standard should be adjusted to the
31 abilities of the State carrying the obligation.

32
33 While articles 192 and 194 of the Convention do not create a legal obligation to
34 implement the specialized treaty regime on climate change, that regime is important
35 in examining the standard and content of the due diligence obligation under the
36 Convention in relation to climate change, as other States agree.³¹

37

²⁵ Written statement of France, 16 June 2023, para. 96.

²⁶ Written statement of the United Kingdom, 16 June 2023, para. 39; written statement submitted by the Government of the Republic of Indonesia, 15 June 2023, paras. 58-64; written statement of Australia, 16 June 2023, paras. 26-29.

²⁷ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, *ITLOS Reports 2015*, 1, 63 para. 219 (Apr. 2). See also *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016 paras. 956, 959, 964 (acknowledging that the obligations in Art. 192 of UNCLOS are due diligence obligations).

²⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, *ITLOS Reports 2011*, 43 para. 117 (1 Feb. 2011).

²⁹ *Ibid.*, p. 41, para. 110.

³⁰ ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, *ITLOS Reports 2015*, p. 1, para. 120.

³¹ Written statement of the Republic of Korea, 16 June 2023, para. 16.

1 The specialized treaty regime on climate change, at its core, emphasizes a
2 balancing of environmental protection against the need for “economic development
3 to proceed in a sustainable manner” and “on the basis of equity and in the context of
4 sustainable development and efforts to eradicate poverty.”³²

5
6 As other States Members have recognized, the specialized treaty regime on climate
7 change further recognizes the principles of common but differentiated responsibilities
8 (“CBDR”), which means that countries listed in Annex I to the UNFCCC have made a
9 larger historical contribution to climate problems because they industrialized early,
10 have greater resources to address climate change and, therefore, have a different
11 responsibility to address climate change.³³

12
13 Accordingly, the standard of due diligence under articles 192 and 194 is not to be
14 applied uniformly across States Parties. Rather, the standard of due diligence with
15 respect to climate change, a standard of conduct, is fluid and requires interpretation
16 in light of different levels of responsibility due to varying historic greenhouse gas
17 emissions that occurred within the borders of different States, the need for economic
18 development to be taken into account, as well as the economic status, capacity and
19 technical capabilities of States. This must respect the principle of common but
20 differentiated responsibilities. As affirmed by the Seabed Disputes Chamber, the due
21 diligence obligation requires States to take measures that are “reasonably
22 appropriate.” What measures are “reasonably appropriate” depends on the facts and
23 circumstances.

24
25 In the context of climate change, States have operationalized the obligation of due
26 diligence by adopting various regulations in the framework of the UNFCCC and the
27 Paris Agreement, which provide the obligations of conduct for States in respect of
28 GHG emissions. This framework is based on a bottom-up approach that recognizes
29 differentiated national circumstances through Nationally Determined Contributions
30 (NDCs).

31
32 The Paris Agreement requires States Parties to identify and publish NDCs, which are
33 to be balanced, fair and ambitious in light of a State’s national circumstances. In its
34 NDC, each State defines its own level of ambition towards climate change mitigation
35 in terms of amount and means under respective national circumstances. It is through
36 an NDC that a State articulates the extent to which the State can prevent, reduce
37 and control pollution of the marine environment from the State’s own greenhouse
38 gas emissions. This is because the NDC is where the State sets out its ambition to
39 reduce greenhouse gas emissions that occur within its own national borders based
40 on its national circumstances.³⁴

³² UNFCCC, Art. 2; Paris Agreement, Art. 2.2.

³³ Paris Agreement, Art. 4.1; see also written statement of New Zealand, 15 June 2023, fn. 105; written statement of the People’s Republic of China, 15 June 2023, para. 27-29; written statement of Australia, 16 June 2023, para. 36; written statement of the Federative Republic of Brazil, 15 June 2023, paras. 13, 22; written statement of France, 16 June 2023, para. 113; written statement of the Republic of Sierra Leone, 16 June 2023, para. 62; written statement of the Republic of Djibouti, 16 June 2023, para. 57; written statement of Vietnam, 16 June 2023, para. 5.3; written statement of COSIS, 16 June 2023, para. 329; AU, para. 173; written statement of IUCN, 13 June 2023, para. 194.

³⁴ Lavanya Rajamani, *Due Diligence in International Climate Change Law*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 163, 169 (2020).

1 Further, as a consequence of careful negotiation to achieve realistic objectives,
2 States are required to “aim” at achieving the objectives of their NDCs through
3 domestic measures. The Paris Agreement, in its article 4(2), provides that “[e]ach
4 Party shall prepare, communicate and maintain successive nationally determined
5 contributions that it *intends* to achieve. The Parties shall pursue domestic mitigation
6 measures, with the *aim* of achieving the objectives of such contributions.”³⁵ In other
7 words, States are not legally bound to meet targets or goals set forth in their NDCs.³⁶

8
9 I have already drawn attention to article 193 of UNCLOS, which reflects General
10 Assembly resolution 1803, declaring by consensus that “[t]he right of peoples and
11 nations to permanent sovereignty over their natural wealth and resources must be
12 exercised in the interest of their national development and of the well-being of the
13 people of the State concerned”.³⁷

14
15 Like UNCLOS, the UNFCCC in its preamble recognizes the sovereign right of States
16 to exploit their own resources in accordance with the Charter of the United Nations,³⁸
17 which indicates the need for a flexible approach and the need to have regard to the
18 differentiated positions of States.³⁹

19
20 Consistent with article 193 of UNCLOS, article 4.8 of the UNFCCC requires Parties
21 to consider actions necessary to meet the specific needs and concerns of States not
22 listed in Annex I to the UNFCCC and affected by response measures to climate
23 change, including States whose economies are highly dependent on fossil fuel
24 production and export.

25
26 Article 4.15 of the Paris Agreement likewise requires the Parties to “take into
27 consideration in the implementation of this Agreement the concerns of Parties with
28 economies most affected by the impacts of response measures, particularly
29 developing country Parties.”

30
31 UNCLOS, like the specialized treaty regime on climate change, underscores that
32 efforts to mitigate climate change must be balanced with national circumstances,
33 ending energy poverty, geographic and resource constraints and the rights of States,
34 and particularly States not listed in Annex I to the UNFCCC, to develop and use their
35 natural resources and pursue sustainable development.

36
37 Your Honour, members of the Tribunal, I now turn to the fifth part of my statement.
38 As I noted at the outset, the Tribunal ruled in 2015 that it has advisory jurisdiction
39 where the requirements of Rule 138 are met. Nonetheless, a number of States in the
40 current proceeding either contest the existence of the Tribunal’s advisory jurisdiction,
41 argue that it should not be exercised in the very different circumstances of this case,
42 or at least ask for clarification of the reasoning underlying the Tribunal’s jurisdictional
43 holding. Jurisdictional issues occupy considerable portions of the first-round written
44 submissions of many States.

³⁵ Paris Agreement, Art. 4(2) (emphasis added).

³⁶ Lavanya Rajamani, *Due Diligence in International Climate Change Law*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 163, 169 (2020).

³⁷ G.A. Res. 1803 (XVII), 14 December 1962, op. para. 1.

³⁸ See UNFCCC eighth preambular paragraph.

³⁹ See e.g., UNFCCC sixth, tenth, twentieth preambular paragraphs; Arts. 3.1, 3.2, 3.3, 4.1, 4.2.

1
2 This leads me to two alternative procedures. I suggest, for the Tribunal's
3 consideration, one is to bifurcate these proceedings: for the Tribunal to rule first on
4 jurisdiction, clarifying its rationale and the scope of its exercise in this case, and
5 thereafter to invite States to weigh in on the substance of the questions presented. In
6 this manner, States would first receive helpful guidance on the scope of the issues
7 on which they should focus before addressing the merits, and would not waste the
8 Tribunal's time or their time covering irrelevant or marginal issues, while omitting or
9 underemphasizing the most important issues. This approach would be fairer to
10 States and sounder for the Tribunal than attempting to wrap up all the issues in a
11 single, inadequately briefed round, in which States are not certain which issues are
12 material.

13
14 Alternatively, the Tribunal might invite a second round of written submissions, as was
15 done in the prior proceeding, and encourage States to focus their second-round
16 submissions on substance, considering that issues of jurisdiction have already been
17 extensively addressed by the States in the first round and in these oral hearings.

18
19 Either of these alternative approaches would also give States the opportunity to
20 coordinate their second-round submissions before this Tribunal with their separate
21 submissions in the ICJ advisory proceeding on climate change. The result would be
22 beneficial to all concerned. The information and arguments States present to both
23 tribunals would be more coherent and consistent, and more useful to the judges.

24
25 Mr President, members of the Tribunal, to summarize. The Tribunal has been asked
26 to provide an advisory opinion on the specific obligations of States to UNCLOS,
27 particularly under Part XII, in relation to preventing pollution and protecting the
28 marine environment from climate change effects like ocean warming, sea-level rise,
29 and ocean acidification due to anthropogenic greenhouse gas emissions.

30
31 It is to be hoped that the Tribunal will take the opportunity to provide guidance on the
32 appropriate use of its advisory function in relation to legal matters within its purview.

33
34 If the Tribunal decides to give an opinion, it will need to approach the questions
35 asked with considerable caution. It will need to interpret the scope of the questions
36 asked within defined boundaries, focusing only on obligations under UNCLOS and
37 deferring to those bodies and judicial organs with primary responsibility for
38 determining questions of interpretation relating to the specialized regime on climate
39 change. Its opinion must also be based on interpretation of existing law.

40
41 The specialized treaty regime on climate change (consisting of the UNFCCC and the
42 Paris Agreement) specifically addresses States' commitments to protect the
43 environment from climate change caused by greenhouse gas emissions, including
44 with respect to the marine environment.

45
46 The Paris Agreement requires States Parties to identify and publish NDCs.⁴⁰ NDCs
47 are designed to allow for differentiated treatment of States, reflecting, among other

⁴⁰ Paris Agreement, Art. 4(2) provides that "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. The Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

1 considerations, the different levels of historic greenhouse gas emissions that
2 occurred within the borders of different States, and the position of high greenhouse
3 gas emitting States that industrialized early and are listed in Annex I to the UNFCCC.

4
5 If UNCLOS were to be interpreted to impose climate change-related obligations
6 additional to the UNFCCC and Paris Agreement (*quod non*), such interpretation
7 could open the door to the potential of compulsory third-party dispute settlement
8 under UNCLOS concerning obligations under the UNFCCC and Paris Agreement,
9 even though States Parties to the specialized treaty regime have not consented to
10 compulsory third-party dispute settlement. Such an interpretation of UNCLOS would
11 go beyond what States Parties ratifying UNCLOS, the UNFCCC and the Paris
12 Agreement agreed to. It would amount not only to a significant jurisdictional
13 overreach, it would risk fragmentation in the international legal system, creating
14 incoherence and uncertainty.

15
16 Accordingly, UNCLOS could not be interpreted to include specific greenhouse gas
17 emissions reduction targets and certainly not those going beyond those of the
18 specialized treaty regime on climate change. The Kingdom is acutely aware that an
19 effective response to climate change will only be achieved through political
20 decisions. The role of courts, if they are to remain within their jurisdictional function,
21 is to apply the existing law to the facts. The development of a new law is a political
22 matter, requiring often difficult negotiations. This is especially true for effectively
23 combating the global phenomenon of climate change, which requires active
24 participation, cooperation and, thus, agreement by a substantial majority of States.
25 Many differentiated interests are at stake.

26
27 The obligations under UNCLOS should be interpreted so that they are consistent
28 with, not additional to, the obligations under the UNFCCC and the Paris Agreement.
29 No sound legal basis exists for imposing new obligations that go beyond those which
30 States have agreed to in the UNFCCC and the Paris Agreement; to do so would
31 undermine those instruments, and it would undermine progress in the negotiation
32 process that is ongoing within the framework of those instruments.

33
34 Mr President, members of the Tribunal, one final word. As we are all aware, although
35 advisory opinions are not binding, we believe in this important role of the Tribunal
36 and trust that it will take utmost care when considering the questions put to it.

37
38 Mr President, members of the Tribunal, that concludes the submissions of the
39 Kingdom of Saudi Arabia. I thank you for the opportunity to address you this morning
40 and for your kind attention.

41
42 **THE PRESIDENT:** Thank you, Ms Noorah Mohammed Algethami. And this brings us
43 to the end of this morning's sitting. The hearing will resume at 3:00 p.m. The sitting is
44 now closed.

45
46 *(Lunch break)*