

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

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

WRITTEN STATEMENT OF CANADA

16 JUNE 2023

Table of Contents

CHAPTER 1 – INTRODUCTION	2
CHAPTER 2 – THE APPLICABLE LAW	4
I. States Parties’ general obligation to protect and preserve the marine environment under Part XII of the Convention.....	4
a. Article 192 and 194 of the Convention.....	4
II. The interaction between relevant international legal agreements and Part XII of the Convention, including States Parties’ obligations with respect to specific forms of marine pollution.....	7
a. Articles 237 and 311 of the Convention	7
b. Articles 207 and 212 of the Convention	8
c. Relevant agreements related to climate change	12
III. States Parties’ duty to cooperate under Part XII of the Convention.....	14
a. Article 197 of the Convention.....	14
IV. Due diligence and States Parties’ obligations under Part XII of the Convention.....	17
V. Further jurisdictional considerations	19
CHAPTER 3 – CONCLUSION.....	19

CHAPTER 1 – INTRODUCTION

1. On 16 December 2022, the International Tribunal for the Law of the Sea (the “Tribunal”) produced an order accepting the request from the Commission of Small Island States on Climate Change and International Law (COSIS) for an advisory opinion on the following question:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the “Convention”), including under Part XII:

- a. to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
 - b. to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?¹
2. Following the Tribunal’s Order on 15 February 2023, States Parties to the UN Convention on the Law of the Sea (the “Convention”)² were granted until 16 June 2023, to provide their written statements. As a State Party to the Convention, Canada is availing itself of the opportunity to provide our reflections to the Tribunal.³
 3. Climate change is undoubtedly one of the greatest global challenges of our times, and Canada firmly acknowledges the significant role that our oceans play in relation to this challenge.⁴ As the world’s largest heat sink and one of the most important carbon sinks,⁵ our oceans are vital for the mitigation of and adaptation to climate change. At the same time, the health of our oceans is at serious risk due to climate change.

¹ International Tribunal for the Law of the Sea, Order 2023/1, online:

<https://www.itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2023-1_15.02.2023_Readable.pdf>.

² *United Nations Convention on the Law of the Sea*, 10 December 1982, 1883 UNTS 397 (entered into force 16 November 1994) [Convention], online:

<https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>.

³ Canada became a Party to the Convention, *supra* note 2, on 7 December 2003.

⁴ See, for example, Fisheries and Oceans Canada, News Release, “Canada participates in successful Our Ocean Conference” (3 March 2023) online: <<https://www.canada.ca/en/fisheries-oceans/news/2023/03/canada-participates-in-successful-our-ocean-conference.html>>.

⁵ According to the UN, oceans capture 90 percent of the world’s excess heat and absorb 25 percent of all carbon dioxide emissions. United Nations Climate Action, “The ocean – the world’s greatest ally against climate change”, online:

<<https://www.un.org/en/climatechange/science/climateissues/ocean#:~:text=The%20ocean%20generates%2050%20percent,heat%20generated%20by%20these%20emissions>>.

4. Canada recognizes that coastal States, and particularly Small-Islands Developing States, are especially impacted by climate change. As an Arctic nation, Canada is also deeply aware of the impact that climate change is having in the Arctic, which is warming up four times faster than the rest of the world.⁶ Rising temperatures, decreased sea ice extent and stability, disruptions to food and water resources, and changes to wildlife and plants are already impacting Canada. Furthermore, many Indigenous Peoples, including those in the Arctic, exercise stewardship, management, and governance over their coastal lands and waters, and therefore share deep ties with ocean ecosystems.
5. Across the world, but particularly for Small Islands Developing States and the Arctic, climate change is threatening our oceans' critical role in preserving and supporting biodiversity, as well as the support they provide in human health and well-being.
6. Although climate change was not a consideration when the Convention was negotiated, the questions being asked of the Tribunal in this Advisory Opinion request offer an important opportunity to revisit the overarching objectives of the Convention and assess how climate change can now be situated within its provisions, while considering the other relevant and intersecting frameworks that have emerged since then that deal with climate change under international law.
7. Canada asserts that the Convention must be read in light of current knowledge of the adverse impacts of climate change on the marine environment, given that the object and purpose of Part XII of the Convention is the protection and the preservation of the marine environment.⁷ Canada also considers that such a reading of the Convention must be done in a manner that preserves the integrity of the Convention, as well as that of other relevant international agreements, particularly those under the International Climate Change regime.⁸ Doing so is

⁶ Of the many components that constitute the Arctic environment, the cryosphere is the most sensitive to the effects of climate change, and the decrease of snow and ice cover intensify global warming. See Bronwyn Hancock et al, *Northern Canada; Chapter 6 in Canada in a Changing Climate: Regional Perspectives Report*, ed by Fiona J Warren, Nicole Lulham & Donald S Lemmen (Ottawa: Government of Canada, 2022), online: <<https://changingclimate.ca/site/assets/uploads/sites/4/2020/11/Northern-Chapter-Regional-Perspectives-Report.pdf>>.

⁷ See, for example, Alan Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change" (2005) 54 ICLQ 564 (HeinOnline); Jill Barrett & Richard Barnes, eds, *Law of the Sea: UNCLOS as a Living Treaty* (London: British Institute of International and Comparative Law, 2016).

⁸ For the purposes of this submission, Canada is using the term International Climate Change regime to include the three multilateral climate change treaties (the *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 1 March 1994), online: <https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf>, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [Kyoto Protocol], online:

consistent with the applicable legal principles of treaty interpretation, and will enhance the rules-based international order and respect for international law.

8. With this written Statement, and as a country that is committed to an ambitious multilateral approach to both address climate change and support ocean health, Canada encourages the Tribunal to seek an appropriate balance between these considerations.

CHAPTER 2 – THE APPLICABLE LAW

I. States Parties’ general obligation to protect and preserve the marine environment under Part XII of the Convention

a. Article 192 and 194 of the Convention

9. Under Article 192, “States have the obligation to protect and preserve the marine environment.”⁹
10. The Tribunal has recognized that this obligation “is informed by the provisions in Part XII and other applicable rules of international law,”¹⁰ which includes the obligation of States to “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”¹¹ It has also found that Article 192 includes the conservation of marine living resources,¹² and “extends both to protection of the marine environment from

<https://treaties.un.org/doc/Treaties/1998/09/19980921%2004-41%20PM/Ch_XXVII_07_ap.pdf>, and the *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015 3156 UNTS 88 (entered into force 4 November 2016), online:

<<https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54113/Part/I-54113-080000280458f37.pdf>>) and the outputs of their governing bodies.

⁹ Convention, *supra* note 2, art 192.

¹⁰ *The Republic of Philippines v The People’s Republic of China* (2016), ICGJ 495 at 373 (Permanent Court of Arbitration) [SCS Arbitration], online: <<https://pcacases.com/web/sendAttach/2086>>.

¹¹ *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 226 at para 29 [Legality of the Threat or Use of Nuclear Weapons], online: <<https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>. Reference from ITLOS, SCS Arbitration, *supra* note 10 at para 941. See *UN Conference on the Human Environment*, “Declaration of the United Nations Conference on the Human Environment” in *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, UN Doc A/Conf/48/Rev.1, (1973), Principle 21 [Stockholm Declaration], online: <<http://un-documents.net/aconf48-14r1.pdf>>; the *Trail Smelter Award, United States v Canada* (1938), 3 RIAA 1905 at 1963 (Convention of Ottawa), online: <https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf>.

¹² Both ITLOS in *Southern Bluefin Tuna Cases* and the Annex VII Tribunal in *Chagos Marine Protected Area*, have taken the view that the conservation of marine living resources constitutes a component of marine environment protection, even though the provisions related thereto are not found in Part XII. See *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order of 27 August 1999, [1999] ITLOS Rep 280 at para 70, online: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf>; *Mauritius v United Kingdom* (2015), ICGJ 486 at para 538 (Permanent Court of Arbitration), online: <<https://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>>.

future damage and preservation in the sense of maintaining or improving its present condition,”¹³ thereby implying “the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.”¹⁴

11. Of the articles in Part XII, Article 194 is central to further understanding the general obligation to protect and preserve the marine environment set out in Article 192 in relation to climate change. Article 194(1) clarifies that States Parties have an obligation to:

“take, individually or jointly as appropriate, all measures consistent with [the] Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.”¹⁵

12. Article 194(3) further emphasizes that measures to be taken shall deal with “*all sources*” of marine pollution, including inter alia: “[...] *the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping*”, and that these measures must be designed to minimize all these sources of marine pollution to the “*fullest extent possible*.”¹⁶

13. In examining States Parties’ obligations under Articles 192 and 194, alongside the broad definition of marine pollution under Article 1(1)(4),¹⁷ Canada considers that the Convention has been drafted in a way which enables it to encompass new sources of pollution that may not have been anticipated at the time of its negotiation, such as the anthropogenic emissions of greenhouse gases (GHGs). In this regard, it is noteworthy that the list of sources of marine pollution in Article 194(3) is expressly open-ended.

14. In its latest report, the Intergovernmental Panel on Climate Change (IPCC) concluded that it is “extremely likely” that anthropogenic emissions of GHGs are the dominant cause of global warming since the mid-20th century.¹⁸ Scientifically, it can be confirmed that as natural sinks,

¹³ SCS Arbitration, *supra* note 10 at para 941.

¹⁴ *Ibid.*

¹⁵ Convention, *supra* note 2, art 194(1).

¹⁶ *Ibid.*, art 194(3).

¹⁷ Article 1(1)(4) of the Convention, *supra* note 2, states that “[f]or the purposes of this Convention: [...] pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

¹⁸ See The Intergovernmental Panel on Climate Change [IPCC], “Climate Change 2021: The Physical Science Basis” (2021) 6 Assessment Report, online: <<https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/>>.

the oceans capture carbon dioxide (CO₂) (a “*substance*”) emitted from various human activities, which alters the oceans’ chemistry and leads to acidification and deoxygenation (“*direct effects*”), among other effects.¹⁹ Further, GHGs add “*energy*” into the marine environment, which leads to ocean warming and thermal expansion. These processes exacerbate sea-level rise by combining with the melting of the cryosphere (“*indirect effects*”).²⁰

15. While the natural process of oceans functioning as a heat and carbon sink would not, *per se*, meet the definition of marine pollution, human activities leading to increased emissions of GHGs in the atmosphere and resulting in an increase of excess heat that is then absorbed by the oceans, as well the introduction of CO₂ in the marine environment, is a different matter.
16. Canada is of the view that the Tribunal should find that the greatest contributor to climate change, GHGs, is captured by the Convention as a source of marine pollution. In support of this view, historical records on Article 194(1) indicate that this provision was originally developed by the Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP) who wanted to ensure that:

“the development and implementation of [pollution] control should be sufficiently flexible to [...] take into account the fact that a number of new and hitherto unsuspected pollutants are bound to be brought to light.”²¹

17. Furthermore, Canada asserts it would be reasonable for the Tribunal to opine that States Parties to the Convention have a general obligation to protect and preserve the marine environment from the impacts of climate change. In the context of Part XII, this would include an obligation to prevent, reduce, and control pollution of the marine environment from GHG emissions, as well as an obligation on all States, either individually or jointly, as appropriate, not to degrade the marine environment by emissions of this source of pollution.

¹⁹ Rozemarijn J Roland Holst, “Taking the current when it serves: Prospect and challenges for an ITLOS advisory opinion on oceans and climate change” (2023) at 5, online: <<https://dro.dur.ac.uk/37423/2/37423VoR.pdf?DDD19+vbdv77>>.

²⁰ *Ibid.*

²¹ James Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, 1st ed (New York, NY: Oxford University Press, 2017) at 27 [Harrison, *Saving the Oceans Through Law*].

II. The interaction between relevant international legal agreements and Part XII of the Convention, including States Parties' obligations with respect to specific forms of marine pollution

a. Articles 237 and 311 of the Convention

18. As a starting point, Article 237 is central to answering the questions submitted to the Tribunal as it governs the relationship between Part XII and other agreements. It provides that the provisions of Part XII:

“are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in the Convention.”²²

19. This is further nuanced by paragraph 2, which requires that:

“[s]pecific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.”²³

20. The effect of these provisions is to establish an inter-relationship between the obligations under Part XII and those under the more specialized agreements, whereby those more specialized obligations continue as long as they do not conflict with the Convention.

21. This is further reinforced by Article 311, which governs the relationship with other agreements in relation to the Convention as a whole, and indicates that the Convention will:

“not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”²⁴

22. Given that the object and purpose of Part XII of the Convention is the protection and preservation of the marine environment, it can be asserted that the agreements comprising the International Climate Change Regime, as well as other international agreements that deal with climate change, are “in furtherance of the general principles set forth in the Convention.”²⁵ The inter-connectedness of these instruments is further bolstered by the Convention’s Preamble, which indicates that “[c]onscious that the problems of ocean space are closely interrelated and need to be considered as a whole.”²⁶

²² Convention, *supra* note 2, art 237(1).

²³ *Ibid*, art 237(2).

²⁴ *Ibid*, art 311(2).

²⁵ *Ibid*, art 237(1).

²⁶ *Ibid*, Preamble.

23. Since none of the instruments in the International Climate Change regime affect States Parties' rights and obligations, Canada asserts that Articles 237 and 311 allow the Tribunal to refer to those instruments in understanding the Convention's obligations as they relate to climate change.
24. Canada notes that the Tribunal has made reference to other international agreements in the interpretation of obligations under Part XII on other occasions,²⁷ which can be useful in relation to climate change.²⁸ In the *South China Sea* (SCS) Arbitration, the Tribunal considered the definition of ecosystems under Article 2 of the Convention on Biological Diversity (CBD)²⁹ as well as the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),³⁰ in interpreting the obligations under Part XII of the Convention, and ultimately, used those sources in finding that Article 192 includes:³¹

“a due diligence obligation to prevent the harvesting of endangered species that are recognized internationally as being at risk of extinction and requiring international protection.”³²

25. Moreover, in deciding to use these external international norms in the SCS Arbitration, the Tribunal emphasized that the definition under the CBD is an internationally accepted definition and that CITES is the “subject of nearly universal adherence,”³³ which informs Article 192 and 194(5).

b. Articles 207 and 212 of the Convention

26. The general obligation to protect and preserve the marine environment under Article 192, which includes the obligation to take measures to prevent, reduce, and control “*all forms*” of pollution of the marine environment under Article 194, is supplemented by more specific rules in Part XII. Under Articles 207 to 212, States Parties have obligations to take measures with respect to specific forms of pollution of the marine environment. These provisions make

²⁷ SCS Arbitration, *supra* note 10 at paras 941-942; *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), *Advisory Opinion*, [2011] ITLOS Rep 10 at 135 [Seabed Mining Advisory Opinion], online: <https://itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf>.

²⁸ Harrison, *Saving the Oceans Through Law*, *supra* note 21 at 5.

²⁹ *Convention on Biological Diversity* [CBD], 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), online: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-8.en.pdf>>.

³⁰ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975), online:

<<https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14537-English.pdf>>.

³¹ SCS Arbitration, *supra* note 10 at para 946, 956 and 957.

³² *Ibid.*, at para 956.

³³ *Ibid.*

reference to external international rules, standards practices and procedures, and further clarify the interaction between the Convention and other agreements.³⁴

27. These references, which have been characterised as “rules of reference,”³⁵ offer a useful basis to consider relevant climate change related norms in determining what is required from States Parties under Part XII. While there is significant debate among scholars on whether GHGs should be located under pollution from land-based sources (Article 207), pollution through or from the atmosphere (Article 212), or both these sources,³⁶ for the purpose of this Statement, Canada will refer to both Articles 207 and 212, as they adopt the same rules of reference formulation and therefore, have the same implications.

28. In requiring States Parties to:

“adopt laws and regulations to prevent, reduce and control pollution of the marine environment [...] taking into account internationally agreed rules, standards and recommended practices and procedures [...],”³⁷

Articles 207 and 212 express the weakest form of rules of reference under Part XII. Unlike the obligations for pollution from vessels in Article 211, which requires States Parties to “*adopt laws and regulations for the prevention, reduction and control of pollution*” that:

“shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference,”³⁸

Articles 207 and 212 only require States Parties to consider the external international norms.

29. Moreover, by referring to “*internationally agreed rules, standards and recommended practices and procedures*” instead of “*generally accepted international rules and standards*,” the rules of reference formulation in Articles 207 and 212 encompass a broader set of external international norms than Article 211, which may include both binding and non-binding norms, and which may have a lower threshold of acceptance at the international level.

30. Apart from the rules of reference, the concept of evolutive interpretation could be of relevance to the Tribunal in determining whether and how climate-related agreements should be used in interpreting the obligations under Part XII. In *Dispute Regarding Navigational and Related*

³⁴ Convention, *supra* note 2, art 207 and 212.

³⁵ Irina Buga, “3 Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction” in *The Oxford Handbook of the Law of the Sea* (New York: Oxford University Press, 2015) 46 at 66.

³⁶ Jesse Cameron Glickenhau, “Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emissions” (2015) 22 NYU Envt LJ 117 at 144.

³⁷ Convention, *supra* note 2, art 207(1) and 212(1).

³⁸ *Ibid*, art 211(2).

Rights, the ICJ formulated two cumulative requirements for this concept to apply: 1) that the treaty “has been entered into for a very long period” or is “of continuing duration,”³⁹ and 2) that the parties have used generic terms.⁴⁰ Moreover, the intention of the parties is also highly relevant in determining the evolutionary nature of treaty provisions.

31. Canada is of the opinion that the Convention meets all the requirements for an evolutive interpretation in this context. In addition, the extensive use of the rules of reference is a strong indication that Part XII, was intended to ensure that it would be taking into account new relevant developments in international law. The Secretariat of the International Maritime Organization (IMO) has taken a similar view in describing the Convention as providing a governing framework with principles and obligations of a more general nature, that “can be implemented only through specific operative regulations in other international treaties.”⁴¹
32. Moreover, Canada views the effect of Articles 207 and 212 as crucial to preserving the integrity of the Convention while encouraging States Parties to take action under more specialized regimes dealing with climate change. Of particular importance, Articles 207(4) and 212(3) establish an obligation for States Parties, “*acting especially through competent international organizations or diplomatic conference*”⁴² to “*endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment*”⁴³ in relation to land-based sources of pollution and pollution through and from the atmosphere. In the context of marine pollution from GHGs, these provisions should be interpreted as encouraging States Parties to work through the International Climate Change regime in establishing rules, standards and recommended practices and procedures. In Canada’s view the effect of these provisions is “to avoid creating a mosaic of legal regimes, differing in their content as in their provenance.”⁴⁴

³⁹ (*Costa Rica v Nicaragua*), [2009] ICJ Rep 213 at para 66 [Dispute regarding Navigational and Related Rights], online: <<https://www.icj-cij.org/sites/default/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>>.

⁴⁰ *Ibid*, at para 63.

⁴¹ See, for example, International Maritime Organization [IMO], “Implications of the United Nations Convention on the Law of the Sea 1982 for the International Maritime Organization (IMO), Study by the Secretariat of IMO” (30 January 2014), Doc.LEG/MISC.8 (2014) at 8, online: <<https://www.kuestenpatent-kroatien.at/LEG%20MISC%208-1.pdf>>.

⁴² Convention, *supra* note 2, art 207(4).

⁴³ *Ibid*, art 212(3).

⁴⁴ Myron H Nordquist, Satya Nandan & Shabtai Rosenne, eds, *United Nations Convention on the Law of the Sea Online* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2013) at para 194.10(10) [Virginia Commentary].

33. In this way, Part XII sets out an important basis to be informed, where appropriate, by the obligations under more specialized regimes dealing with climate change into the general law of the sea framework.⁴⁵
34. In line with the Tribunal’s previous findings in the SCS Arbitration, Canada is of the view that there is a clear legal basis, both in international law and in the express wording of the relevant provisions under Part XII, to determine the obligations of States Parties under the Convention while taking into account external international norms. Given the broad rules of reference formulation in Articles 207 and 212, Canada also considers that both “*generally accepted*”⁴⁶ norms such as those referenced in Article 211, as well as norms that have not yet reached that status, can be used in this interpretation. However, unlike the obligations under Article 211 that expressly render the external international norms binding on States Parties, and which would therefore require or indicate state consent,⁴⁷ Articles 207 and 212 only require States Parties to consider these norms in adopting rules and measures.⁴⁸
35. More precisely, it is Canada’s view that while the Tribunal can look at a number of relevant agreements and non-binding instruments in determining States Parties’ obligations under Articles 207 and 212, even if they have not reached the level of being “*generally accepted*”,⁴⁹ these may not be binding on States Parties and would rather form a part of their consideration in determining how they will implement the Convention.
36. In addition, the Convention’s interaction with other legal regimes is dynamic. This was demonstrated in the SCS Arbitration by the Tribunal’s use of the Appendices of CITES, which are updated regularly.⁵⁰ Canada believes that this is critical in the context of climate change, as a progressive understanding of what is required from States Parties to fulfill their obligations under Part XII, should evolve as standards and rules progressively develop in line with new available scientific information.

⁴⁵ *Ibid* at para 237.1.

⁴⁶ Convention, *supra* note 2, art 211(2) and 211(5).

⁴⁷ State consent is a customary rule, codified in Article 34 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). However, under Articles 35 and 36, if a state consents to the rights and obligations of a treaty that it is not a party to, those become binding on that State. See also Lan Ngoc Nguyen, “Jurisdiction and Applicable Law in the Settlement of Marine Environmental Disputes under UNCLOS” (2021) 9 *Korean J Int’l & Comp L* 337 (Brill).

⁴⁸ See, for example, Lan Ngoc Nguyen, “Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits” (2021) 52 *Ocean Devel & Int’l L* 419 at 440 (Brill)

⁴⁹ Convention, *supra* note 2, art 211(2) and 211(5).

⁵⁰ See, *supra* note 10.

c. Relevant agreements related to climate change

37. Effective implementation of the climate change agreements, namely the UN Framework Convention on Climate Change⁵¹ (UNFCCC) and the Paris Agreement⁵², and other agreements related to climate change, such as the CBD, could assist in determining whether States Parties are fulfilling their obligations under Part XII, either wholly or in part. It is also worth noting that all three of these treaties have near universal acceptance, and as such, serve as valuable forums for establishing global standards and practices. A high level of ambition when implementing these treaties could also serve as an indicator as to whether States Parties are fulfilling their obligations under Part XII, either wholly or in part.⁵³ In addition, the recently concluded text of the International Legally Binding Instrument under the Convention on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ Treaty), also contains obligations that could serve this purpose once it enters into force.⁵⁴ In making this assertion, Canada is also mindful that Articles 207 and 212 do not expressly require States Parties to implement those treaties, although they do require States Parties to endeavour to establish global and regional rules, standards, and practices, and to consider the norms established under relevant international agreements.
38. Both the UNFCCC and the Paris Agreement recognize the importance of oceans within the context of the International Climate Change regime. The main objective of the UNFCCC is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,”⁵⁵ which it defines “as meaning the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.”⁵⁶ In addition, Article 4(1)(d) of the UNFCCC notes that Parties shall:

⁵¹ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 1 March 1994) [UNFCCC], online: <https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf>.

⁵² *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, 3156 UNTS 88 (entered into force 4 November 2016) [Paris Agreement], online: <<https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54113/Part/I-54113-0800000280458f37.pdf>>.

⁵³ See, *ibid*, Article 4(3) of the Paris Agreement says “Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

⁵⁴ *Draft Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (advanced, unedited)*, (concluded on 5 March 2023) [BBNJ Treaty], online: <https://www.un.org/bbnj/sites/www.un.org/bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf>.

⁵⁵ UNFCCC, *supra* note 51, art 2.

⁵⁶ *Ibid*, art 1(3).

“promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems.”⁵⁷

39. The Paris Agreement also highlights in its preamble “the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity.”⁵⁸
40. This integration of the oceans into the climate change context has been further developed through various intergovernmental processes.⁵⁹ For example, the International Climate Change regime has recognized the need to strengthen understanding of, and action on, ocean and climate change, and has instituted an annual Ocean and Climate Change Dialogue. These Dialogues draw upon the knowledge and scientific findings from the IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, and can help inform concrete climate action with lasting benefits in terms of reduced global emissions, improved adaptive capacity and resilience, and ocean protection and restoration. They can also enhance greater collective understanding of the linkages between climate change and the oceans based on current and emerging scientific and Indigenous knowledge, and raise the visibility of the work being done across the International Climate Change regime on ocean-climate related issues.
41. While the main focus of the CBD and the concluded text of the BBNJ Treaty is on biological diversity, both contain obligations and targets related to the protection of marine areas and species that may be particularly affected by climate change and which have the potential to assist in addressing the adverse impacts of climate change. For example, under the CBD’s Post-2020 Global Biodiversity Framework, a non-legally binding document adopted in December 2022, Parties have committed to minimizing the “impact of climate change and ocean acidification on biodiversity and [increasing] its resilience through mitigation, adaptation, and disaster risk reduction action.”⁶⁰ In addition, while not yet in force, under the BBNJ Treaty, the Area-Based Management Tools (ABMTs) and Environmental Impact Assessments (EIAs) sections of the concluded text have the potential to contribute to the

⁵⁷ UNFCCC, *supra* note 51, art 4(1).

⁵⁸ Paris Agreement, *supra* note 52, Preamble.

⁵⁹ See UN General Assembly, *Report of the Secretary-General*, 72nd Sess, Supp No 49, UN Doc A/72/70/ Add.1 (2017), online:

<<https://undocs.org/Home/Mobile?FinalSymbol=A%2F72%2F70%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>>.

⁶⁰ CBD Secretariat, Press Release, “Final text of Kunming-Montreal Global Biodiversity Framework available in all languages” (22 December 2022) online: <<https://prod.drupal.www.infra.cbd.int/sites/default/files/2022-12/221222-CBD-PressRelease-COP15>

Final.pdf?_gl=1*1sk25m6*_ga*MjUwMTQ3MDYyLjE2NjU2NzAwMTE.*_ga_7S1TPRE7F5*MTY4Njg5NTE0MS4xLjEuMTY4Njg5NTY3My42MC4wLjA.>.

conservation of the global ocean's biodiversity across all zones of the water column, including the mesopelagic zone, which could lead to the restoration of ecological processes such as carbon cycling and storage in the oceans which can in turn contribute to climate change mitigation and adaptation.⁶¹

42. Canada is also of the opinion that while it is reasonable for the Tribunal to assess the obligations of States Parties to the Convention, in light of other agreements, and especially those under the UNFCCC and the Paris Agreement, the obligations under Part XII of the Convention should be consistent with these external agreements and not impose additional or contradictory obligations.

III. States Parties' duty to cooperate under Part XII of the Convention

a. Article 197 of the Convention

43. The duty to cooperate is central to the examination of the questions in this Advisory Opinion. Not only has the Tribunal already recognized this duty as a fundamental principle under Part XII and international law,⁶² but in Canada's view, in order to achieve any meaningful progress, climate change must be characterized as a global problem requiring collective action.⁶³

44. Under Part XII, States Parties have an obligation to:

“cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended

⁶¹ See Vrinda Suresh, Julia Mason & Doug Rader, “What the BBNJ negotiations could mean for the ocean's ‘twilight zone’”, *Environmental Defense Fund* (9 January 2023), online: <<https://blogs.edf.org/edfish/2023/01/09/what-the-bbnj-negotiations-could-mean-for-the-oceans-twilight-zone>>; Nathalie Hilmi et al, “The Role of Blue Carbon in Climate Change Mitigation and Carbon Stock Conservation” (2021), 3 *Frontiers in Climate* 1, online: <<https://doi.org/10.3389/fclim.2021.710546>>; Bianca S Santos & al, “The diverse benefits of biodiversity conservation in global ocean areas beyond national jurisdiction” (2022) 9 *Frontiers in Marine Science* 1, online: <<https://doi.org/10.3389/fmars.2022.1001240>>; Sala et al, “Protecting the global ocean for biodiversity, food and climate” (2021) 592 *Nature* 397, online: <<https://doi.org/10.1038/s41586-021-03371-z>>; Carlos M Duarte et al, “Rebuilding marine environment” (2020) 580 *Nature* 39, online: <<https://doi.org/10.1038/s41586-020-2146-7>>.

⁶² *The Mox Plant Case (Ireland v United Kingdom)* (2001), Provisional Measures, Order of 3 December 2001, ITLOS Rep 95 at para 82, online: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-3_dec_01.pdf>; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Rep 10 at para 92, online: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf>.

⁶³ See IPCC, “Climate Change 2014: Synthesis Report” (2014) Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, online <https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf>.

practices and procedures consistent with [the Convention], for the protection and preservation of the marine environment.”⁶⁴

45. The importance of this duty for Part XII is further highlighted through the annual UN General Assembly Resolution on Oceans and Law of the Sea, which:

“calls upon all States to cooperate and take measures consistent with the Convention, directly or through competent international organizations, for the protection and preservation of the marine environment.”⁶⁵

46. In addition, the importance of cooperation is found in several international agreements and instruments related to climate change, including, among others, Articles 7(6), 7(7), 8(3), 8(4) and 12 of the Paris Agreement.⁶⁶

47. The duty to cooperate can include a variety of actions from States Parties, including mitigation of and adaptation to climate change,⁶⁷ capacity-building and transfer of technology initiatives,⁶⁸ as well as the further development of international norms that are consistent with the Convention.⁶⁹

48. Mitigation and adaptation are central concepts to the International Climate Change regime. Pursuant to the Paris Agreement, each Party is required to prepare, communicate and maintain successive nationally determined contributions (NDCs), including pursuing domestic mitigation measures, towards reducing greenhouse gases that contribute to climate change. Under Articles 4(2) and 4(3), these NDCs are meant to represent progression beyond its previous ones and to reflect its highest possible ambition. In addition, at the international level,

⁶⁴ Convention, *supra* note 2, art 197.

⁶⁵ UN General Assembly, *Ocean and the law of the sea*, GA Res 77/248, 77th Sess, Supp No 49, UN Doc A/RES/77/248, (2023) 1 at para 203, online: <<https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F77%2F248&Language=E&DeviceType=Desktop&LangRequested=False>>.

⁶⁶ See *supra* note 52; Stockholm Declaration, *supra* note 11, Principle 24; *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, 13 June 1992, UN Doc A/CONF.151/26, (1992), Principles 7 and 27, online:

<https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf>; UNFCCC, *supra* note 51, art 3.5, 4.1(c), (d), (e), (g), (h), (i).

⁶⁷ See Robin Kundis Craig, “Mitigation and Adaptation” in Elise Johansen, Signe Veierud Busch & Ingvild Ulrikke Jakobsen, eds, *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge: Cambridge University Press, 2020).

⁶⁸ Gabriele Goettsche-Wanli, “Part I Assessing the UN Institutional Structure for Global Ocean Governance: The UN’s Role in Global Ocean Governance, 1 The Role of the United Nations, including its Secretariat in Global Governance” in David Joseph Attard, David M Ong & Dino Kritsiotis, eds, *The IMLI Treatise on Global Ocean Governance: Volume I: UN Global Ocean* (New York: Oxford University Press, 2018) 3 at 10.

⁶⁹ The ILC and ILA have put forward recommendations for the progressive development of the law on complex and emerging issues such as sea-level rise, along with the recommendation that these do not entail any modifications to the Convention. See Catherine Redgwell, “Treaty Evolution, Adaptation and Change: Is LOSC ‘Enough’ to Address Climate Change Impacts on the Marine Environment?” (2019) 34 *Int’l J Mar & Coast L* 440 at 452 (Brill).

in order to reduce emissions from fuels used for international aviation and maritime transport, there has been ongoing work in the International Civil Aviation Organizations and the IMO, as well as cooperation between these two organizations and the International Climate Change regime.

49. On the adaptation side, under Article 7(2) of the Paris Agreement, Parties recognize that adaptation is:

“a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change.”⁷⁰

50. Work on adaptation within the International Climate Change regime has been long-standing and includes constituted bodies and work streams meant to progress adaptation responses and enhance resilience. This includes, among other things, a work programme on the Global Goal on Adaptation, which is meant to map out the way for the world to enhance adaptive capacity, strengthen resilience, and reduce vulnerabilities associated with climate change; the Least Developed Countries Expert Group (LEG), which is mandated to provide guidance and accelerate support to the Least Developed Countries with respect to their national adaptation plans; and the Adaptation Committee which provides expert guidance, enhances outreach and supports implementation of the Paris Agreement.

51. Capacity building and technology transfer are also fundamental to combatting climate change,⁷¹ and this importance is highlighted through both the UNFCCC and the Paris Agreement. Initiatives and work programs on these two issues have been established including the Paris Committee on Capacity-building and the Technology Mechanism.

52. Moreover, efforts to further develop international norms in addressing climate change have taken place not only through the development of international agreements such as the Paris Agreement, but also through amendments of existing agreements such as the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI to improve ships' energy efficiency,⁷² as well as the development of soft law such as initiatives, voluntary

⁷⁰ *Supra* note 52, art 7(2).

⁷¹ See also Convention, *supra* note 2, art 200 & 202.

⁷² Resolution MEPC.203(62), Amendments to The Annex of The Protocol Of 1997 to Amend The International Convention For The Prevention Of Pollution From Ships, 1973, As Modified By The Protocol Of 1978 Relating Thereto (Adopted on 15 July 2011), online:

<<https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/Technical%20and%20Operational%20Measures/Resolution%20MEPC.203%2862%29.pdf>>. On the negotiating background, see James Harrison, “Recent Developments and Continuing Challenges in the Regulation of Greenhouse Gas Emissions from International Shipping” (2013) 27 *Ocean Yearbook* 359; Edmund Hughes, “The IMO: Ship-sourced Emissions,

schemes, and declarations, including the Global Methane Pledge and the Powering Past Coal Alliance.⁷³

53. Accordingly, as a strong proponent of taking a cooperative, coordinated, and multilateral approach to addressing climate change, Canada believes that the duty to cooperate should form a central part of States Parties' obligations under Part XII.

IV. Due diligence and States Parties' obligations under Part XII of the Convention

54. In elaborating on the content of States Parties' obligations under Part XII, the Tribunal should rely on its previous determination that the obligations under Part XII are ones of due diligence.⁷⁴ In other words, the Tribunal should consider how these obligations are those of conduct that require States Parties "to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result", but not "to achieve, in each and every case, the result."⁷⁵ At its core, due diligence is about determining the appropriate standard of conduct to assess the risk of harm and take action to minimize or avoid that harm.⁷⁶ A determination of what due diligence requires however, is highly context specific⁷⁷ and includes an examination of the level of risk. As described by the Tribunal in the 2011 *Seabed Disputes Chamber Advisory Opinion* (Seabed Advisory Opinion), "[t]he standard of due diligence has to be more severe for the riskier activities."⁷⁸
55. Of key importance in the environmental context is the prevention of environmental harm, and, accordingly, the principle of prevention is an integral part of due diligence⁷⁹ and "is now part

Climate Change, and Global Ocean Governance" in David Joseph Attard, Rosalie P Balkin & Donald W Greig, eds, *The IMLI Treatise on Global Ocean Governance Volume III: IMO and Global Ocean Governance* (Oxford: Oxford University Press, 2018) at 205. Unlike the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) at art 2(2). There is no explicit mention of the IMO in the Paris Agreement, nonetheless, the IMO Secretariat continues to report to the UNFCCC Subsidiary Body for Scientific and Technical Advice under the standing agenda item on "Emissions from fuel used for international aviation and maritime transport."

⁷³ Climate & Clean Air Coalition Secretariat, *Global Methane Pledge*, online:

<<https://www.ccacoalition.org/en/resources/global-methane-pledge>>; Powering Past Coal Alliance, *Powering Past Coal Alliance Declaration*, online: <<https://poweringpastcoal.org/declaration/>>.

⁷⁴ Seabed Mining Advisory Opinion, *supra* note 27.

⁷⁵ *Ibid.*, at para 110.

⁷⁶ International Law Association [ILA], "ILA Study Group on Due Diligence in International Law: Second Report" (July 2016) at 2, online: <https://www.ila-hq.org/en_GB/documents/draft-study-group-report-johannesburg-2016>.

⁷⁷ See Irini Papanicolopulu, "Due Diligence in the Law of the Sea" in Heike Krieger, Anne Peters & Leonhard Kreuzer, eds, *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020) 147 at 150; Lavanya Rajamani, "Due Diligence in International Climate Change Law", in Heike Krieger, Anne Peters & Leonhard Kreuzer, eds, *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020) 163 at 164.

⁷⁸ Seabed Mining Advisory Opinion, *supra* note 27 at para 117.

⁷⁹ The Tribunal made this pronouncement in Seabed Mining Advisory Opinion, *supra* note 27 at para 131.

of the corpus of international law.”⁸⁰ In *Pulp Mills*, the International Court of Justice (ICJ) clarified that this principle “as a customary rule, has its origins in the due diligence that is required of a State in its territory”⁸¹ and therefore, that States have an obligation:

“to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”⁸²

56. This statement is directly applicable to those areas of the marine environment that are under national jurisdiction, but the broad wording of Article 192 suggests that this principle also applies to the entire marine environment.

57. The Tribunal has previously stated that due diligence obligations in an environmental context requires both the adoption and the enforcement of rules and measures,⁸³ which entails “a certain level of vigilance [...] and the exercise of administrative control.”⁸⁴ The ICJ has further noted that these rules and measures are reinforced by the requirement that they be “in accordance with applicable international agreements” and “in keeping, where relevant, with the guidelines and recommendations of international technical bodies.”⁸⁵

58. As noted by the International Law Association (ILA), States Parties should nonetheless be provided with sufficient flexibility in choosing the most effective measures to discharge their due diligence obligations, while at the same time, respecting their sovereignty and associated rights,⁸⁶ as well as having due regard for other States’ interests.⁸⁷ This position is reflected in Article 194(1), which indicates that States Parties shall take these measures “*using the best practical means at their disposal*” and “*in accordance with their capabilities*.”⁸⁸ It is further reflected in Article 193, which grants States Parties:

“the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”⁸⁹

⁸⁰ Legality of the Threat or Use of Nuclear Weapons, *supra* note 11 at para 23.

⁸¹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, [2010] ICJ Rep 14 at para 101 [Pulp Mills], online: <<https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>>.

⁸² *Ibid.*

⁸³ SCS Arbitration, *supra* note 10 at para 1203(B).

⁸⁴ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, (2015) ITLOS Rep 4 at para 131 [SRFC Advisory Opinion], online: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf>; quoting *Pulp Mills*, *supra* note 81 at para 197.

⁸⁵ *Pulp Mills*, *supra* note 81 at para 196.

⁸⁶ *Supra* note 76.

⁸⁷ SCS Arbitration, *supra* note 10 at para 1197.

⁸⁸ Convention, *supra* note 2, art 194(1).

⁸⁹ *Ibid.*, art 193.

Rather than providing a broad exception, this provision “represents a compromise between the interests of individual States in their economic development and the universal interests in the protection and preservation of the marine environment.”⁹⁰

59. Taking into consideration the above, Canada encourages the Tribunal to find that under Part XII, States Parties have a due diligence obligation to protect and preserve the marine environment in relation to climate change, which includes preventive measures to avoid and reduce pollution of the marine environment from GHGs. In addition, given the significant risks associated with climate change, including acidification, oxygenation, adverse impacts on biodiversity, and exacerbated sea-level rise, Canada believes that the standard of due diligence in relation to marine pollution from climate change should reflect those risks accordingly.

V. Further jurisdictional considerations

60. The Tribunal has found that it has broad jurisdiction over “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”⁹¹ Moreover, as noted in previous sections of this Statement, in certain circumstances, the interpretation of the Convention can be informed by external international norms, such as international agreements and non-binding instruments related to the purpose of the Convention.

61. In the case of climate change, there may be a multitude of international agreements that are relevant for giving effect to the general obligations set out under Part XII. While Canada is of the view that the Tribunal has the jurisdiction to determine the specific climate change related obligations under Part XII, including how they may be informed by the obligations under other treaties, Canada notes that the Tribunal does not have the jurisdiction to determine the specific measures that must be taken under these other treaties. Determinations of the content of the obligations under the UNFCCC and the Paris Agreement for example, would fall outside the scope of the Tribunal.

CHAPTER 3 – CONCLUSION

62. In conclusion, for the reasons outlined in this Statement, Canada respectfully submits that the Tribunal should reach findings that are aligned with the following:

- 1) Anthropogenic emissions of GHGs are captured by the definition of marine pollution under Article 1(1)(4) of the Convention;

⁹⁰ Virginia Commentary, *supra* note 44 at para 193.6(a).

⁹¹ Convention, *supra* note 2, Annex VI, art 21. See also *SRFC Advisory Opinion*, *supra* note 84 at paras 56-58.

- 2) All States Parties have a general obligation under Part XII to protect and preserve the marine environment in relation to the impacts of climate change, including ocean warming, acidification, and sea level rise;
- 3) All States Parties have a general obligation under Part XII to put rules and measures in place to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic GHGs emissions into the atmosphere;
- 4) All States Parties also have obligations to prevent, reduce and control pollution of the marine environment from specific forms of pollution related to climate change, with the most important ones being pollution from land-based sources, and pollution from and through the atmosphere;
- 5) The obligations of States Parties under Part XII are ones of due diligence, which require both the adoption and enforcement of rules and measures, and such rules and measures must take into account “*internationally agreed rules, standards and recommended practices and procedures*,”⁹² especially those from the International Climate Change regime;
- 6) All States Parties have a duty to cooperate in addressing pollution of the marine environment from climate change, which can include mitigation and adaptation efforts, capacity-building and the transfer of technology initiatives, and the further development of international norms;
- 7) The obligations under Part XII are informed by the obligations under specialized international regimes dealing with climate change, and especially those under the International Climate Change regime, but the obligations under Part XII should not create additional obligations that go beyond or conflict with the relevant external obligations; and
- 8) An important indicator of the extent to which States Parties are meeting their general obligation to protect and preserve the marine environment, as well as their specific obligations under Part XII in relation to climate change pollution and the impacts of climate change, is the extent to which they effectively and ambitiously implement relevant international agreements related to climate change.⁹³

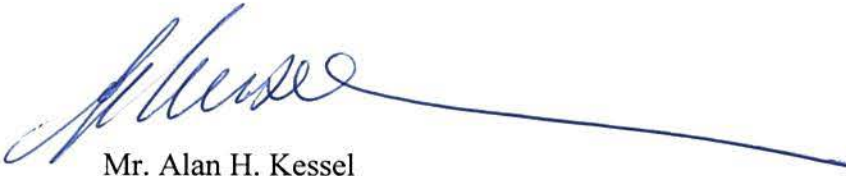
⁹² Convention, *supra* note 2, art 207 and 212.

⁹³ See, for example, compliance with Article 4(1), Article 4(2) and Article 4(3) of the Paris Agreement, *supra* note 52, could be one indicator of State compliance with obligations under Articles 207 and 212.

63. Canada is of the view that the above positions will ensure the preservation of the Convention's overall integrity and overarching objectives, while also ensuring that obligations under other agreements, such as the UNFCCC and the Paris Agreement, are not undermined by imposing a separate set of conflicting or differing climate change related obligations.
64. As a final observation, Canada would like to highlight the role it played during the negotiations of the Convention in ensuring the inclusion of Article 192. In 1972, during a Sea-Bed Committee session, Canada introduced a working paper on the preservation of the marine environment for the purpose, in part, of providing "a general outline of a comprehensive approach to the preservation of the marine environment and the prevention and control of marine pollution."⁹⁴ The paper noted an absence of any treaty provision "explicitly laying down the general obligation of States to preserve the marine environment and to prevent its pollution from all sources" and stressed:
- "[t]he importance of such a general formulation in a general or master treaty on the preservation of the marine environment cannot be overemphasized; it would be the binding element or organic link between the general treaty and particular treaties or national measures dealing with individual aspects of marine pollution, and would help to establish a general commitment to the elaboration of and adherence to such particular treaties. In addition it would provide a new environmentally-oriented basis for the work of such specialized agencies as IMCO [IMO] in this field."⁹⁵
65. While those words were written over 50 years ago, during a time when climate change was not under international consideration, Canada believes that the sentiment of those words remains relevant today and serves as an important reminder of the Convention's role in furthering commitments to protect and preserve our oceans, by supporting and promoting the work in other more specialized international regimes dealing with climate change.
66. As such, addressing the impacts of climate change on our oceans should involve the harmonious and complementary engagement of many different areas of international law, including the law of the sea and the International Climate Change regime.

⁹⁴ Virginia Commentary, *supra* note 44 at para 194.

⁹⁵ *Ibid.*

A handwritten signature in blue ink, appearing to read 'A. Kessel', with a long horizontal flourish extending to the right.

Mr. Alan H. Kessel
Assistant Deputy Minister Legal Affairs and Legal Adviser
Global Affairs Canada
Government of Canada

