

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

(REQUEST FOR ADVISORY OPINION SUBMITTED BY THE TRIBUNAL)

AMICUS CURIAE MEMORIAL OF THE HIGH SEAS ALLIANCE

16 JUNE 2023

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2. *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, Chapter 5
3. BBNJ Draft Agreement A/CONF.232/2023/CRP.2/Rev.2
4. Wright, G., Rochette, J., Gjerde, K., Seeger, I. (2018), The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, IDDRI, Studies N°08/18.

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Introduction

1. This Memorial is submitted by the High Seas Alliance, a coalition of fifty-one non-governmental organizations concerned with protection of areas beyond national jurisdiction, being the high seas and the Area. The objective of the Alliance is to facilitate international cooperation to establish high seas protected areas and to strengthen high seas governance.
2. This Memorial addresses the following question:
*What are the specific obligations of States Parties to the United Nations Convention on the Law of the Sea (UNCLOS) including under Part XII:
(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sealevel rise, and ocean acidification?*
3. This Memorial addresses some specific legal obligations, relevant factual issues and makes submissions for the consideration of the Tribunal.

Legal obligations

4. Under Part XII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), States Parties have specific obligations to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.
5. These obligations include Article 192, which provides that States have the obligation to protect and preserve the marine environment, and Article 194(5), which provides that States must take necessary measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.
6. They also include the precautionary principle or approach, which this Tribunal said in the Seabed Advisory Opinion¹ has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration and which has initiated a trend towards making this approach part of customary international law.
7. Articles 192 and 194 of UNCLOS set forth obligations that apply not only to activities directly undertaken by States, but also apply to ensuring that activities “within their jurisdiction and control do not harm the marine environment.”²

¹ *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), Case. No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, para 135.*

² *In re South China Sea Arbitration (Phil. v. China), PCA Case Repository No. 2013-19, Award of July 12, 2016, (Perm. Ct. Arb. 2016) [hereinafter The South China Sea Arbitration Award], paras. 944-945. At <https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.*

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8. Also crucial are the obligations of cooperation, including in particular the obligation under Article 197 of UNCLOS to “co-operate 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 practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.” The Tribunal has made it clear that the duty of co-operation is a fundamental principle under the Convention and general international law.³
9. The Tribunal is required under Article 293 of UNCLOS to apply not only UNCLOS but also other rules of international law not incompatible with UNCLOS.⁴ That includes provisions of the Convention on Biological Diversity (CBD).⁵
10. Article 22 of the CBD provides that:
 - “1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.
 2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.”
11. Article 5 of the CBD requires each Contracting Party to cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.⁶ Article 8 of the CBD provides for a system of protected areas or areas where special measures need to be taken to conserve biological diversity.
12. There are currently 196 Parties to the CBD,⁷ and 169 Parties to UNCLOS,⁸ constituting the broad participation both Conventions as strong evidence of State practice. Articles 5

³ *The MOX Plant Case (Ireland. v. U.K.)*, Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95, 110 at para. 82 [hereinafter *The MOX Plant Case*], at <https://www.itlos.org/en/main/cases/list-of-cases/case-no-10/>; *Land Reclamation in and Around the Straits of Johor* (Malaysia v. Singapore), Case No. 12, Order of Oct. 8, 2003, 7 ITLOS Rep. 10, 25, para. 92 [hereinafter *Straits of Johor Case*], at <https://www.itlos.org/en/main/cases/list-of-cases/case-no-12/> and *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, Advisory Opinion of 2 April 2015, para. 140.

⁴ See Elisa Morgera, *Far Away, So Close: A Legal Analysis of the Increasing Interactions Between the Convention on Biological Diversity and Climate Change Law*, 2 CLIMATE L. 85, 113–15 (2011) for a discussion of the links between global biodiversity loss and climate change.

⁵ Convention on Biological Diversity 31 ILM 818. Opened for signature 5 June 1992; entered into force 29 December 1993. At <https://www.cbd.int/convention/text/>.

⁶ Article 5. Cooperation

Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

⁷ List of CBD Parties at <https://www.cbd.int/information/parties.shtml>.

⁸ List of UNCLOS Parties at <https://www.cbd.int/information/parties.shtml>.

and 8 of the CBD are entirely consistent with Article 197 of UNCLOS and Article 5 of CBD is entirely consistent with Article 192 of UNCLOS.

Factual and Scientific Matters

13. The dossier included [Chapter 3: Oceans and Coastal Ecosystems \(Executive Summary\)](#). This Memorial supplements the dossier by adding the [entire text](#) of Chapter 3.⁹ On page 383 of Chapter 3 the IPCC states that:

“Marine protected areas (MPAs), as currently implemented, do not confer resilience against warming and heatwaves (medium confidence) and are not expected to provide substantial protection against climate impacts past 2050 (high confidence). However, MPAs can contribute substantially to adaptation and mitigation if they are designed to address climate change, strategically implemented and well governed (high confidence). Habitat restoration limits climate-change-related loss of ecosystem services, including biodiversity, coastal protection, recreational use and tourism (medium confidence), provides mitigation benefits on local to regional scales (e.g., via carbon-storing blue carbon ecosystems) (high confidence) and may safeguard fish-stock production in a warmer climate (limited evidence). Ambitious and swift global mitigation offers more adaptation options and pathways to sustain ecosystems and their services (high confidence).”

14. Box FAQ 3.2 states that “Marine protected areas and no-take zones, in addition to terrestrial protection surrounding vulnerable coastal ecosystems, cannot prevent [marine heat waves] from occurring. But, depending on the location and adherence by people to restrictions on certain activities, the cumulative effect of other stressors on vulnerable ecosystems can be reduced, potentially helping to enhance the rate of recovery of marine life.”
15. The IPCC elaborated these themes and stated that in 2021 only 2.7% of the ocean was in fully or highly protected marine protected areas (MPAs), and only 1.18% of ABNJ (areas beyond national jurisdiction) was protected, mostly due to governance limitations.¹⁰ The authors noted that “There is growing international support for a 30% conservation target for 2030”. The section concludes that “MPAs and other marine spatial-planning tools have great potential to address climate change mitigation and adaptation in ocean and coastal ecosystems, if they are designed and implemented in a

⁹ Cooley, S., D. Schoeman, L. Bopp, P. Boyd, S. Donner, D.Y. Ghebrehiwet, S.-I. Ito, W. Kiessling, P. Martinetto, E. Ojea, M.-F. Racault, B. Rost, and M. Skern-Mauritzen, 2022: Oceans and Coastal Ecosystems and Their Services. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Lösschke, V. Möller, A. Okem, B. Rama (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 379–550, doi:10.1017/9781009325844.005 [hereafter “IPCC Chapter 3”]

¹⁰ IPCC Chapter 3, Pages 481-2, section 3.6.3.2.1 headed “Area-based protection: MPAs for adapting to climate change”.

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coordinated way that takes into account ecosystem vulnerability and responses to projected climate conditions, considers existing and future ecosystem uses and non-climate drivers, and supports effective governance (high confidence).”

16. Since then, Parties to the CBD have agreed the [Kunming-Montreal Global Biodiversity Framework](#) in [Decision 15.4](#),¹¹ CBD/COP/DEC/15/4, which includes Targets including Target 3, which is:

“TARGET 3 Ensure and enable that by 2030 at least 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories, where applicable, and integrated into wider landscapes, seascapes and the ocean, while ensuring that any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognizing and respecting the rights of indigenous peoples and local communities, including over their traditional territories.”

17. This is the best available science from the IPCC and Target 3 is an example of the “international rules, standards and recommended practices and procedures,” adopted on a global basis by co-operation through the CBD Conference of the Parties, as required called for in Article 197 of UNCLOS.
18. Chapter 5 from the IPCC report *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*¹² explains that the ocean is essential for all aspects of human well-being and livelihood. It provides key services like climate regulation, through the energy budget, carbon cycle and nutrient cycle.¹³ It notes that “[e]cosystem-based adaptation is a cost-effective coastal protection tool that can have many co-benefits, including supporting livelihoods, contributing to carbon sequestration and the provision of a range of other valuable ecosystem services (high confidence).”¹⁴ Climate impacts on marine ecosystems affect their ability to provide seafood and raw materials, and to support biodiversity, habitats and other regulating processes.¹⁵ The deep sea is also in need of protection, as most of the deep seafloor ecosystems are susceptible to

¹¹ CBD/COP/DEC/15.4. 19 December 2022. 15/4 Kunming-Montreal Biodiversity Framework.

¹² Bindoff, N.L., W.W.L. Cheung, J.G. Kairo, J. Aristegui, V.A. Guinder, R. Hallberg, N. Hilmi, N. Jiao, M.S. Karim, L. Levin, S. O’Donoghue, S.R. Purca Cuicapusa, B. Rinkevich, T. Suga, A. Tagliabue, and P. Williamson, 2019: Changing Ocean, Marine Ecosystems, and Dependent Communities. In: *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegria, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 447–587. <https://doi.org/10.1017/9781009157964.007>. [Hereafter IPCC Special report on the Ocean and Cryosphere, Chapter 5]. At https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/07_SROCC_Ch05_FINAL.pdf

¹³ IPCC Special report on the Ocean and Cryosphere, Chapter 5. Executive Summary. Page 450.

¹⁴ IPCC Special report on the Ocean and Cryosphere, Chapter 5. Page 454.

¹⁵ IPCC Special report on the Ocean and Cryosphere, Summary for Policymakers 5.4.2.5.

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experience rising temperatures and declining oxygen, pH and POC flux (sinking flux of particulate organic carbon) within the next half century.¹⁶ These are all matters that need to be addressed in the context of States' obligations under Articles 192, 194(2), the precautionary principle/approach and the obligations of co-operation in Articles 197 and elsewhere.

The Draft BBNJ Agreement

19. The 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 (“Draft BBNJ Agreement”) is expected to be adopted on June 19-20, 2023. The Draft Agreement A/CONF.232/2023/CRP.2/Rev.2¹⁷ is attached to this Memorial.
20. The Draft BBNJ Agreement includes specific references to climate change and steps to be taken. It includes in its preamble:

“Recognizing the need to address, in a coherent and cooperative manner, biological diversity loss and degradation of ecosystems of the ocean, due, in particular, to climate change impacts on marine ecosystems, such as warming and ocean deoxygenation, as well as ocean acidification, pollution, including plastic pollution, and unsustainable use.”

21. Its objective, as expressed in Article 2, is “to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.”
22. Article 7, General Principles and Approaches, provides that “[i]n order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches:

“(h) An approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role of the ocean in climate.”

¹⁶ IPCC Special report on the Ocean and Cryosphere, Chapter 5. Page 492.

¹⁷ A/CONF.232/2023/CRP.2/Rev.2 . 3 May 2023. 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. Final text of the 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 as agreed by the open-ended informal working group, established by the Intergovernmental conference on an international legally binding instrument 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 to ensure the uniformity of terminology throughout the text of the draft agreement and harmonize the versions in the six official languages of the United Nations, at its meeting on 3 May 2023.

<https://www.un.org/bbnj/InfoResumed5th>

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23. In Part III Measures Such as Area-Based Management Tools, Including Marine Protected Areas, Article 17 Objectives including to: (a) Conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas; and (c) Protect, preserve, restore and maintain biological diversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution.
24. Appendix II, the types of capacity-building and of the transfer of marine technology includes (a) The sharing of relevant data, information, knowledge and research, in user-friendly formats, including: “(iv) Stressors on the ocean that affect marine biological diversity of areas beyond national jurisdiction, including the adverse effects of climate change, such as warming and ocean deoxygenation, as well as ocean acidification.”
25. The Agreement also addresses environmental impact assessments, a requirement under Article 206¹⁸ of UNCLOS, and recognised by this Tribunal in the *Seabed Advisory Opinion*.¹⁹ The Draft BBNJ Agreement in Part IV operationalizes the provisions of the Convention on environmental impact assessment for areas beyond national jurisdiction by establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties, ensuring that activities covered by Part IV are assessed and conducted to prevent, mitigate and manage significant adverse impacts for the purpose of protecting and preserving the marine environment and support the consideration of cumulative impacts and impacts in areas within national jurisdiction.²⁰ It should be observed that cumulative impacts include the consequences of climate change and ocean acidification.²¹
26. The Draft BBNJ Agreement was finalized on 5 March 2023 by consensus, subject to uniforming terminology and harmonizing the versions in the six official languages of the United Nations.²² This came nearly six years of formal negotiations in the Intergovernmental Conference, since 2015, and nine more years of informal discussions under the auspices of the United Nations General Assembly, since 2006.²³ As such, the signature, ratification or approval or accession and subsequent participation will be in fulfilment of the obligations outlined in this Memorial, including the obligations of co-operation and of the obligation to protect and preserve the marine environment.

¹⁸ Article 206 Assessment of Potential Effects of Activities

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

¹⁹ Seabed Advisory Opinion, para. 145.

²⁰ Draft BBNJ Agreement Article 27(a)-(c).

²¹ Draft BBNJ Agreement Article 1(6).

²² See UNGA resolution 77/62 (29 March 2023).

²³ The *Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity* beyond areas of national jurisdiction, was established by UNGA resolution 59/24 of 17 November 2004, at paragraph 73. At <https://undocs.org/A/RES/59/24>. See Wright, G., Rochette, J., Gjerde, K., Seeger, I. (2018), *The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction*, IDDRI, Studies N°08/18. At <https://www.iucn.org/sites/default/files/2022-10/iddri-study-the-long-and-winding-road.pdf>.

Conclusion

27. In our submission, in light of the above obligations, particularly including the obligation of cooperation, a critical step States can and should take in fulfilment of their obligations is to sign and ratify the Draft BBNJ Agreement as soon as possible. This will enable it to enter into force as early as possible, and will facilitate the objectives of the Draft BBNJ Agreement, including the establishment of ecologically representative and well-connected networks of marine protected areas, and ensuring that environmental impact assessments are carried out according to the Draft BBNJ Agreement. These will help build ecosystem resilience, thus protecting, preserving, restoring and maintaining biological diversity and ecosystems and ecosystem services, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution under Part III of the Draft BBNJ Agreement.
28. Respectfully submitted



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Attachments:

1. IPCC WGII *Sixth Assessment Report*, Chapter 3: Oceans and Coastal Ecosystems
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