

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**

COMMENTS OF THE
UNITED KINGDOM

2 OCTOBER 2023

INTRODUCTION

1. The Tribunal has invited participating States Parties and intergovernmental organisations to make responsive written submissions on a specific and limited question. The relevant background is as follows:
 - a. On 11 September 2023, Judge Kittichaisaree asked COSIS and the International Union for Conservation of Nature ('IUCN') to clarify whether the obligations referenced in passages of their respective written statements were 'obligations of result' or 'obligations of conduct' and to explain why.¹
 - b. On 21 September 2023, IUCN answered that question in the course of its oral submissions ('IUCN's Answer').²
 - c. On 25 September 2023, the last day of the hearing, COSIS filed a written answer to Judge Kittichaisaree's question ('COSIS's Answer'),³ 14 days after it had been asked.
 - d. Later that day, after the close of the hearing, the participating parties were made aware of COSIS's Answer. The Tribunal invited the parties to submit any comments in response to COSIS's and IUCN's Answers within 7 days.⁴
2. The United Kingdom set out its position on the character of the relevant obligations in Part XII of UNCLOS in its oral submissions,⁵ to which the Tribunal is invited to have specific regard in this context. The United Kingdom nonetheless takes this opportunity to respond to the key points made in COSIS's and IUCN's Answers in turn.

RESPONSE TO COSIS'S ANSWER

3. COSIS's **first** key point is that the distinction between 'obligations of conduct' and 'obligations of result' has a "limited pedigree in international law".⁶ This, COSIS suggests, is signified by the decision of the International Law Commission ('ILC') to "abandon it for the purposes of its work on State responsibility".⁷ In this context, COSIS also appears to question the relationship between "due diligence obligations" and "obligations of conduct".⁸
4. The United Kingdom's position is as follows:
 - a. The concepts of 'obligations of conduct' and 'obligations of result' are well-established in international law. As the Seabed Dispute Chamber recognised in

¹ Questions by Individual Judges, 11 September 2023.

² IUCN Oral Submissions, ITLOS/PV.23/C31/16, p. 33 (line 23) – p. 36 (line 17) (Payne).

³ COSIS, 'Case No. 31: Response to Judge Kittichaisaree's Question' (dated 24 September 2023; filed on 25 September 2023).

⁴ Email from Registrar to FCDO Legal Director, 25 September 2023.

⁵ United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p. 35 (line 22) – p. 36 (line 16).

⁶ COSIS's Answer, Section I heading.

⁷ COSIS's Answer, para. 2. See, more generally, paras 3-7 for COSIS's discussion of the ILC material.

⁸ COSIS's Answer, para. 4.

2011, they represent “terminology current in international law”.⁹ This is reflected in their recognition by the ICJ¹⁰ and by the Tribunal.¹¹

- b. The ICJ and the Tribunal have similarly accepted the relationship between ‘obligations of conduct’ and ‘obligations of due diligence’,¹² as COSIS recognises later in its Answer.¹³ For example, in the *Pulp Mills* case the ICJ’s classification of a treaty provision as “an obligation of conduct” led it to the conclusion that “[b]oth Parties are therefore called upon ... to exercise due diligence”.¹⁴ It is notable that, like Articles 194 and 212, the relevant treaty provision in the *Pulp Mills* case obliged the parties to take “necessary measures”.¹⁵
 - c. The fact that the ILC chose not to include draft articles referring to ‘obligations of conduct’ and ‘obligations of result’ in the ILC’s Articles on the State Responsibility for Internationally Wrongful Acts is not a reason for the Tribunal to reject that categorisation for the purposes of its analysis in the present case. In particular, the distinction between these categories of obligations concerns the classification of primary obligations, not the secondary rules of State responsibility. The ILC was concerned with the latter subject. The Tribunal is concerned exclusively with the former.
5. COSIS’s **second** submission is that it is not “practicable” to categorise the specific obligations under Part XII as obligations of conduct or result in the abstract.¹⁶ Instead, the Tribunal should make findings at a higher level of generality, which does not require it to categorise obligations in this way.¹⁷ This is because “[t]he meaning of the UNCLOS provisions lies in what they say and what they necessarily entail”.¹⁸
 6. The United Kingdom agrees that, pursuant to the terms of the questions put before it, the Tribunal’s advisory opinion should do no more than identify the specific obligations in relevant Part XII provisions engaged by anthropogenic greenhouse gas emissions and explain their content and meaning.¹⁹ Any further step would not only be impracticable,

⁹ *Activities in the Area* Advisory Opinion, para. 110; approved in *SRFC* Advisory Opinion, para. 128.

¹⁰ *Pulp Mills* Judgment, paras. 186-187; *Certain Activities* Judgment, Separate Opinion of Judge Donoghue, para. 9.

¹¹ *SRFC* Advisory Opinion, para. 128 (approving *Activities in the Area* Advisory Opinion, para. 110).

¹² *SRFC* Advisory Opinion, para. 128 (approving *Activities in the Area* Advisory Opinion, para. 111).

¹³ COSIS’s Answer, para. 21.

¹⁴ *Pulp Mills* Judgment, para. 187. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, *I.C.J. Reports 2018*, p. 507, para. 87 where the Court addressed the character of an obligation to negotiate, observing that “generally” an obligation to negotiate does not imply an obligation to reach an agreement but that “[w]hen setting forth an obligation to negotiate, the parties may ... establish an ‘obligation to achieve a precise result’”.

¹⁵ *Pulp Mills* Judgment, para. 52 (Article 36 of the 1975 Statute of the River Uruguay provided that “[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it”, emphasis added). See also *Activities in the Area* Advisory Opinion, para. 131 (“The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage ...”, emphasis added).

¹⁶ COSIS’s Answer, para. 17. See further Section II heading and paras 18-19.

¹⁷ COSIS’s Answer, para. 20. For example, “the release of anthropogenic greenhouse gases amounts to pollution under Article 1(1)(4) of the Convention and is in principle subject to Part XII”.

¹⁸ COSIS’s Answer, para. 20.

¹⁹ United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p. 29 (line 42) – p. 30 (line 6).

but it would be likely to require the Tribunal to engage with matters beyond the scope of the request.²⁰

7. However, the United Kingdom disagrees with any suggestion that the classification of those provisions as obligations of conduct or result can be simply dismissed as unhelpful or unwarranted. In the present case, classification would assist the Tribunal in determining and explaining the meaning to be attributed to the very general obligations in Part XII. The Tribunal's recognition of the role played by this classification exercise is demonstrated by the fact that it has engaged in that exercise in other advisory proceedings.²¹
8. COSIS's **third** key point is that "the text of UNCLOS in Part XII, and in particular Articles 192 and 194, entails but also goes beyond due diligence obligations".²²
9. The United Kingdom agrees that the relevant Part XII provisions are governed by a standard of due diligence, as COSIS expressly acknowledged in its written²³ and oral submissions.²⁴ It does not agree, however, that they "also go beyond due diligence obligations". First of all, this is inconsistent with the Seabed Disputes Chamber's observation that Article 194(2) is governed by the due diligence standard.²⁵ More fundamentally, COSIS's submission appears to misapprehend the role of "due diligence" in this context. As the United Kingdom explained in its Written Statement,²⁶ due diligence is a standard against which State conduct can be assessed in many areas of international law. It is not itself an obligation. COSIS's attempt to identify "due diligence obligations" and obligations that "go beyond such obligations" within individual Part XII provisions (such as Article 194(1))²⁷ misapprehends this character and function of the concept of due diligence. Furthermore, COSIS's attempt to identify applicable subsidiary obligations within the relevant provisions is also inconsistent with its own recognition that the Tribunal's task is to recognise the relevance of Part XII provisions at a high level of generality.²⁸ Moreover, seeking to apply the due diligence standard in a limited and fragmented manner within individual Part XII provisions is not only unsupported by the text of those provisions, but would be unworkable in practice.

²⁰ United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p. 32 (lines 14-22).

²¹ *Activities in the Area* Advisory Opinion; *SRFC* Advisory Opinion.

²² COSIS's Answer, para. 27. See also paras. 21, 23, 25 and 26.

²³ COSIS Written Statement, Chapter 7 and Chapter 8 (III)(B).

²⁴ See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 6 (lines 1-3) (Brunnée) ("Part XII of UNCLOS is dedicated to the protection and preservation of the marine environment. Prior jurisprudence has confirmed that due diligence provides the standard of conduct in this context").

²⁵ *Activities in the Area* Advisory Opinion, para. 113.

²⁶ United Kingdom Written Statement, paras. 62 and 64. See further *Certain Activities* Judgment, Separate Opinion of Judge *ad hoc* Dugard, para. 7 ("The duty of due diligence is therefore the standard of conduct required to implement the principle of prevention") and para. 9 ("Due diligence is the standard of conduct that the State must show at all times to prevent significant transboundary harm").

²⁷ COSIS's Answer, para. 25.

²⁸ COSIS's Answer, para. 20; COSIS's slides setting out their requested dispositive part for the Tribunal's opinion; see further United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p. 29 (line 42) – p. 30 (line 6).

RESPONSE TO IUCN'S ANSWER

10. The IUCN's broad submission is that obligations concerning a State's own activities are 'obligations of result', whereas obligations concerning the activities of a non-State actor are 'obligations of conduct'. It relies on the *Activities in the Area* Advisory Opinion as the source of this distinction²⁹ and specifically identifies Articles 194(1), 197 and 204-206 and the provisions in Section V as 'obligations of result'.³⁰
11. The Seabed Disputes Chamber made no such finding. Nor does it follow from its recognition³¹ in the context of that case that States held both "direct obligations" and obligations concerning sponsored contractors' activities that the former category of obligations are, by definition, 'obligations of result', whereas the latter are 'obligations of conduct'. Such a conclusion is also inconsistent with international law, which does not limit the application of the due diligence standard to circumstances in which a State is accountable for the conduct of others. By way of example – and contrary to the IUCN's submissions on the character of Article 206³² – the ICJ has recognised that the obligation to undertake an environmental impact assessment is a facet of a State's obligation to exercise due diligence in preventing significant transboundary environmental harm.³³

CONCLUSION

12. For the reasons set out above and in the United Kingdom's written and oral submissions, the United Kingdom invites the Tribunal to endorse the express position of the vast majority of participating States and intergovernmental organisations that the relevant provisions of Part XII (in the United Kingdom's view, Articles 192, 194, 197-207, 212-213 and 222) are governed by a standard of due diligence and are thus obligations of conduct.³⁴

²⁹ IUCN Oral Submissions, ITLOS/PV.23/C31/16, p. 34 (lines 16-20) (Payne) ("the State has obligations that it must perform, and it also has obligations with regard to the sponsored contractor. In this sense, we understand the Seabed Advisory Opinion to indicate that the former obligations are generally obligations of result, and the obligations with regard to the contractor are obligations of conduct"). See further IUCN Oral Submissions, ITLOS/PV.23/C31/16, p. 33 (lines 34-38) (Payne).

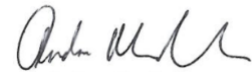
³⁰ IUCN Oral Submissions, ITLOS/PV.23/C31/16, p. 35 (line 1) – p. 36 (line 2) (Payne).

³¹ *Activities in the Area* Advisory Opinion, paras. 121 and 177.

³² IUCN Oral Submissions, ITLOS/PV.23/C31/16, p. 34 (lines 6-11) (Payne).

³³ *Certain Activities* Judgment, paras. 104, 153, 168 and 228. See further United Kingdom Written Statement, para. 70; Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 34 (lines 40-42) (Sands) ("State Parties must act in accordance with a standard of due diligence, including in relation to prior environmental assessment"); Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 36 (lines 21-25) (Wordsworth) ("due diligence in this context naturally requires monitoring and assessment of risk, ... and Section 4 of Part XII gives concrete form to this").

³⁴ See, e.g., in order of presentation of oral submissions: COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 10 (lines 28-29) ("the obligations contained in articles 192 and 194(2) have been found to constitute obligations of due diligence") (Brunnée); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 7 (lines 36-37) (Donaghue) ("article 194(1) is ... an obligation of conduct rather than result"), p. 7 (lines 43-44) (Donaghue) ("articles 207(1) and 212(1) ... plainly create obligations of conduct rather than result"), p. 11 (lines 30-32) (Donaghue) ("article 194(2) imposes an obligation of conduct, compliance with which is assessed against a standard of due diligence") and p. 13 (lines 1-4) (Parlett) ("a duty to cooperate [e.g., in Art. 197] is, of its nature, one of conduct rather than result"); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 30 (lines 14-18) (Mohammed Algethami) ("[t]he obligations in Part XII are obligations of due diligence. ... They are obligations of conduct rather than obligations to achieve a particular result."); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 7 (lines 15-16) (Herrera) ("[art. 194] is an obligation of conduct and 'due diligence' and not of result") and p. 11 (lines 1-2) (Herrera)



Andrew Murdoch
Legal Director
Foreign, Commonwealth and Development Office

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(“[t]here is also an obligation on States to exercise due diligence to prevent their nationals from violating article 192”); Chile Oral Submissions, ITLOS/PV.23/C31/7, p. 9 (lines 43-49) (Fuentes Torrijo) (“it is usual to describe the obligations contained in articles 192 and 194 of the Convention as due diligence obligations. This means that States have an obligation of conduct”); Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 13 (lines 44-46) (Crosato Neumann) (“you have heard this week that the obligations under articles 192 and 194 are due diligence obligations. Guatemala agrees. This means that they require certain conduct, but not a particular result”); India Oral Submissions, ITLOS/PV.23/C31/8, p. 17 (lines 10-12) (Rangreji) (“[art. 192], as has been widely recognized, involves an obligation of conduct as opposed to an obligation of result. It is a due diligence/best endeavour obligation...”); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 13 (lines 1-5) (Paparinskis) (“the key rules contained in Part XII of relevance to this case are ... ‘due diligence obligations’. The relevant rules are obligations of conduct and not result”); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 12 (lines 10-13) (Skerten) (“[a]rticle 192, like article 194 of the Convention, reflects States’ obligation under customary international law to act with due diligence. ... The Tribunal has previously described this kind of due diligence obligation as an obligation ‘to deploy adequate means, to exercise best possible efforts, to do the utmost’”); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 18 (lines 5-8) (Hwang) (“articles 192 and 194 give rise to an obligation of due diligence. As clarified by this Tribunal, and in the case law of the International Court of Justice and arbitral tribunals, this is an obligation of conduct to exercise best possible efforts and deploy adequate measures, not an obligation to ensure a certain result”); China Oral Submissions, ITLOS/PV.23/C31/10, p. 29 (line 25) (Ma) (“[art. 192] is an obligation of conduct, rather than an obligation of result”); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 26 (lines 37-39) (Motzfeldt Kravik) (“[arts. 192 and 194] are general obligations of a due diligence nature”); Philippines Oral Submissions, ITLOS/PV.23/C31/12, p. 11 (lines 19-39) (Ponce) (“[arts. 207, 212, 213 and 222] serve to operationalize the obligation of due diligence. ... [T]he same obligation of due diligence could be derived from ... articles 217, 218 and 220”); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 27 (lines 11-16) (Tladi) (“the obligation of due diligence, reflected in both articles 192 and 192 ... requires States ‘to deploy adequate means, to exercise best efforts, to do the utmost’”) and p. 32 (lines 35-36) (Jalloh) (“[t]he duty to cooperate is also implicit in the due diligence obligation”); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 2 (lines 25-26) (Yee) (“[arts 192 and 194] are both due diligence obligations. They are obligations of conduct rather than result”), p. 11 (lines 13-14) (“article 197 which imposes a duty of cooperation ... is an obligation of conduct”); Timor-Leste Oral Submissions, ITLOS/PV.23/C31/14, p. 9 (lines 5-8) (Middleton) (“[the obligation in art. 192] is of a due diligence character”), p. 15 (lines 30-33) (Stoeger) (“the obligation in article 194 is an obligation of conduct, not result. The conduct in question requires the exercise of due diligence ..., which similarly applies to the obligation in article 194. ... [A]n obligation ‘of conduct’, due diligence cannot be measured by achieving a specific outcome...”); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 26 (lines 25-28) (Bouquet) (“the obligations of Part XII of UNCLOS, as well as those stemming from the other relevant instruments such as the UNFCCC and Paris Agreement, ... are, by their nature, obligations of conduct”); Viet Nam Oral Submissions, ITLOS/PV.23/C31/14, p. 44 (line 9) (Hanh) (“[t]his ‘due diligence’ obligation [in art. 194] is an obligation of conduct”); Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 9 (lines 39-49) (Coppens) (“due diligence obligation under article 194”) and p. 12 (line 3) (Connolly) (“due diligence aspects of their obligations under article 192”); African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 13 (lines 13-14) (Lockhart) (“Article 194 establishes a due diligence obligation, which varies with the circumstances”) and p. 15 (lines 27-29) (Raju) (“Article 192 requires ... conduct directed towards both mitigation and adaptation”); France Oral Submissions, ITLOS/PV.23/C31/18, p. 10 (lines 36-38) – p. 11 (lines 1-4) (Forteau) (“there is no doubt in our minds – and this is true of the majority of those taking part in these proceedings – that the substantive obligations under Part XII of the Convention (the situation is different for procedural obligations) are obligations of conduct”); and Kingdom of the Netherlands Oral Submissions, ITLOS/PV.23/C31/18, p. 24 (line 44) (Lefeber) (“[b]oth articles 192 and 194 of the Convention are obligations of conduct”).