

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Tuesday, 19 September 2023, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Albert J. Hoffmann presiding

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

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

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|-----------------|----------------|----------------------------|
| <i>Present:</i> | President | Albert J. Hoffmann |
| | Vice-President | Tomas Heidar |
| | Judges | José Luís Jesus |
| | | Stanislaw Pawlak |
| | | Shunji Yanai |
| | | James L. Kateka |
| | | Boualem Bouguetaia |
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| | | Ida Caracciolo |
| | | Maurice K. Kamga |
| | Registrar | Ximena Hinrichs Oyarce |

List of delegations:

STATES PARTIES

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1 **THE PRESIDENT:** Good morning. Today the Tribunal will continue the hearing in the
2 *Request for an Advisory Opinion submitted by the Commission of Small Island*
3 *States on Climate Change and International Law.* This morning we will hear oral
4 statements from the Philippines and Sierra Leone.

5
6 I now give the floor to the representative of the Philippines, Mr Sorreta, to make his
7 statement. You have the floor, Sir.

8
9 **MR SORRETA:** Mr President, distinguished members of the Tribunal, good morning.
10 It is an honour and an imperative for the Republic of the Philippines to appear before
11 the Tribunal and be part of these proceedings – proceedings that could prove to be
12 the crucial turning point in collective efforts to turn the tide on climate change.

13
14 I am Carlos D. Sorreta, Philippine Permanent Representative to the United Nations
15 in Geneva and Representative for these proceedings. I am joined by my Co-
16 Representatives, Ambassador Maria Angela A. Ponce, Assistant Secretary for
17 Maritime and Ocean Affairs, Office of the Department of Foreign Affairs, and
18 Assistant Solicitor General Gilbert U. Medrano of the Office of the Solicitor General.

19
20 We will speak for approximately 60 minutes. I will speak first, by way of introduction,
21 followed by Assistant Solicitor General Medrano, who will touch on relevant
22 Philippine laws and discuss jurisdiction, admissibility and applicable law.
23 Ambassador Ponce will then expound on the Philippines' response to question (a),
24 after which, I will address question (b) and conclude our presentation.

25
26 Mr President, from the time that COSIS filed the request for an advisory opinion last
27 December to today's hearing, nine devastating typhoons have battered my country.
28 Lives have been lost, people hurt and displaced, cities and towns flooded, and large
29 areas of farmlands inundated. The trajectory and magnitude of our typhoons have
30 become even more erratic and even less predictable.

31
32 Between 2011 and 2021, typhoons caused 12,000 deaths, countless injuries and
33 US\$ 12 billion worth of loss to my country. The worst of these was super Typhoon
34 Haiyan in 2013, which resulted in over 6,000 fatalities and remains among the top 10
35 deadliest in all of history.¹

36
37 When not battered by typhoons, we are hit by periods of drought caused by El Niño,
38 a weather phenomenon which is exacerbated by climate change.² Farms dry up,
39 coastal fishing areas end up empty and people go hungry.³

40
41 The Philippines ranks first among countries most at risk to disasters and extreme
42 natural events such as tsunamis, floods and drought.⁴ Such vulnerability is evident in

¹ Thelwell, K. (2019). *A look at the top 10 worst typhoons.* *The Borgen Project.*
<https://borgenproject.org/top-10-worst-typhoons/>

² Kiest, K. (2023). *How will climate change change El Niño and La Niña?* NOAA Research.
<https://research.noaa.gov/2020/11/09/new-research-volume-explores-future-of-enso-under-influence-of-climate-change/>

³ *Impact of El Niño on agriculture, fisheries and forestry - World* (15 November 1997). ReliefWeb.
<https://reliefweb.int/report/world/impact-el-niper-centC3per-centB1o-agriculture-fisheries-and-forestry>

⁴ *The World Risk Report* (19 October 2022). WeltRisikoBericht - WeltRisikoIndex. WeltRisikoBericht.
<https://weltrisikobericht.de/weltrisikobericht-2022-e/>.

1 our coastal and marine ecosystems, which are now deteriorating at alarming rates.
2 Studies and reports⁵ reveal coastal erosion, bleaching of coral reefs, loss of sea
3 grass and conversion of mangrove areas which, in turn, affect marine resources and
4 the livelihood of our coastal communities.

5
6 As an archipelagic State comprised mostly of small islands and one of the most
7 vulnerable to, and most affected by climate change, the Philippines stands in
8 solidarity with COSIS and all the small island States that comprise it, and outside of
9 its membership, and support their initiative to request the Tribunal's advisory opinion.

10
11 Fundamental to our position is that, while UNCLOS was not designed as a
12 mechanism for regulating climate change, its mandate is broad enough to consider
13 the connection between climate and the oceans. This 40-year-old framework
14 agreement must be interpreted in light of changing global circumstances and
15 changing laws.⁶ It is, among others, a strong, innovative and comprehensive global
16 environmental treaty governing over two thirds of the planet.⁷ It must be interpreted
17 and applied with subsequent developments in international law and policy in mind.⁸

18
19 At this point, Mr President, and with the Tribunal's permission, may I ask my Co-
20 Representative, Assistant Solicitor General Gilbert Medrano, to continue by placing
21 in context how Philippine law has been protecting the environment and contributing
22 to the fight against climate change as well as discuss the issues of jurisdiction,
23 admissibility and applicable law.

24
25 **MR PRESIDENT:** Thank you, Mr Sorreta. I now give the floor to Mr Medrano to
26 make his statement. You have the floor, Sir.

27
28 **MR MEDRANO:** Mr President, distinguished members of the Tribunal, good
29 morning.

30
31 When President Ferdinand R. Marcos, Jr. addressed the United Nations General
32 Assembly last year, he stressed that "climate change is the greatest threat affecting
33 our nations and peoples." Our participation today emphasizes how the Philippines

⁵ Villarin, J. T., Algo, J. L., Cinco, T. A., Cruz, F. T., de Guzman, R. G., Hilario, F. D., Narisma, G. T., Ortiz, A. M., Siringan, F. P., Tibig, L. V. (2016). *2016 Philippine Climate Change Assessment (PhilCCA): The Physical Science Basis*. The Oscar M. Lopez Center for Climate Change Adaptation and Disaster Risk Management Foundation Inc. and Climate Change Commission; Cruz, R. V. O., Aliño, P. M., Cabrera O. C., David, C. P. C., David, L. T., Lansigan, F. P., Lasco, R. D., Licuanan, W. R. Y., Lorenzo, F. M., Mamauag, S. S., Peñaflor, E. L., Perez, R. T., Pulhin, J. M., Rollon, R. N., Samson, M. S., Siringan, F. P., Tibig, L. V., Uy, N. M., Villanoy, C. L. (2017). *2017 Philippine Climate Change Assessment: Impacts, Vulnerabilities and Adaptation*. The Oscar M. Lopez Center for Climate Change Adaptation and Disaster Risk Management Foundation, Inc. and Climate Change Commission.

⁶ Ellycia Harrould-Kolieb, Margaret Youn (24 July 2023). *Could the law of the sea be used to protect small island states from climate change? The Conversation*. <https://theconversation.com/could-the-law-of-the-sea-be-used-to-protect-small-island-states-from-climate-change-208842>.

⁷ John R. Stevenson and Bernard H. Oxman (1994). "The Future of the United Nations Convention on the Law of the Sea", 88 *Am. J. Int'l. Law* 488

⁸ Alan Boyle (2020). *Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime, in The Law of the Sea and Climate Change: Solutions and Constraints*, edited by Elise Johansen, et al., Cambridge University Press.

1 considers these advisory proceedings and the central role the Tribunal plays in
2 addressing this existential threat in the Anthropocene epoch.

3
4 Before I proceed, allow me first to state the context in which the Philippines has been
5 protecting the environment through our national laws, which shape and inform our
6 position in these advisory proceedings.

7
8 The protection and advancement of the right to a balanced and healthful ecology is a
9 fundamental right enshrined in Section 16, article II, of our Constitution. The highest
10 court of our land, our Supreme Court, interpreted this provision in the landmark case
11 of *Oposa v. Factoran*,¹ where it held that the right to a balanced and healthful
12 ecology need not be written in our Constitution, for it is assumed – like other civil and
13 political rights guaranteed in the Bill of Rights – to exist from the inception of
14 humankind, and it is an issue of transcendental importance. Such right carries with it
15 the correlative duty to refrain from impairing the environment.

16
17 Further, we have in our jurisdiction the concept of intergenerational responsibility
18 which affords legal standing to sue for the enforcement of environmental rights in
19 representation of future generations.

20
21 As a party to the United Nations Framework Convention on Climate Change (or the
22 UNFCCC), the Philippines adheres to the Convention’s ultimate objective, which is
23 the stabilization of greenhouse gas concentrations in the atmosphere at a level that
24 would prevent dangerous anthropogenic interference with the climate system, to
25 ensure food security and sustainable development. This objective is enshrined in our
26 Climate Change Act.²

27
28 We have several other domestic laws on marine environmental protection that
29 address marine pollution³ and toxic substances and hazardous wastes,⁴ establish an
30 environmental policy⁵ and institutionalize a system of environmental impact
31 assessment (or EIA) for marine protected areas.⁶ Non-compliance with the
32 requirement of EIA has been ruled by our Supreme Court as a serious statutory
33 violation.⁷

34
35 The Philippines has also led in climate legislation with laws to reduce black carbon,⁸
36 address wastewater pollution,⁹ promote clean, sustainable energy,¹⁰ strengthen

¹ G.R. No. 101083, 30 July 1993.

² Republic Act No. 9729 or the Climate Change Act (23 October 2009).

³ Presidential Decree No. 979 or the Marine Pollution Decree (18 August 1976).

⁴ Republic Act No. 6969 or the Toxic Substances and Hazardous and Nuclear Wastes Control Act (26 October 1990).

⁵ Presidential Decree No. 1151 or the Philippine Environment Policy (6 June 1979).

⁶ Republic Act No. 7586 or the National Integrated Protected Areas System Act (1 June 1992).

⁷ *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes*, G.R. No. 180771, 21 April 2015.

⁸ Republic Act No. 8749 or the Clean Air Act (23 June 1999).

⁹ Republic Act No. 9275 or The Clean Water Act (22 March 2004).

¹⁰ Republic Act No. 9513 or the Renewable Energy Act (16 December 2008).

1 climate governance,¹¹ finance local adaptation,¹² transition to a green economy¹³
2 and, more recently, pursue effective and judicious use of energy.¹⁴

3
4 Beyond the statutes, the Philippine Supreme Court likewise promulgated rules
5 concerning environmental cases, that is, The Rules of Procedure in Environmental
6 Cases,¹⁵ which aim, *inter alia*, to protect and advance the constitutional right of the
7 people to a balanced and healthful ecology through a special remedy called *Writ of*
8 *Kalikasan*.

9
10 All the foregoing demonstrates the Philippines' serious efforts and particular attention
11 to marine environmental protection as an archipelagic and a developing State. These
12 are our contributions to making marine environmental protection a global norm.

13
14 Mr President, I will now briefly tackle the issue of jurisdiction and admissibility.

15
16 The Tribunal's advisory jurisdiction, outside of the competence of the Seabed
17 Disputes Chamber, is settled in the *Sub-Regional Fisheries Commission Advisory*
18 *Opinion*. Here, the Tribunal pronounced that its advisory jurisdiction derives from
19 article 21 of its Statute (or Annex VI of UNCLOS), read together with article 138 of its
20 Rules.¹⁶ This is now set in stone, and for the Philippines there is no reason to depart
21 from the said ruling.

22
23 Having satisfied of its competence in the said case, the Tribunal further indicated the
24 prerequisites for its advisory jurisdiction, based on article 138 of its Rules, namely:
25 first, an international agreement related to the purposes of the Convention that
26 specifically provides for the submission to the Tribunal of a request for an advisory
27 opinion; second, the request must be transmitted to the Tribunal by a body
28 authorized by or in accordance with the agreement mentioned above; and, third,
29 such an opinion may be given on "a legal question".

30
31 It is the Philippines' position that COSIS' request satisfies the prerequisites for the
32 Tribunal to assume advisory jurisdiction. The *Agreement for the Establishment of the*
33 *Commission of Small Island States on Climate Change and International Law*¹⁷ is an
34 international agreement between and among small island States whose mandate is
35 related to the purposes of UNCLOS, in particular, the protection and preservation of
36 the marine environment.

37
38 Moreover, article 2(2) of the said Agreement empowers COSIS to request ITLOS
39 advisory opinions "on any legal question within the scope" of UNCLOS. Equally
40 important, the questions posed by COSIS are legal in nature, as they require the
41 Tribunal to interpret specific provisions of UNCLOS without implicating any dispute
42 between or among States Parties.

¹¹ Republic Act No. 9729 or the Climate Change Act (23 October 2009).

¹² Republic Act No. 10174 or the People's Survival Fund Act (16 August 2012).

¹³ Republic Act No. 10771 or the Green Jobs Act (29 April 2016).

¹⁴ Republic Act No. 11285 or the Energy Efficiency and Conservation Act (12 April 2019).

¹⁵ A.M. No. 09-6-8-SC (13 April 2010).

¹⁶ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, ITLOS Reports 2015, p. 22, para. 58.

¹⁷ *Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law*, U.N. Reg. 56940 (31 October 2021).

1 On the matter of admissibility, it would suffice for our presentation to state the
2 jurisprudence of the International Court of Justice (ICJ) in the *Legality of the Threat*
3 *or Use of Nuclear Weapons*, whereby the Court said “[i]t is well-settled that a request
4 for an advisory opinion should not, in principle, be refused except for ‘compelling
5 reasons.’”¹⁸ The Philippines does not see any compelling reason for the Tribunal to
6 refuse its advisory jurisdiction; rather, what exists are compelling reasons for the
7 Tribunal to exercise its jurisdiction and carry on with its advisory competence.

8
9 Mr President, I will now lay down the foundation of our analysis by articulating the
10 applicable laws that are pertinent to answering the questions before the Tribunal.

11
12 Article 23 of the Tribunal’s Statute states that “[t]he Tribunal shall decide all disputes
13 and applications in accordance with article 293” of UNCLOS, with the understanding
14 that the word “applications” covers requests for an advisory opinion. Article 293(1)
15 states that “[a] court or tribunal having jurisdiction under this Section shall apply this
16 Convention and other rules of international law not incompatible with this
17 Convention.” By the strength of these two provisions alone, it is clear that UNCLOS
18 allows cross-reference with other rules or sources of international law as long as
19 they are compatible with it.

20
21 Part XII of UNCLOS on the *Protection and Preservation of the Marine Environment*,
22 in particular Section 11, article 237, states the “provisions of this Part are without
23 prejudice to the specific obligations assumed by States under special conventions
24 and agreements” relating to the protection and preservation of the marine
25 environment that were previously concluded or which may be concluded “in
26 furtherance of the general principles set forth” by UNCLOS.

27
28 Likewise, “specific obligations assumed by States under special conventions, with
29 respect to the protection and preservation of the marine environment, should be
30 carried out in a manner consistent with the general principles and objectives of the
31 Convention.” In other words, UNCLOS explicitly recognizes and advances its
32 synergy with other related international instruments.

33
34 We are likewise reminded of the rules on treaty interpretation under article 31(3)(c)
35 of the Vienna Convention on the Law of Treaties (VCLT), which takes into account,
36 together with the context, “[a]ny relevant rules of international law applicable in the
37 relations between the parties.”

38
39 This interpretative approach was employed in the *South China Sea Arbitration*,¹⁹
40 particularly in the Award on Jurisdiction and Admissibility, whereby the arbitral
41 tribunal considered relevant provisions of the Convention on Biological Diversity
42 (CBD) “for the purposes of interpreting the content and standard of articles 192 and
43 194” of UNCLOS, relying on the strength of article 293(1) of UNCLOS and
44 article 31(3) of the VCLT.²⁰ Likewise, in the Award on Merits, the arbitral tribunal

¹⁸ *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996*, p. 235, para. 14.

¹⁹ *In the matter of the South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China*, UNCLOS Annex VII Arbitral Tribunal, PCA Case N° 2013-19, 29 October 2015.

²⁰ *Ibid.*, Award on Jurisdiction and Admissibility, p. 69, para. 176.

1 considered the Convention on International Trade in Endangered Species of Wild
2 Fauna and Flora (CITES) as forming “part of the general corpus of international law
3 that informs the content of articles 192 and 194(5)” of UNCLOS.²¹
4

5 In the same vein, in interpreting the specific provisions of UNCLOS that are
6 implicated in these advisory proceedings, the Philippines will make reference to
7 related conventions and rules of international law to arrive at a holistic position that
8 extols the synergy which the UNCLOS invites with the relevant corpus of
9 international law.

10
11 At this point, Mr President, with the Tribunal’s permission, allow me to turn over the
12 floor to my Co-Representative, Ambassador Maria Angela A. Ponce, to continue the
13 Philippines’ oral statement. Thank you.

14
15 **THE PRESIDENT:** Thank you, Mr Medrano. I now give the floor to Ms Ponce to
16 make her statement. You have the floor, Madam.

17
18 **MS PONCE:** Mr President, distinguished members of the Tribunal, good morning.
19 I will discuss the Philippines’ position on the first question; that is, what are the
20 specific obligations of States Parties to the UNCLOS, including under Part XII “to
21 prevent, reduce and control pollution of the marine environment in relation to the
22 deleterious effects that result or are likely to result from climate change, including
23 through ocean warming and sea-level rise, and ocean acidification, which are
24 caused by anthropogenic greenhouse gas emissions into the atmosphere?”
25

26 Article 1(4) distills the elements of what constitutes “pollution of the marine
27 environment.” First, is its nature: it is a substance or energy. Second, is its source: it
28 is “anthropogenic” or introduced by man, directly or indirectly, into the marine
29 environment. Third, is the result: it results or is likely to result in deleterious effects –
30 of which an indicative list is provided – such as harm to living resources and marine
31 life, hazards to human health, hindrance to marine activities, including fishing and
32 legitimate uses of the sea, impairment of quality for use of sea water and reduction
33 of amenities.
34

35 The Philippines submits that greenhouse gas emissions fulfil these elements and
36 therefore qualify as “pollution of the marine environment”.
37

38 Mr President, the science behind climate change and the effects of greenhouse gas
39 emissions on the marine environment is unassailable.
40

41 The *Sixth Assessment Report of the Intergovernmental Panel on Climate Change*
42 (AR6) confirms that “human activities, principally through emissions of greenhouse
43 gases, have unequivocally caused global warming”. The IPCC further stresses: “It is
44 unequivocal that human influence has warmed the atmosphere, ocean and land.
45 Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere
46 have occurred”.¹

²¹ *Ibid.*, Award on Merits, 12 July 2016, p. 380, para. 956.

¹ IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team,

1 The IPCC's Working Group II contribution to the AR6 – Chapter 3 on *Oceans and*
2 *Coastal Ecosystems and their Services* – provides scientific evidence that climate
3 change is affecting marine ecosystems through rising sea temperatures, ocean
4 acidification and sea-level rise.²

5
6 Greenhouse gases, such as carbon dioxide, are both substance and energy that
7 heat up the oceans. It is well-established that oceans are sinks and reservoirs of
8 greenhouse gases. They have taken up 20-30 per cent of total anthropogenic carbon
9 dioxide emissions since the 1980s.³ The global ocean is centrally involved in
10 sequestering anthropogenic atmospheric carbon dioxide and recycling many
11 elements, and it regulates the global climate system.⁴

12
13 The impacts of greenhouse gases on oceans include ocean warming, ocean
14 acidification and sea-level rise, which, in turn, cause harmful effects to marine life,
15 human health and marine activities, such as fishing, among others.

16
17 Ocean warming causes migration of certain fish species, and kills corals, adversely
18 affecting other marine resources. According to the 2016 and 2017 Philippine Climate
19 Change Assessment Reports, “the highest positive anomaly occurred in 1998, during
20 one of the most significant El Niño events in the equatorial Pacific which caused
21 widespread drought in the Philippines”.⁵ Previously, in 1998-1999, the first massive
22 coral bleaching was observed in the country. “It was noted that coral bleaching was
23 correlated with abnormally high sea surface temperature.”⁶

24
25 Currently, moderate El Niño is present in the tropical Pacific, including in the
26 Philippines, and is expected to strengthen in the coming months, until the first
27 quarter of 2024. The Philippines' agriculture sector will be most likely affected by the
28 limited water supply, decreased agricultural productivity, fish kills and coral
29 bleaching.

30
31 Ocean acidification, as a result of higher carbon dioxide in the atmosphere, disrupts
32 carbonate chemistry, making it more difficult for marine organisms to build shells and

H. Lee and J. Romero (eds.]. IPCC, Geneva, Switzerland, 184 pp. doi: 10.59327/IPCC/AR6-9789291691647.

² IPCC, 2022: *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. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 3056 pp. doi:10.1017/9781009325844.

³ IPCC, 2019: *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. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–35. <https://doi.org/10.1017/9781009157964.001>.

⁴ IPCC, 2022: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 385.

⁵ Villarín, J. T., et. al. (2016). *2016 Philippine Climate Change Assessment (PhilCCA): The Physical Science Basis*, p. 30.

⁶ Cruz, R. V. O., et. al. (2017). *2017 Philippine Climate Change Assessment: Impacts, Vulnerabilities and Adaptation*, p. 23.

1 structures. This could slow down their overall growth and reproduction, and thus
2 reduce abundance. It could also suppress reef formation and production.⁷

3
4 Sea-level rise, on the other hand, could alter river flows and, in turn, change the
5 distribution of salinity and freshwater in mangrove areas, eventually reducing their
6 diversity and zonation. As sea levels rise, mangroves migrate inland to agricultural
7 areas.⁸

8
9 In addition, the number and severity of typhoons will likely cause more structural
10 damage to reef and sea grass systems due to increased tidal activities. Intense
11 rainfall likewise causes inundation of nesting grounds of various marine species and
12 could potentially increase fungal pathogen loads that leads to their mortality.⁹

13
14 Mr President, I will now discuss the specific provisions under Part XII that are
15 relevant to answering the first question, and these are namely:

16
17 Under Section 1, General Provisions: article 194 on measures to prevent, reduce
18 and control pollution of the marine environment; article 195 on the duty not to
19 transfer damage or hazards or transform one type of pollution into another; and
20 article 196 on the use of technologies or introduction of alien or new species.

21
22 Under Section 5, International Rules and National Legislation to Prevent, Reduce
23 and Control Pollution of the Marine Environment, we have: article 207 on pollution
24 from land-based sources; and article 212 on pollution from or through the
25 atmosphere.

26
27 And under Section 6, Enforcement, we have: article 213 on enforcement with respect
28 to pollution from land-based sources; and article 222 on enforcement with respect to
29 pollution from or through the atmosphere.

30
31 This list is by no means exhaustive of all applicable provisions under Part XII. But for
32 my delegation, these are the palpably relevant articles that relate to the first
33 question.

34
35 In interpreting these provisions, and the other provisions of UNCLOS that bear
36 significance on the questions before the Tribunal, the *South China Sea Arbitration*,
37 which has been cited extensively by many States participating in these proceedings,
38 provides a most authoritative determination on the obligation to protect and preserve
39 the marine environment. It pronounced legal doctrines that could help determine the
40 outcome of these proceedings.

41
42 The *South China Sea Arbitration* is legally binding international law, with its
43 proceedings faithfully carried out in accordance with UNCLOS. It has been cited by
44 this Tribunal itself in its *Mauritius/Maldives* decision. Its validity cannot be assailed.

45
46 Article 192 provides the general obligation of States to protect and preserve the
47 marine environment. As submitted by the Philippines in the *South China Sea*

⁷ *Ibid.*, p. 24.

⁸ *Ibid.*, p. 23.

⁹ *Ibid.*, pp. 23-24.

1 *Arbitration*, we consider this to form part of customary international law which covers
2 areas within national jurisdiction as well as areas beyond national jurisdiction. This
3 requires States to take “active measures” to prevent harm, to “conserve marine living
4 resources,” and to “preserve the ecological balance of the oceans as a whole.”¹⁰
5

6 Article 194(1) establishes the obligation to “take, individually or jointly as appropriate,
7 all measures that are necessary to prevent, reduce and control pollution of the
8 marine environment.” This pertains to two specific obligations, namely, the obligation
9 not to cause damage to the environment of other States and areas beyond the limits
10 of national jurisdiction or the “no-harm” rule, and the obligation of due diligence. I will
11 elaborate on these when discussing the subsequent provisions under Part XII.
12

13 This obligation applies regardless of where the greenhouse gas emissions – which,
14 as posited earlier, qualify as “pollution of the marine environment” – originate. It also
15 does not matter whether this marine pollution occurs within or outside a State’s
16 national jurisdiction.
17

18 This point was clarified in the *South China Sea Arbitration* where the arbitral tribunal
19 said that “the environmental obligations in Part XII apply to States irrespective of
20 where the alleged harmful activities took place,”¹¹ and that “the obligations in Part XII
21 apply to all States with respect to the marine environment in all maritime areas, both
22 inside the national jurisdiction of States and beyond it.”¹²
23

24 We should relate this to article 194(3) which emphasizes that all necessary
25 measures taken “shall deal with all sources of pollution of the marine environment”.
26 “These measures shall include, *inter alia*, those designed to minimize to the fullest
27 possible extent” the release of greenhouse gases “from land-based sources”, and
28 “from or through the atmosphere” as stated in subparagraph (a). This likewise
29 applies to pollution from vessels and installations and devices mentioned in
30 subparagraphs (b), (c) and (d), insofar as they contribute to greenhouse gas
31 emissions. Greenhouse gases are emitted from land, air and sea, covering all areas
32 where anthropogenic activities take place, and article 194(3) deals with all these
33 sources of pollution.
34

35 In fulfilling their obligations under article 194(1), it is clear that States shall use “the
36 best practicable means at their disposal and in accordance with their capabilities.” In
37 the context of climate change, this pertains to the “common but differentiated
38 responsibilities and respective capabilities” found in article 3(1) of the UNFCCC
39 which is now a widely recognized principle of international law. We will discuss this
40 further under question (b).
41

42 In this regard, article 194(1) mandates States Parties to “endeavour to harmonize
43 their policies”.
44

45 Article 194(2) points to a more specific obligation that “States shall take all measures
46 necessary to ensure that activities under their jurisdiction or control are so conducted
47 as not to cause damage or pollution to other States and their environment, and that

¹⁰ *South China Sea Arbitration*, Award on Merits, 12 July 2016, p. 360, para. 907.

¹¹ *Ibid.*, p. 370, para. 927.

¹² *Ibid.*, p. 373, para. 940.

1 pollution arising from incidents or activities under their jurisdiction or control does not
2 spread beyond the areas where they exercise sovereign rights in accordance with
3 [UNCLOS]”.

4
5 This is a clear reference to and a codification of the “no-harm” rule, that is, the
6 principle of *sic utere tuo ut alienum non laedas*, which is customary international law.
7 First stated as Principle 21 of the Stockholm Declaration¹³ that, “States have ... the
8 responsibility to ensure that activities within their jurisdiction or control do not cause
9 damage to the environment of other States or of areas beyond the limits of national
10 jurisdiction,” it was reiterated in subsequent important environmental pacts and
11 instruments, such as Principle 2 of the Rio Declaration¹⁴ and article 3 of the
12 Convention on Biological Diversity.¹⁵

13
14 The *Trail Smelter*¹⁶ and the *Corfu Channel*¹⁷ cases were the early cases that
15 enunciated the “no-harm rule”. But it was the ICJ Advisory Opinion in *Legality of the*
16 *Threat of Use of Nuclear Weapons* which established that “[t]he existence of the
17 general obligation of States to ensure that activities within their jurisdiction and
18 control respect the environment of other States or of areas beyond national control is
19 now part of the corpus of international law relating to the environment.”¹⁸ This
20 pronouncement has been reaffirmed in subsequent ICJ cases, such as the
21 *Gabcíkovo-Nagymaros Project*¹⁹ and the *Pulp Mills on the River Uruguay*.²⁰

22
23 The Philippines is of the position that the “no-harm rule”, as a customary norm, is not
24 limited to causing harm in the territory of another State, but includes damage caused
25 in areas beyond national jurisdiction. This is solidified by the adoption of the
26 *Agreement under the United Nations Convention on the Law of the Sea on the*
27 *conservation and sustainable use of marine biological diversity of areas beyond*
28 *national jurisdiction*, or the BBNJ Agreement,²¹ which among others, provides that

29
30 [w]hen a Party with jurisdiction or control over a planned activity that is to
31 be conducted in marine areas within national jurisdiction determines that
32 the activity may cause substantial pollution of or significant and harmful
33 changes to the marine environment in areas beyond national jurisdiction,
34 that Party shall ensure that an environmental impact assessment of such
35 activity is conducted.²²

¹³ Report of the United Nations Conference on Human Environment, Stockholm (5-16 June 1972), A/CONF.48/14/Rev.1, 25 July 1995.

¹⁴ Report of the United Nations Conference on Environment and Development, Rio De Janeiro (3-14 June 1992), A/CONF.151/26 (Vol. I), 12 August 1992.

¹⁵ Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992).

¹⁶ *Trail Smelter (United States / Canada)*, Award, 11 March 1941, III RIAA 1905, p. 1965.

¹⁷ *Corfu Channel (United Kingdom v. Albania)*, Judgment, 9 April 1949, I.C.J. Reports 1949, p. 22.

¹⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 242, para. 29.

¹⁹ *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, I.C.J. Reports 1997, p. 41, para. 53.

²⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order (Provisional Measures), 13 July 2006, I.C.J. Reports 2006, p. 132, para. 72; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, I.C.J. Reports 2010, pp. 55-56, para. 101.

²¹ 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, A/CONF.232/2023/4.

²² *Ibid.*, article 28 (2).

1 The Philippines will join the international community in signing this landmark treaty
2 tomorrow in New York.

3
4 As a customary norm that informs the content of article 194 of UNCLOS, the “no-
5 harm rule” creates an obligation on all States Parties to ensure that their activities do
6 not aggravate the current situation by further contributing to the warming of the
7 planet and of the oceans.

8
9 This thus requires States to limit their greenhouse gas emissions, consistent with
10 their obligations under the UNFCCC and the Paris Agreement.

11
12 Related to article 194(2) are articles 195 and 196 such that, in taking all these
13 measures necessary to prevent, reduce and control pollution of the marine
14 environment, including those “resulting from the use of technologies under their
15 jurisdiction or control”, “States shall act so as not to transfer, directly or indirectly,
16 damage or hazards from one area to another or transform one type of pollution into
17 another”.

18
19 Articles 207 and 212 mandate that “States shall adopt laws and regulations to
20 prevent, reduce and control pollution of the marine environment” from land-based
21 sources, and from or through the atmosphere. In addition to adopting such laws and
22 regulations, articles 213 and 222 require States to enforce the laws and regulations
23 they have so adopted. These provisions, taken together, serve to operationalize the
24 obligation of due diligence, that is, the obligation for States to ensure that their laws
25 and regulations are enforced effectively within their jurisdiction.

26
27 Articles 207 and 212 also mandate that “States shall take other measures as may be
28 necessary to prevent, reduce and control” pollution of the marine environment, while
29 articles 213 and article 222, respectively, further require that States “shall adopt laws
30 and regulations and take other measures necessary to implement applicable
31 international rules and standards established through competent international
32 organizations or diplomatic conference to prevent, reduce and control pollution of the
33 marine environment” from land-based sources, and from or through the atmosphere.

34
35 With respect to the pollution from vessels and installations and devices in
36 subparagraphs (b), (c) and (d) of article 194(3), the same obligation of due diligence
37 could be derived from the provisions relating to enforcement by the flag, port and
38 coastal States in articles 217, 218 and 220 respectively.

39
40 Mr President, the due diligence obligation is related to the “no-harm rule.” The “no-
41 harm rule” is the obligation not to harm or pollute the marine environment, while due
42 diligence is the obligation to undertake means to ensure that such obligation not to
43 harm is carried out.

44
45 From the *South China Sea Arbitration*,²³ we can deduce that the obligation of due
46 diligence is twofold: first is “adopting appropriate rules and measures to prohibit a
47 harmful practice,” and second is ensuring enforcement or compliance with said rules

²³ *South China Sea Arbitration*, Award on Merits, 12 July 2016, paras. 944, 956, 964 and 971.

1 and measures, with the qualification that “the obligation to ‘ensure’ is an obligation of
2 conduct” and not of result.

3
4 As the ICJ pronounced in *Pulp Mills on the River Uruguay*,²⁴ and as reiterated by the
5 Tribunal in its Advisory Opinion in the *Sub-Regional Fisheries Commission*, the
6 obligation of due diligence “entails not only the adoption of appropriate rules and
7 measures, but also a certain level of vigilance in their enforcement and the exercise
8 of administrative control applicable” to all public and private entities under its
9 jurisdiction.²⁵

10
11 But what exactly is the content of these rules and regulations, and all other
12 necessary measures, that States shall enact and enforce within their jurisdictions to
13 prevent, reduce and control greenhouse gas emissions? Employing the interpretative
14 approach we have laid down earlier, and in the context of climate change and its
15 deleterious effects on the marine environment, the provisions I just discussed can
16 only have substantive meaning by making reference to the UNFCCC and the Paris
17 Agreement.

18
19 In particular, these rules and regulations and other measures should, *inter alia*, aim
20 towards the realization of article 2 of the UNFCCC for the “stabilization of
21 greenhouse gas concentrations in the atmosphere at a level that would prevent
22 dangerous anthropogenic interference with the climate system”, and, as fleshed out
23 in article 1(a) of the Paris Agreement, by “[h]olding the increase in the global average
24 temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit
25 the temperature increase to 1.5°C above pre-industrial levels.”

26
27 For this purpose, the Philippines notes the universal or near-universal adoption of
28 these two agreements which now make them part of the general corpus of
29 international law, similar to the characterization of the CITES Convention made by
30 the arbitral tribunal in the *South China Sea Arbitration*.

31
32 Mr President, article 194(5) states that measures taken “shall include those
33 necessary to protect and preserve rare or fragile ecosystems as well as the habitat
34 of depleted, threatened and endangered species and other forms of marine life”.
35 Indeed, as I have discussed, ocean warming, sea-level rise and ocean acidification
36 have adversely affected critical marine ecosystems and habitats.

37
38 This article is peculiar because although it falls under the chapeau of “measures to
39 prevent, reduce and control pollution of the marine environment” it pertains more to
40 the protection and preservation of the marine environment. The provision highlights
41 that inevitable nexus between pollution management and the protection and
42 preservation of ecosystems.

43
44 As explained in the *Chagos Marine Protected Area* arbitration, “article 194 is ... not
45 limited to measures aimed strictly at controlling pollution and extends to measures

²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, *I.C.J. Reports 2010*, pp. 79-80, para. 197.

²⁵ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 41, para. 131.

1 focused primarily on conservation and the preservation of ecosystems.”²⁶ The
2 control of pollution forms an important part, but by no means the only aspect, of
3 environmental protection.²⁷

4
5 Question (b) of the request for advisory opinion pertains to that wider net of
6 environmental protection, which will be discussed by my Co-Representative,
7 Ambassador Carlos D. Sorreta. May I ask, Mr President, that you give the floor to
8 Ambassador Sorreta.

9
10 **THE PRESIDENT:** Thank you, Ms Ponce. I now give the floor to Mr Sorreta to
11 continue his statement. You have the floor, Sir.

12
13 **MR SORRETA:** Thank you, Mr President. The second question relates to a key pillar
14 of UNCLOS – the protection and preservation of the marine environment as
15 enshrined in its Preamble and contained in article 192. This is complemented by
16 article 193 that requires States to protect and preserve the marine environment in
17 exploiting their natural resources.

18
19 Answering this question requires a reference to the *South China Sea Arbitration*
20 which elaborated the scope of article 192. It said:

21
22 Although phrased in general terms, the Tribunal considers it well
23 established that article 192 does impose a duty on States Parties, the
24 content of which is informed by the other provisions of Part XII *and other*
25 *applicable rules of international law*. This “general obligation” extends both
26 to “protection” of the marine environment from future damage and
27 “preservation” in the sense of maintaining or improving its present
28 condition. Article 192 thus entails the positive obligation to take active
29 measures to protect and preserve the marine environment, and by logical
30 implication, entails the negative obligation not to degrade the marine
31 environment.¹

32
33 That arbitral tribunal also stated that “[t]he content of the general obligation in
34 article 192 is further detailed in the subsequent provisions of Part XII, including
35 article 194, as well as by reference to specific obligations set out in *other*
36 *international agreements*, as envisaged in article 237.”²

37
38 It is my task now to discuss the other UNCLOS provisions, the “other applicable
39 rules of international law” and “other international agreements” that inform the
40 content of article 192 as they relate to climate change impacts.”

41
42 Ambassador Ponce earlier discussed the “no-harm” rule as a customary norm and
43 the obligation of due diligence as an imperative duty. These are rules of international
44 law equally inform the content of article 192, following again the pronouncement in
45 the *South China Sea Arbitration*. The Philippines emphasizes that it is the obligation

²⁶ *In the matter of the Marine Protected Area Arbitration between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland*, UNCLOS Annex VII Arbitral Tribunal, Award, 18 March 2015, p. 211, para. 538.

²⁷ *Ibid.*, pp. 128-129, para. 320.

¹ *South China Sea Arbitration*, Award on Merits, 12 July 2016, pp. 373-374, para. 941.

² *Ibid.*, p. 373, para. 942.

1 of States to adopt appropriate rules and measures to preserve and protect the
2 marine environment, and to ensure compliance by entities under its control and
3 jurisdiction.

4
5 Let me now expound on the other provisions of UNCLOS and other rules of
6 international law that are implicated in the obligations in UNCLOS to protect and
7 preserve the marine environment from the harmful effects of climate change,
8 namely: the duty to cooperate; the duty of due regard and good faith; the
9 requirement for environmental impact assessment; the precautionary principle;
10 equity; and sustainable development.

11
12 I will also incorporate discussions on the specific provisions of other international
13 agreements relating to environmental protection that inform the content of
14 article 192. These are: the Convention on Biological Diversity; the UNFCCC; the
15 Paris Agreement; and the Agreement on biological diversity beyond national
16 jurisdiction.

17
18 The Philippines would like to make the argument that in the field of international
19 environmental law, various international agreements on environmental protection
20 build upon each other to create a normative synergy between past, present and
21 future agreements.

22
23 It is not only in article 237 that this normative synergy is found in UNCLOS, but also
24 in various provisions, particularly in Part XII, which call for the application or
25 enforcement of “generally accepted” or “applicable” international rules and standards
26 “established through competent international organizations or diplomatic conference
27 for the prevention, reduction and control of pollution of the marine environment”, and
28 can be found from articles 207 to 222³ and include article 297(c), Section 3, Part XV
29 of UNCLOS pertaining to settlement of disputes.

30
31 Mr President, there exists an obligation to cooperate. Article 197 requires States to
32 cooperate on a regional basis to formulate standards and practices for the protection
33 and preservation of the marine environment. The Tribunal in *MOX Plant* considered
34 the duty to cooperate as “a fundamental principle in the prevention of pollution of the
35 environment under Part XII of the Convention and general international law.”⁴ This is
36 reiterated in the *South China Sea Arbitration*.⁵

3
1. Article 207(4) on pollution from land-based sources
2. Article 208(5) on pollution from seabed activities subject to national jurisdiction;
3. Article 210(4) on pollution by dumping;
4. Article 211(1), (2) and (5) on pollution from vessels;
5. Article 212(3) on pollution from or through the atmosphere;
6. Article 213 on enforcement with respect to pollution from land-based sources;
7. Article 214 on enforcement with respect to pollution from seabed activities;
8. Article 216(1) on enforcement with respect to pollution by dumping;
9. Article 217(1) and (4) on enforcement by flag States;
10. Article 218 on enforcement by port States;
11. Article 220(2) on enforcement by coastal States;
12. Article 222 on enforcement with respect to pollution from or through the atmosphere.

⁴ *The MOX Plant Case (Ireland v. United Kingdom)*, Order, 3 December 2001, ITLOS Reports 2001, p. 110, para. 82.

⁵ *South China Sea Arbitration*, Award on Merits, 12 July 2016, pp. 394-395, para. 985.

1 Following the arbitral tribunal's ruling, the Philippines emphasizes the duty under
2 article 197 to cooperate on a global or regional basis, "directly or through competent
3 international organizations [...] for the protection and preservation of the marine
4 environment" in relation to climate change impacts.

5
6 Mr President, there are obligations to act in good faith and to not abuse rights.
7 Outside of Part XII, article 300 of Part XVI bears significance, that "States Parties
8 shall fulfill in good faith the obligations assumed under this Convention and shall
9 exercise the rights, jurisdiction and freedoms recognized in this Convention in a
10 manner which would not constitute an abuse of rights." Exercising rights in good faith
11 is akin and relates to the obligation to give "due regard" set out in article 56(2).

12
13 These two obligations, good faith and non-abuse of rights, are moral guideposts
14 within the Convention that must also inform the content of the States Parties'
15 obligation under article 192. Fulfilling all the obligations that we are discussing
16 requires good faith and due regard to the rights of other States.

17
18 Mr President, related to good faith and due regard is the precautionary principle.
19 Principle 15 of the Rio Declaration states that "[i]n order to protect the environment,
20 the precautionary approach shall be widely applied by States according to their
21 capabilities. Where there are threats of serious or irreversible damage, lack of full
22 scientific certainty shall not be used as a reason for postponing cost-effective
23 measures to prevent environmental degradation." Similar language was incorporated
24 in article 3 of the UNFCCC.

25
26 In its *Area Advisory Opinion*, the Tribunal's Seabed Disputes Chamber pointed out
27 that "the precautionary approach is also an integral part of the general obligation of
28 due diligence," which requires States "to take all appropriate measures to prevent
29 damage that might result from the activities" in the Area, and this obligation "applies
30 in situations where scientific evidence concerning the scope and potential negative
31 impact of the activity in question is insufficient but where there are plausible
32 indications of potential risks."⁶

33
34 The Chamber also observed that "the precautionary approach has been incorporated
35 into a growing number of international treaties and other instruments, many of which
36 reflect the formulation of Principle 15 of the Rio Declaration" and that "[t]his has
37 initiated a trend towards making this approach part of customary international law",⁷
38 as clearly reinforced by the inclusion of the precautionary approach in the Nodules
39 and Sulphides Exploration Regulations.

40
41 The latest in this trend, Mr President, is the BBNJ Agreement which provides in
42 article 7 that in order to achieve these objectives, Parties shall be guided by, among
43 others, "[t]he precautionary principle or precautionary approach, as appropriate".

44
45 Another general obligation under UNCLOS and customary international law is to
46 conduct environmental impact assessments (EIAs). Article 206, in relation to
47 article 205, provides the obligation to conduct EIAs for activities to be undertaken in

⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 46, para. 131.

⁷ *Ibid.*, p. 47, para. 135.

1 the marine environment. In the *Area Advisory Opinion*, the Seabed Disputes
2 Chamber stressed that this is “a direct obligation under the Convention and a
3 general obligation under customary international law.”⁸ Citing *Pulp Mills on the River*
4 *Uruguay*, the Chamber said that this is a requirement under general international law
5 “where there is risk that the proposed industrial activity may have a significant impact
6 in a transboundary context, in particular, on a shared resource”, and considered that
7 the obligation “also appl[ies] to activities with an impact on the environment in the
8 area beyond the limits of national jurisdiction”.⁹

9
10 Related to articles 205 and 206 is article 204, which imposes the obligation to
11 monitor the risks or effects of “any activities which they permit or in which they
12 engage in order to determine whether these activities are likely to pollute the marine
13 environment.”

14
15 The *South China Sea Arbitration* emphasized that in order “to fulfill the obligations of
16 article 206, a State must not only prepare an EIA but must also communicate it ... by
17 the terms of article 205, to competent international organizations, which should make
18 them available to all States.”¹⁰ The obligation, therefore, is twofold.

19
20 Of more recent significance is the BBNJ Agreement which has a dedicated part, from
21 articles 27 to 39, on EIAs which elaborates on this twofold obligation.¹¹ Once it
22 enters into force, the BBNJ Agreement could become a benchmark in elaborating
23 these obligations.

24
25 Mr President, there exists an obligation to observe the norm of equity. Central to
26 UNCLOS’ contribution to the strengthening of peace, security, cooperation and
27 friendly relations is the principle of justice¹² – and from justice proceeds equity. In the
28 *Continental Shelf* case, the ICJ said: “Equity as a legal concept is a direct emanation
29 of the idea of justice”.¹³

30
31 Equity has had a long tradition in and has been robustly applied by the ICJ and the
32 Tribunal maritime delimitations, most recently in *Mauritius/Maldives*.¹⁴ Equity’s
33 application should not be limited to maritime delimitation but should also apply with
34 fervor to these advisory proceedings. To borrow the language of the ICJ in the *North*
35 *Sea Continental Shelf* cases, whatever legal reasoning the Tribunal adopts, “its
36 decision must by definition be just, and therefore in that sense equitable.”¹⁵ The

⁸ *Ibid.*, pp. 50-51, paras. 145-148.

⁹ *Ibid.*, p. 51, para. 147.

¹⁰ *South China Sea Arbitration*, Award on Merits, 12 July 2016, p. 396, para. 991.

¹¹ These include, among others, provisions on thresholds and factors for conducting EIA, procedures for conducting the same, public notification and consultation and procedure for reporting and monitoring. More importantly, the BBNJ Agreement in its preamble recognizes “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...”

¹² 7th Preambular Paragraph, Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397.

¹³ *Continental Shelf (Tunisia v. Libya)*, Judgment, 24 February 1982, *I.C.J. Reports 1982*, para. 71.

¹⁴ *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Judgment, 28 April 2023, para. 245.

¹⁵ The *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands)*, Judgment, 20 February 1969, *I.C.J. Reports 1969*, para. 88.

1 International Panel on Climate Change has stated that equity remains a central
2 element in the UN climate change regime.¹⁶

3
4 It is on the basis of equity, and in the context of climate justice, that the obligations
5 under UNCLOS should be subject to the common but differentiated responsibility
6 principle. Countries that have contributed to and benefited from environmental
7 pollution more, should carry a greater share of this burden – a norm enshrined in
8 article 3(1) of the UNFCCC¹⁷ and article 2(2) of the Paris Agreement¹⁸ as well as
9 article 4(4).¹⁹

10

11 Mr President, there exists an obligation to promote sustainable development.
12 UNCLOS aims to promote “the economic and social advancement of all peoples in
13 the world”. Pursuing economic development is crucially linked to the preservation
14 and protection of the marine environment. We cannot, as in the past, interfere with
15 nature without considering its effects on the environment. We need to carefully
16 balance these two ends. As the ICJ pronounced in its judgment in the *Gabcíkovo-*
17 *Nagymaros Project*, “[t]his need to reconcile economic development with protection
18 of the environment is aptly expressed in the concept of sustainable development.”

19

20 The obligation under article 192 is inextricably linked to the notion of sustainable
21 development. In the context of climate change, the obligation to reduce greenhouse
22 gas emissions is a cognate imperative in the pursuit of economic progress.

23

24 And in this context, we are reminded of article 4 of the Paris Agreement that States
25 should “undertake rapid reductions ... in accordance with best available science, so
26 as to achieve a balance between anthropogenic emissions by sources and removals
27 by sinks of greenhouse gases in the second half of this century, on the basis of
28 equity, and in the context of sustainable development and efforts to eradicate
29 poverty.”

30

31 To this end, the dictates of sustainable development should also inform the content
32 of article 192 in the context of all our efforts to address climate change.

33

34 Mr President, in closing we would like to make several brief points. UNCLOS has
35 been called the “the most significant achievement in international law in the
36 20th century”²⁰ and hailed as “the constitution of the oceans”.²¹ It ended confusion
37 and chaos and brought stability, certainty and legal certainty to our seas and oceans.

38

¹⁶ IPCC, 2023, p. 101.

¹⁷ “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. *Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*” (emphasis supplied)

¹⁸ “... to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

¹⁹ As such, under article 4(4), developed countries are obliged to take the lead “by undertaking economy-wide absolute emission reduction targets”, while developing countries are given time to move “towards economy-wide emission reduction or limitation targets”.

²⁰ UN Secretary General Javier Perez De Cuellar, Montego Bay, Jamaica, 10 December 1982.

²¹ Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, Montego Bay, Jamaica, 10 December 1982.

1 As a living constitution of the oceans, it is the thread that weaves through the
2 international rules and standards – past, present, and future – relating to the
3 protection and preservation of the marine environment. Applying intertemporal rules
4 in interpreting is allowed as long as it is consistent with the intention of the parties
5 reflected, by reference to the object and purpose.²² And so, while climate change
6 was not yet a prominent concern during the negotiations and adoption of UNCLOS in
7 1982, there is no other way to interpret this important document and its provisions
8 now without taking into account climate change and its effects on the marine
9 environment.²³

10
11 Treaty law icon, Professor Ian Sinclair, also believed that States can take an
12 “evolutionary reading” like this under these circumstances.²⁴

13
14 Through the codification and progressive development of the law of the sea,
15 UNCLOS contributes to the strengthening of peace, security, cooperation and
16 friendly relations in accordance with the UN Charter.²⁵

17
18 The warming of the planet and the resulting changes to the natural environment
19 pose numerous threats to humanity. Increased competition for resources like fertile
20 land and fresh water are already disrupting societies and uprooting entire
21 communities – exacerbating current conflicts and fuelling new ones.²⁶ There are
22 alarming estimates of the potential scope of forced migration due to climate
23 change.²⁷

24
25 The global climate crisis is, therefore, a key risk to international peace and security.²⁸
26 Climate change can unravel the architecture of UNCLOS itself and undermine the
27 world order it has helped create over the past four decades.

28
29 The Security Council is responsible for the “maintenance of international peace and
30 security”; however, the Charter does not define what exactly constitutes a ‘threat’,
31 and the Council is tasked with determining its existence.²⁹ Today, eight of the
32 countries that are hosting UN peacekeeping or special political missions are among
33 the 15 most vulnerable to climate change.³⁰

34
35 As early as 1992, the President of the Security Council, speaking on behalf of its
36 members, said:

37

²² Rosalyn Higgins, *Some Observations on the Inter-Temporal Rule in International law*. In Jerzy Makarzyk (ed), *ESSAYS IN HONOR OF KRZYSZTOF SKUBISZEWSKI* (Kluwer Law International 1996) 181.

²³ Ingvild Ulrikke Jakobson, Elise Johansen, Philipp Peter Nickels, *The Law of the Sea as Part of the Climate-Change Regime Complex*, in Elferink, A. G. O. (2005). *Stability and Change in the Law of the Sea: The Role of the LOS Convention*. In Brill | Nijhoff eBooks.

²⁴ I. Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (Manchester University Press 1984), p. 140.

²⁵ 7th Preambular paragraph, Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397.

²⁶ Explainer: How Is the Climate Crisis Impacting Conflict and Peace? Conciliation Resources, 2021.

²⁷ Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, *Climate Law* 2, no. 1 (2011): 345-374.

²⁸ Climate & Peace. Climate-Diplomacy. <https://climate-diplomacy.org/exhibition/climate-peace>

²⁹ <https://www.universal-rights.org/climate-change-a-threat-to-international-peace-and-security/>

³⁰ *Ibid.*

1 The absence of war and military conflicts amongst States does not in itself
2 ensure international peace and security. The non-military sources of
3 instability in the economic, social, humanitarian and ecological fields have
4 become threats to peace and security.³¹
5

6 At a meeting of the Security Council in June this year, the vast majority of speakers
7 recognized that the climate change crisis is a threat to global peace and security,
8 and that it must ramp up its efforts to lessen the risk of conflicts emanating from
9 rising sea levels, droughts, floods and other climate-related events.³²
10

11 The rising levels of the oceans will inundate islands of low-lying coastal States,
12 which could potentially shift maritime boundaries.³³ The potential loss of maritime
13 boundaries as a result of sea-level rise will inevitably lead to conflicts in fisheries and
14 other marine resources³⁴ but more importantly could impact the stability of
15 boundaries³⁵ and trigger conflict.³⁶
16

17 The Philippines understands and respects the concerns of the arbitral tribunal in
18 *Bangladesh v. India*,³⁷ that settled maritime boundaries would be jeopardized if
19 climate-related changes were allowed to influence the delimitation process. The
20 Philippines believes that international courts and tribunals, and the world itself, would
21 not necessarily have to face this dilemma if we are able to stay a step ahead of
22 climate change.
23

24 Mr President, staying a step ahead of climate change is the existential challenge for
25 us all, as emphasized by President Marcos at the UN General Assembly last year
26 when he said: "There is no other problem so global in nature that it requires a unified
27 effort".
28

29 The decision of the Tribunal as a consequence of these proceedings, could, and
30 should, be a crucial and pivotal part of these efforts.
31

32 Mr President, based on the arguments and proof presented, the Philippines
33 respectfully submits:
34

35 First, the Tribunal has jurisdiction to give an advisory opinion in response to the
36 request submitted by COSIS;
37

³¹ S/23500, 31 January 1992.

³² With Climate Crisis Generating Growing Threats to Global Peace, Security Council Must Ramp Up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate, <https://press.un.org/en/2023/sc15318.doc.htm>.

³³ David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 2 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2008).

³⁴ Redgwell, C. (2012). *UNCLOS and Climate Change*. *American Society of International Law Proceedings*, 106(1), 406-409.

³⁵ Frances Anggadi, *What States Say And Do About Legal Stability And Maritime Zones, And Why It Matters*, *International & Comparative Law Quarterly*, Volume 71, Issue 4, October 2022, pp. 767-798

³⁶ Snjolaug Arnadottir, *CLIMATE CHANGE AND MARITIME BOUNDARIES LEGAL CONSEQUENCES OF SEA LEVEL RISE*. Cambridge University Press, 2022.

³⁷ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, UNCLOS Annex VII Arbitral Tribunal, PCA Case N° 2010-16, Award, 7 July 2014, p. 117, para. 399.

1 Second, there exists no compelling reason for the Tribunal to decline giving an
2 advisory opinion; rather, what exists, are compelling reasons for the Tribunal to
3 exercise its discretion and issue an advisory opinion;

4
5 Third, the advisory opinion should rule that there are specific, identifiable obligations
6 on the part of States Parties to UNCLOS including under Part XII: (a) to prevent,
7 reduce and control pollution of the marine environment in relation to the deleterious
8 effects that result or are likely to result from climate change, including through ocean
9 warming and sea-level rise, and ocean acidification, which are caused by
10 anthropogenic greenhouse gas emissions into the atmosphere; and (b) to protect
11 and preserve the marine environment in relation to climate change impacts, including
12 ocean warming and sea-level rise and ocean acidification; and

13
14 Fourth, there exist norms in conventional, customary, and general principles of
15 international law that support and reinforce these legal obligations.

16
17 Mr President, members of the Tribunal, thank you.

18
19 **THE PRESIDENT:** Thank you, Mr Sorreta. I now give the floor to the representative
20 of Sierra Leone, Mr Sesay, to make his statement. You have the floor, Sir.

21
22 **MR SESAY:** Mr President, distinguished members of the Tribunal, good morning. It
23 is my distinct honour to appear before you today in my capacity as the Deputy
24 Minister of Justice representing the Republic of Sierra Leone in these historic
25 proceedings. We appear before you, for the first time, because of the already
26 significant impacts of climate change for my country. And its people.

27
28 Though the climate emergency poses the greatest threat to our planet and to this
29 generation, there is simply no equity when it comes to managing its effects. This
30 Tribunal's advisory opinion is an opportunity to change that.

31
32 Sierra Leone, located on the west coast of Africa, is among the lowest contributors of
33 greenhouse gas emissions in the world. Yet, my country is also among the 10 per
34 cent of countries that are most vulnerable to climate change. Sierra Leone hopes
35 that the Tribunal will use the opinion not just to clarify States Parties' obligations
36 under the Convention, but also to help strengthen the foundation for equitable
37 solutions to the climate emergency.

38
39 Members of the Tribunal, starting with the legal framework, there can be no doubt
40 that the two questions that the Commission of Small Island States on climate change
41 and International Law have put to this Tribunal in its request for an advisory opinion
42 address fundamental issues that lie at the heart of modern international law. The
43 Tribunal is asked to clarify how UNCLOS obligations agreed upon more than four
44 decades ago are aligned with the demands of the climate emergency the global
45 community faces today. In answering those questions, taking into careful account the
46 latest scientific consensus on climate change, the Tribunal has an historic
47 opportunity to make at least three fundamental contributions.

48
49 First, to play a vital role in outlining not just how those obligations under the
50 Convention might be interpreted under international law, but also interpreted in a

1 manner that shows appropriate sensitivity to the disproportionate impact of the
2 climate emergency on developing countries such as ours.

3
4 Second, the Tribunal has an opportunity to set the historical record straight. For it is
5 a fact that those most affected by climate induced changes to the marine
6 environment have contributed the least to the problem. Legal consequences must
7 flow from this fact if we are really serious about addressing marine pollution and
8 climate change more broadly.

9
10 Finally, building on this last point, the Tribunal could make clear that international law
11 can play a meaningful role in offering solutions to address this practical problem.
12 This will require paying due regard to the reality: the reality of differential capabilities
13 of States to mitigate and adapt to the various harms caused by climate change; the
14 reality that, if we are to solve the climate challenge, those with the means must step
15 up to their responsibilities; the reality that, those who have not been industrialized
16 and are still developing, are essentially being asked to subsidize the polluters by
17 being left to deal with the climate mess not of their own making.

18
19 Mr President, these are among the important reasons why these advisory opinions
20 are so important to Sierra Leone as a country. They are an opportunity for law and
21 justice to be served, not just for Sierra Leone, but also for the many other developing
22 countries in the Global South that find themselves in a similar position. Developing
23 countries from all regions, which have contributed the least to the pollution of the
24 marine environment and the pollution of the atmosphere, are shouldering a
25 disproportionate burden of the existential threats posed to our planet by the
26 deleterious effects of climate change. The polluters, who have produced most of the
27 greenhouse gas emissions that got us where we are today, reap the benefits while
28 we the non-polluters pay, and continue to pay the price. The polluters must pay.

29
30 Mr President, for Sierra Leone, the science is clear; the science is uncontested. It is
31 this clear and uncontested science which makes our presence in these proceedings
32 imperative. For us, the risks from human-induced climate change are particularly
33 high. This is due to our particular geography as a low-lying coastal State. In fact, the
34 negative effects of climate change on the marine environment have already been
35 keenly felt in Sierra Leone. The impacts are multiple. They range from rising seas, to
36 the forced displacement of our people inhabiting certain islands and low-lying coastal
37 areas, to dramatic changes to our fisheries economy.

38
39 Economically, the fisheries sector is an important facet of Sierra Leone's future
40 growth. The industry provides food security and employment opportunities. In
41 addition to generating substantial economic activity, and providing a valuable source
42 of export earnings, the fisheries sector represents a major lifeline for Sierra Leone as
43 a recovering post-civil war society, to provide both sustenance and opportunities for
44 its people. The harm that climate change is currently causing threatens to undo hard-
45 fought progress that has been made thus far.

46
47 Moreover, Sierra Leone has had to grapple with the impact of food insecurity,
48 particularly amongst rural households, for decades. Fisheries are vital for food
49 security. They are especially important to our poorest communities. Yet climate
50 change-induced ocean warming has contributed to an overall decrease in maximum

1 catch potential. This has compounded the impacts from overfishing for some fish
2 stocks.

3
4 Mr President, Sierra Leone is both particularly susceptible to climate change impacts
5 and, at the same time, lacking in capacity to adapt to these impacts. Sadly, Sierra
6 Leone is not alone. There are many Sierra Leones. Generally, coastal ecosystems in
7 West Africa are among the most vulnerable to climate change because of extensive
8 low-lying deltas exposed to sea-level rise, erosion, saltwater intrusion and flooding.
9 Already, sea-level rise has caused significant challenges to the livelihoods of our
10 coastal inhabitants. Coastal erosion is taking place. The result is a shifting of the
11 coastline – sometimes dramatically so.

12
13 At a 1.5°C global temperature increase, among the principal hazards to ecosystems,
14 are continued sea-level rise and increased frequency and magnitude of extreme sea-
15 level events that encroach on coastal human settlements and damage coastal
16 infrastructure. There is a serious risk of committing low-lying coastal ecosystem to
17 submergence and loss, and expanding land salinization with cascading risks to
18 livelihoods, health, well-being, food and water security.

19
20 If no action is taken, a total of 26.4 square kilometres of the Sierra Leonean coastline
21 is estimated to be lost to the sea by the year 2050. Sea-level rise is expected to
22 affect almost 2.3 million Sierra Leoneans who are at risk of experiencing a one-metre
23 rise of the sea level along coastal areas. Already, in various parts of Sierra Leone,
24 islands have fallen victim to sea-level rise. For instance, inhabitants of Yelibuya
25 Island have had to be relocated due to flooding and partial and permanent
26 inundation.

27
28 The human impact of the climate-related displacement of our people from their
29 homes is immense. People lose their homes. People lose their livelihoods. People
30 even lose memories of where they were born, of where they were raised, of where
31 they started their own families. Generations of memories. Generations of property.
32 Gone. With no hope for return or for recovery.

33
34 Even worse, the science indicates that we are all approaching a point of no return.
35 The marine environment – a shared resource – is especially susceptible to climate
36 change and should therefore be of special concern given the significance of the
37 oceans to the health of our planet as a whole.

38
39 Mr President, I want to be clear: we are not helpless, nor are we resting on our
40 laurels. Sierra Leone has already undertaken various measures to mitigate and
41 adapt to the deleterious effects of climate change on our country and on our people.
42 We have taken significant steps to implement various projects over many years.

43
44 But the stark reality is that, as a developing State, Sierra Leone has limited
45 resources. We also have limited technological capacity to meet all the increasing
46 demands of the climate problem. Finance is a particularly important barrier for
47 government programmes generally, and for ocean health, governance and
48 adaptation to climate change for Sierra Leone.

1 What we put in climate-related mitigation is food out of the mouths of our children.
2 What we put in climate-related mitigation is money we do not use to educate our
3 children. What we put in climate-related mitigation is money we do not use to nurse
4 our sick children back to good health.

5
6 We therefore believe that the obligation to protect and preserve the marine
7 environment under the Convention must be understood in the context of State
8 obligations under general international law and consistent with principles of equitable
9 burden sharing. We further believe that meaningful progress, for the sake of all of
10 humanity, requires strong international cooperation, certainly more cooperation than
11 we have now. Stronger international cooperation means providing sufficient financial
12 and technical assistance to developing States, consistent with the relevant
13 provisions of the Convention, including the common but differentiated responsibilities
14 principle.

15
16 Sierra Leone is proud to be among one of the many African States Parties to
17 UNCLOS to participate in these proceedings. We stand here as the only country
18 from the west coast of the continent to participate.

19
20 Our hope is that this process provides greater clarity on State Party obligations in
21 relation to the legal questions posed.

22
23 Our hope is that this Tribunal gives meaningful content to the common but
24 differentiated responsibilities principle and the technical assistance provisions under
25 the Convention.

26
27 Our hope is that the Tribunal recognizes the vital importance of the marine
28 environment as a shared global resource which needs strong protection from
29 pollution, whether from oceanic sources or from land-based sources.

30
31 Sierra Leone acknowledges that the Tribunal has a significant task ahead of it. We
32 are confident that this Tribunal, whose contributions to the interpretation of the
33 Convention have been remarkable, will continue to play its role; its critical role as a
34 principal interpreter and guardian of the Convention in accordance with its founding
35 instruments and existing international law.

36
37 Sierra Leone very much hopes that its own arguments and those by other States will
38 assist the Tribunal in answering the questions before it. It should ultimately lead the
39 Tribunal to pronounce itself clearly on the legal obligations that may lead to the
40 actual prevention, reduction and control of marine pollution.

41
42 Mr President, distinguished members of the Tribunal, I am grateful for your kind
43 attention and in conclusion, I would like now to request that you invite Professor
44 Tladi to the podium. I thank you.

45
46 **THE PRESIDENT:** Thank you, Mr Sesay. I now give the floor to Mr Tladi to make his
47 statement. You have the floor, Sir.

48

1 **MR TLADI:** Mr President, distinguished members of the Tribunal, it is an honour for
2 me to appear before you today in these proceedings on behalf of the Republic of
3 Sierra Leone.

4
5 On the question of jurisdiction, Sierra Leone wishes only to recall its written
6 submissions that the Tribunal indeed has jurisdiction and should exercise it. And in
7 this context, we would only recall what was said yesterday by Mozambique and just
8 now, this morning, by the Philippines.

9
10 So my task today is really only twofold. First, with a view to assisting the Tribunal,
11 I wish to set out the proper approach to interpreting the obligations under the Law of
12 the Sea Convention.

13
14 My second task will be to address the obligations of due diligence – the overarching
15 obligations contained in articles 192 and 194 of the Convention, and which is
16 relevant to both questions A and B.

17
18 On the basis of the rules of interpretation that I will momentarily set out, Sierra Leone
19 believes that the specific content of this obligation is to be informed by relevant
20 international rules and standards, as well as scientific evidence. It effectively requires
21 States to adopt necessary measures, individually and collectively, to limit the
22 increase in global average temperatures to under 1.5°C above pre-industrial levels.

23
24 I will thereafter hand over to Professor Jalloh, who will argue that the obligation of
25 due diligence necessarily encompasses the precautionary principle, obliging States
26 to act even in the face of scientific uncertainty, whatever scientific certainty there
27 may still be.

28
29 I turn now to the question of the interpretation of the Law of the Sea Convention.

30
31 The Convention, the “constitution of the ocean”, is not only comprehensive; it is also
32 flexible, which allows it to adapt to new developments and scientific knowledge. It
33 was Judge Lucky that observed in the *Sub-Regional Fisheries Commission Advisory*
34 *Opinion* that the Convention is a “living instrument”, which “grow[s] and adapt[s] to
35 changing circumstances”.¹ It is, in part, because of the rules of interpretation that it is
36 able to do so, and it is for that reason that we wish to spend some time on these
37 rules.

38
39 It is the case that the words “climate change” do not appear in the Convention. This,
40 of course, is because the international community did not have the same awareness
41 of climate change and its consequences, including impacts on the marine
42 environment, that we have today. Nonetheless, we shall argue that a proper
43 interpretation of the Convention, relying on the normal rules of interpretation,
44 mandates the consideration of existing instruments, principles and scientific
45 developments.

46

¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Separate Opinion of Judge Lucky, 2 April 2015)*, ITLOS Reports 2015, p. 96.

1 The rules of interpretation, of course, are to be found in article 31 of the Vienna
2 Convention on the Law of Treaties, which, I think we all agree, reflects customary
3 international law.² The general rule, which is expressed in article 31(1), provides that
4 a treaty is to be “interpreted in good faith in accordance with the ordinary meaning of
5 the words in the treaty in their context and in light of that treaties object and
6 purpose.”
7

8 Now, in paragraphs 46 to 49 of our written submissions, we have showed how the
9 ordinary meaning of the words in the Convention, in their context and in light of the
10 Convention’s object and purpose, cover climate change related impacts. We
11 illustrated, just for example, that article 1(1)(4) of the Convention, which defines
12 “pollution to the marine environment”, must necessarily cover excess anthropogenic
13 greenhouse gas emissions into the atmosphere, in part because pollution includes
14 pollution from or through atmosphere as provided for in article 212. We, in
15 consequence, illustrated that the Convention “requires States to prevent, reduce and
16 control marine pollution by, *inter alia*, taking measures to mitigate climate change.”
17

18 We note here, in particular, that the context would necessitate the consideration of
19 available science and the continuously expanding human knowledge. And here, the
20 relevant context here is Part XII of UNCLOS, which anticipates that its provisions
21 would be interpreted in light of exchanges in scientific information and data.
22

23 It is our submission that this allows the content of such obligations to evolve with
24 scientific developments which did not exist at the time the Convention was
25 negotiated and adopted. Relevant in this regard, as many have noted, is the latest
26 report of the Intergovernmental Panel on Climate Change (“IPCC”), which is based
27 on decades of observation and laboratory results.
28

29 An argument has been made for a restrictive interpretation of article 1(1)(4) of the
30 Convention which would exclude climate change impacts.³ With respect, Sierra
31 Leone considers that such an approach would undermine the notion of the
32 Convention as a “living instrument”. But more importantly, such an approach would
33 not be in keeping with the ordinary meaning of the words of the Convention, in their
34 context and in light of its object and purpose, a point illustrated more fully in our
35 written submissions.
36

37 I pause here to add that in the view of Sierra Leone, the question is not whether the
38 emissions of greenhouse gas emissions constitute pollution under general
39 international law or any other instrument. The question, rather, is whether
40 greenhouse gas emissions may constitute pollution under the Law of the Sea
41 Convention itself.
42

43 Sierra Leone submits that under the ordinary meaning of the words of the
44 Convention, in their context and in light of its object and purpose, emissions of
45 greenhouse gases into the atmosphere, which leads to deleterious effects of the
46 marine environment, does amount to pollution within the meaning of the Convention.

² See, e.g. *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment*, *ICJ Rep 1999* (ICJ) 1059 para 18; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (ICJ) 46 para 65.

³ Written Statement submitted by the Government of the Republic of Indonesia to the International Tribunal on the Law of the Sea (15 June 2023), paras.

1 Thus, under the Convention, States Parties are obliged to adopt measures to
2 mitigate climate change. Moreover, the specific measures to be adopted are also to
3 be arrived at on the basis of the application of these very same rules of
4 interpretation.

5
6 Here, I turn to article 31(3)(c) of the Vienna Convention, which specifically requires
7 the Tribunal to take into account “any relevant rules of international law applicable in
8 the relation between the parties”.⁴ Such rules may, of course, include customary
9 international law, other treaties having a similar object or in force between parties to
10 the Law of the Sea Convention.⁵

11
12 Ultimately, this systemic integration approach, which is grounded in the principle of
13 good faith, serves to ensure that States keep their obligations under the Law of the
14 Sea Convention in conformity with their other obligations under international law.
15 Indeed, the Seabed Disputes Chamber has itself affirmed the relevance of “other
16 instruments” and principles in the *Responsibilities and Obligations of States* Advisory
17 Opinion.⁶ You, of course, will recall that in that Advisory Opinion the Chamber took
18 into account the precautionary principle in its interpretation of the Convention,⁷ not
19 withstanding the fact that the precautionary principle does not appear in the
20 Convention.

21
22 Of course, the Convention itself reaffirms this principle of systemic integration, and
23 here, I can point to articles 293, 237, 212, et cetera, et cetera. But read together, all
24 of these provisions confirm the principle in article 31(3)(c) of the Vienna Convention,
25 and thus require the Tribunal to take into account other instruments’ principles
26 relevant to UNCLOS.

27
28 Mr President, members of the Tribunal, applying these rules of interpretation to
29 UNCLOS inevitably leads to the following:

30
31 The Tribunal must take into account other relevant rules and principles, including
32 those contained in other instruments in ascertaining the content of the obligations
33 relevant to both questions A and B. These include rules and principles contained in
34 the United Nations Framework Convention on Climate Change, the Paris
35 Agreement, the Convention on Biological Diversity, the agreement on Biodiversity
36 Beyond National Jurisdiction. We would emphasize here the importance of the Paris
37 Agreement in establishing the appropriate standard for assessing the specific
38 measures required by States. I shall return to this point when addressing the point on
39 due diligence.

40
41 To be clear, Mr President, Sierra Leone is not asking this Tribunal to interpret and
42 apply other international instruments that are outside its jurisdictional scope. It only
43 submits that the Tribunal has to interpret and apply the provisions of the UN
44 Convention on the Law of the Sea in line with rules, principles and standards

⁴ Oliver Dorr & Kristen Schmalenbach, *Vienna Convention on the Law of Treaties: a commentary* (Springer 2018), Article 31 (Dorr), p. 605.

⁵ *Ibid.*

⁶ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, *ITLOS Reports 2011*, para. 135

⁷ *Ibid.*

1 relevant to the protection and preservation of the marine environment in accordance
2 with the ordinary rules of interpretation and consistent with its power to make any
3 legal determinations that are necessary in the discharge of its judicial functions.⁸
4

5 It is important to emphasize, in this respect, that the Tribunal, by giving content to the
6 broadly framed provisions in the Convention, would not be establishing new rules,
7 but only describing the content of already existing obligations.
8

9 With that legal framework in mind, Mr President, I come now to the substance of the
10 questions before you.
11

12 The Tribunal is asked to set out “specific obligations of State Parties [to the
13 Convention], including Part XII” to “prevent, reduce and control pollution of the
14 marine environment” and “to protect and preserve the marine environment” in
15 relation to climate-change impacts. In Sierra Leone’s view, the obligation of due
16 diligence, reflected in both articles 192 and 194, is the thread that ties both questions
17 A and B together.⁹
18

19 In the words of the Seabed Disputes Chamber, this obligation requires States “to
20 deploy adequate means, to exercise best efforts, to do the utmost”.¹⁰ The standard
21 of due diligence, of course, may change over time in light of “new scientific or
22 technological knowledge” but must be “more severe for riskier activities”.¹¹ Thus, the
23 obligation is particularly exacting in respect of measures for the protection of the
24 marine environment from impacts of climate change, given the far-reaching impacts
25 of climate change on the marine environment, as illustrated by scientific evidence.
26

27 Applying the rules of interpretation that I have set out earlier, the obligation of due
28 diligence under the Law of the Sea Convention requires States, individually and
29 collectively, to take “all necessary measures”, as required by the ordinary meaning of
30 the words in the Convention, to prevent and mitigate [...] harm caused by
31 greenhouse gas emissions.
32

33 Applying article 31(3)(c) permits us to look to the Paris Agreement, not as a ceiling,
34 but as providing the standard for determining “all necessary measures”. Thus, the
35 measures must be those necessary to, at a minimum, limit the increase in global
36 average temperatures to 1.5°C above pre-industrial levels, as reflected in the Paris
37 Agreement, which standard reflects the scientific consensus. We would only add that

⁸ See, e.g., *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award (18 March 2015), para. 220 (“As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it”).

⁹ Article 192 provides that “States have the obligation to protect and preserve the marine environment”, while Article 194 requires States to “take ... all measures ... necessary to prevent, reduce and control pollution of the marine environment from any source” and to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”.

¹⁰ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, para. 110.

¹¹ *Ibid.*, para. 117.

1 the identification of all necessary measures must be informed by the common but
2 differentiated responsibilities principle.

3
4 Thus, in Sierra Leone's views, it is not the Nationally Determined Contributions, nor
5 the process for their establishment that is relevant in the context of article 31(3)(c);
6 rather, it is the scientifically agreed standard which, in our view, can assist the
7 Tribunal in identifying the concrete measures to be adopted by the Parties.

8
9 Mr President, members of the Tribunal, this concludes my presentation. I thank you
10 for your patient attention and invite you to call to the podium Professor Jalloh.

11
12 **THE PRESIDENT:** Thank you, Mr Tladi. We have now reached almost 11:30. At this
13 stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the
14 hearing at 12 o'clock.

15
16 (Pause)

17
18 **THE PRESIDENT:** Please be seated. I now give the floor to Mr Jalloh to make his
19 statement also on behalf of Sierra Leone. You have the floor, Sir.

20
21 **MR JALLOH:** Mr President, distinguished members of the Tribunal, I am honoured
22 to appear before you once again, this time on behalf of my home country of Sierra
23 Leone.

24
25 Much has already been said in these proceedings, both in the written statements and
26 during the oral phase of these proceedings which began over a week ago. For that
27 reason, while recalling our written statement to the Tribunal, for the purposes of my
28 presentation today I will only address three principles of international law which we
29 think are particularly worthy to highlight, namely, the precautionary principle, the
30 common but differentiated responsibilities principle, or the CBDR Principle and the
31 duty to cooperate under UNCLOS and international law. I will then, with your
32 permission, hand over to my colleague for our final submission today.

33
34 Mr President, starting with the precautionary principle, our argument boils down to
35 the three following legal propositions: one, the precautionary principle is a core part
36 of the UNCLOS jurisprudence and is thus directly relevant to interpreting States
37 Parties' obligations of due diligence; two, the precautionary principle includes
38 obligations to conduct environmental impact assessments and the duty on States
39 Parties to cooperate in protecting the marine environment; three, the principle
40 requires States Parties to drastically cut their greenhouse gases to at least the levels
41 mandated by the Paris Agreement, if not lower, until they are no longer posing harm
42 to the marine environment. In explanation of our basis for advancing these legal
43 propositions, I wish to make four succinct points.

44
45 First, the precautionary principle is a recognized part of UNCLOS. This Tribunal
46 observed in the *Area Advisory Opinion* that an integral part of the general obligation
47 of due diligence is the precautionary approach.¹ This mandates that due diligence be

¹ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 ("Area Advisory Opinion"), para. 131.*

1 observed even where “scientific evidence concerning the scope and potential
2 negative impact of” activities or projects are “insufficient but where there [is] plausible
3 indications of potential risks.”²

4
5 The importance of the precautionary principle has been reaffirmed by this Tribunal in
6 several cases. For example, in *Southern Bluefin Tuna*, decided in 1999, the Tribunal
7 noted the need to act with “prudence and caution,” when deciding whether to
8 prescribe measures to prevent further deterioration of the marine environment
9 notwithstanding scientific uncertainty.³

10
11 The precautionary approach has also been endorsed in the work of other bodies, for
12 example, the International Law Commission, which in the context of its 2021
13 Guidelines on the Protection of the Atmosphere, *inter alia*, recognized, partly based
14 on UNCLOS and this Tribunal’s jurisprudence, the strong link between the oceans,
15 marine pollution and atmospheric pollution.⁴

16
17 Sierra Leone therefore respectfully disagrees with the contention by one State in its
18 written statement that the relevance of the precautionary principle, in the context of
19 climate change and the marine environment, has diminished.⁵ Quite the opposite.
20 The precautionary principle is even more important now. It will become even more so
21 in the coming years.

22
23 In this regard, we agree with the United Kingdom that the precautionary principle is
24 of particular importance in terms of evaluating the “remaining scientific uncertainty as
25 to the nature or extent of the harm, the risk of it eventuating or eventuating as a
26 result of any particular activity”.⁶ Even acknowledging the wide consensus that the
27 full scope of the harm caused by climate change requires further scientific study
28 confirms that there remains a role for the precautionary principle going forward.

29
30 Mr President, this brings me to Sierra Leone’s second point on the precautionary
31 principle: that it reaffirms both the obligation to conduct Environmental Impact
32 Assessments (or EIAs) and the duty of States Parties to cooperate in protecting the
33 marine environment and controlling marine pollution, both of which are
34 independently core substantive obligations of UNCLOS itself.

35
36 Beginning with EIAs, Sierra Leone reiterates the ICJ’s observation in *Pulp Mills* that:
37 “It may now be considered a requirement under general international law to
38 undertake an environmental impact assessment where there is a risk that the
39 proposed industrial activity may have a significant adverse impact in a transboundary

² *Area Advisory Opinion*, para. 131.

³ *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, *Provisional Measures [1999] ITLOS cases Nos. 3 and 4*, paras.77-80. See also *MOX Plant Case (Ireland v United Kingdom)*, *Provisional Measures, Order of 3 December 2001*, *ITLOS Reports 2001*, p. 95 (“*MOX Plant*”), para. 71; *Land Reclamation In and Around the Straits of Johor (Malaysia v Singapore)*, *Provisional Measures, Order of 8 October 2003*, *ITLOS Reports 2003*, p. 10, para. 74.

⁴ Official Records of the General Assembly, Seventy-second Session, Supplement No. 10(A/76/10), Chapter IV.

⁵ The United Kingdom, Written Statement of the United Kingdom, (16 June 2023), para. 78.

⁶ Written Statement of the United Kingdom, (16 June 2023), para. 78. See also, Written Statement of the Republic of Mauritius, (16 June 2023), para. 80.

1 context, in particular, on a shared resource.”⁷ EIAs are also required by article 206 of
2 UNCLOS where there is “reasonable grounds” to believe that a planned activity “may
3 cause substantial pollution” or “significant and harmful changes” to the marine
4 environment.

5
6 The Convention does not elaborate on what should be included in an EIA. That said,
7 amongst other substantive provisions, article 30 of the recently concluded agreement
8 on marine biodiversity in areas beyond national jurisdiction (“the BBNJ Treaty”)
9 provides various factors for conducting EIAs when a planned activity may have more
10 than a minor or transitory effect on the marine environment.⁸ Where the effects of the
11 activity are unknown or poorly understood, the Party with jurisdiction or control of the
12 activity shall conduct a screening of the activity using specifically provided factors.⁹
13 Sierra Leone submits that the necessary components include the EIA study itself,
14 community consultations, expert opinions and strategic environmental assessments.

15
16 Sierra Leone would also add that the due diligence obligations coupled with the
17 precautionary principle are not performed in isolation. As was held in the *MOX Plant*
18 case, “prudence and caution” require States Parties to cooperate in exchanging
19 information concerning risks or effects of activities.¹⁰ This suggests a close link
20 between the duty to cooperate and the precautionary approach. I will return in more
21 detail to the duty to cooperate in due course.

22
23 The precautionary approach is especially, but not solely, relevant in cases of
24 “irreparable damage to the rights of a nation,” or in cases of serious harm to the
25 marine environment,¹¹ both of which are present in the excessive release of
26 greenhouse gas emissions. The global and interconnected nature of this link
27 requires that this Tribunal acknowledge that the precautionary principle and the duty
28 to cooperate operate in tandem.

29
30 Mr President, Sierra Leone’s third point on the precautionary principle is this: the
31 precautionary principle mandates drastic cuts to greenhouse gas emissions. The
32 most recent IPCC studies have stressed limiting increases in global average
33 temperature to 1.5°C above pre-industrial levels. Science confirms that the situation
34 is dire. Our knowledge of the problem is constantly being updated by new scientific
35 developments. Sierra Leone notes with serious concern that current submitted
36 Nationally Determined Contributions under the Paris Agreement lead to warming
37 closer to 2.4°C, which is equivalent to 3°C for Africa.¹²

38
39 As the African Union has observed in its written statement, and I quote, the “African
40 region is especially vulnerable to, and affected by, the incremental warming between
41 1.5°C and 2°C.”¹³ Africa’s vulnerability, as the world’s second-largest continent, is

⁷ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] *ICJ Rep.* 14, para. 204.

⁸ United Nations, Agreement on Marine Biodiversity in Areas Beyond National Jurisdiction (19 June 2023, A/CONF. 232/2023/4, Article 30).

⁹ *Ibid.* Article 30-31.

¹⁰ *MOX Plant*, para. 84.

¹¹ *MOX Plant*, para. 75.

¹² Written Statement of the African Union, (16 June 2023), para. 62.

¹³ Written Statement of the African Union, (16 June 2023), para. 53.

1 particularly striking when African States have neither individually nor collectively
2 contributed much to global greenhouse gas emissions.

3
4 We also fully agree with the African Union, that even if States were on a path to meet
5 the proposed limit, 1.5°C falls short of “prevent[ing]” further marine pollution or
6 “reduc[ing]” its current cumulative levels.¹⁴ To meet the obligations imposed by
7 article 194, paragraph 1, State Parties must do more. Given the failure of many
8 States to decrease their emissions, it may be beneficial to increasingly implement
9 the precautionary principle and conduct environmental impact assessments to
10 reduce their emissions to reach the common goal of a maximum of 1.5°C warming.

11
12 Finally, Sierra Leone supports the submissions of some States Parties¹⁵ that the
13 precautionary principle should also be taken into account in the adoption of any
14 mitigation and adaptation measures.

15
16 Mr President, distinguished members of the Tribunal, in complying with the
17 obligations thus far discussed, in particular the due diligence obligation, which
18 includes the precautionary principle, States Parties must take into account the CBDR
19 principle, which is also a well-established principle of international environmental law
20 that is applicable in the UNCLOS framework.

21
22 The CBDR principle is contained in the text of UNCLOS itself. Its preamble affirms
23 that the Convention’s goals take into account “the interests and needs of mankind as
24 a whole and, in particular, the special interests and needs of developing countries,
25 whether coastal or land-locked”.

26
27 Article 203 is explicit in providing preferential treatment for developing States in the
28 allocation of appropriate funds and technical assistance, and in the utilization of
29 specialized services. Likewise, article 207 requires taking into account the economic
30 capacity of developing States in taking measures to reduce and control land-based
31 pollution of the marine environment.

32
33 The principle is also reflected in numerous climate change treaties and agreements,
34 which can be relied on by this Tribunal in interpreting UNCLOS. This includes, *inter*
35 *alia*, article 3 of the UNFCCC,¹⁶ principle 7 of the Rio Declaration on Environment
36 and Development,¹⁷ as well as the preamble, substantive articles 2(2), 4(3) and
37 4(19) of the Paris Agreement.¹⁸

38
39 All these provisions, which essentially express the same CBDR principle, share a
40 common feature which makes crystal clear that developed countries should bear the
41 greater responsibility for combating climate change. Developing States are

¹⁴ Written Statement of the African Union, (16 June 2023), para. 21.

¹⁵ See French Republic, Written Statement of the French Republic, (16 June 2023), para. 146; Written Statement of the Republic of Mauritius, (16 June 2023), para. The United Kingdom, Written Statement of the United Kingdom, (16 June 2023), para. 78.

¹⁶ UN General Assembly, *United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189*

¹⁷ The Rio Declaration on Environment and Development (12 August 2015), UN Doc. A/CONF. 151/26 (Vol. I), Annex I.

¹⁸ Paris Agreement to the United Nations Framework Convention on Climate Change (signed 12 December 2015, entered into force 4 November 2016), TIAS 16-1104.

1 disproportionately impacted by climate change but nonetheless must also take
2 measures within their own means.

3

4 Sierra Leone therefore agrees with China that the CBDR principle is “the cornerstone
5 of global governance on climate change”. This applies fully to the marine
6 environment.¹⁹ We also support Brazil’s submission that the interpretation of
7 UNCLOS in relation to the potential deleterious effects of climate change on the
8 marine environment should be guided by the CBDR principle.²⁰

9

10 There should be a practical result of recognizing the relevance of the CBDR
11 principle, and it is this: developed States must assist developing States to prevent
12 pollution and protect and preserve the marine environment. This would include not
13 just adopting economy-wide absolute emission reduction targets, but also providing
14 support for developing States in implementing their obligations under the
15 Convention.²¹

16

17 This principle recognizes that, in general, States that have contributed the least to
18 climate change are both experiencing the brunt of the impacts and are, at the same
19 time, the least able to mitigate them. The failure of UNCLOS to recognize this reality
20 would render core provisions in Part XII nugatory, to the detriment of all States and
21 their populations.

22

23 Mr President, distinguished members of the Tribunal, complementing the
24 precautionary and CBDR principles is the obligation of States to cooperate to meet
25 the severe risks posed by climate change. It is a standalone obligation under
26 UNCLOS and is a general principle of international law.²²

27

28 Climate change is the most serious collective action problem of our time. The gravity
29 of the effects of climate change justifies the highest level of cooperation among all
30 States. Such global cooperation includes not just technological transfers to assist in
31 the fight against climate change, but deeper, collaborative endeavours in taking
32 meaningful mitigation measures, with specific focus on the vulnerability of developing
33 States. Therefore, with respect to the duty to cooperate, which should not be
34 controversial at all. Sierra Leone, for reasons of time, will only make three brief
35 observations.

36

37 *First*, the duty to cooperate enjoys widespread support by States Parties as a
38 general principle of international law. This is also evident in the UNFCCC, whereas
39 the Kyoto Protocol and Paris Agreement fully acknowledge the importance
40 international cooperation and provide the legal framework for climate change
41 cooperation.²³ The duty to cooperate is also implicit in the due diligence obligation,
42 on which my learned friend Mr Tladi addressed you.

43

¹⁹ Written Statement of the People’s Republic of China, (15 June 2023), para. 21.

²⁰ Written Statement of the Federative Republic of Brazil, (16 June 2023), paras. 19-20.

²¹ COP Decision FCCC/CP/2012/L.14/Rev.1, para. 2.

²² *MOX Plant*, para. 82.

²³ Articles 6 and 12 of the Kyoto Protocol and article 6 of the Paris Agreement have made institutional arrangements for flexible compliance mechanisms to promote mitigation actions through international cooperation and support sustainable development.

1 *Second*, UNCLOS provides mechanisms for collective action to address the impact
2 of climate change on the marine environment. Several provisions in Part XII of
3 UNCLOS contain explicit duties of cooperation binding on States, as has also been
4 pointed out by several participants in these proceedings, including just this morning
5 by the Philippines.

6
7 These binding legal obligations are aimed at protecting and preserving the
8 environment by cooperating to firstly, formulate various rules and guidelines, found in
9 article 197; secondly, to eliminate and minimize the effects of pollution, found in
10 articles 198 and 199; and, thirdly, to promote studies, conduct scientific research, and
11 exchange information and data, found in article 200.

12
13 The Tribunal has already elaborated in *MOX Plant* that the duty to cooperate
14 includes obligations “to exchange information, to consult with other States potentially
15 affected by the planned activities, to jointly study the impacts of the activity on the
16 marine environment, monitor risks or the effects of the operation and devise
17 measures to prevent pollution of the marine environment.”²⁴

18
19 In the *SRFC* Advisory Opinion, the Tribunal explained that consultations “should be
20 meaningful in the sense that substantial effort should be made by all States
21 concerned, with a view to adopting effective measures.”²⁵ The stance of this Tribunal
22 in its previous jurisprudence should inform its approach to the COSIS advisory
23 request.

24
25 *Third*, coupled with the duties of cooperation in the provisions of Part XII are
26 UNCLOS provisions which provide for additional scientific and technical assistance
27 for developing States. Article 202 provides for scientific and technical assistance to
28 developing States, aimed at capacity-building, as well as scientific training, supplying
29 necessary equipment and facilities. Article 266 provides for the development and
30 transfer of marine technology, again especially to developing States. However, due
31 to these provisions’ discretionary wording, coupled with the absence— the absence —
32 of political will by the developed polluting States, means that, in practice, such
33 assistance has not really been forthcoming.

34
35 Sierra Leone hopes that the Tribunal will elaborate on the content of the duty of
36 cooperate with respect to States Parties’ obligations under Part XII of UNCLOS and
37 confirm that they provide *concrete* obligations regarding assistance to developing
38 States. They may be guided by several provisions of the Paris Agreement which
39 provide for additional assistance for developing States. In terms of the UNCLOS
40 provisions and the CBDR principle, Sierra Leone submits that that the duty to
41 cooperate includes technological transfers and financial assistance to developing
42 States.

43
44 Lack of funding, technology transfer and capacity building are key barriers for Sierra
45 Leone, and other developing countries, to combat the deleterious effects of climate
46 change. Many States, despite having national climate change strategies, lack the

²⁴ *MOX Plant*, para. 37.

²⁵ *SRFC* Advisory Opinion, para. 210.

1 necessary resources to carry them out. We heard this over the course of the past
2 week.

3
4 So, in our respectful submission, one way in which developed States could comply
5 with their obligations to cooperate under Parts XII and XIV of the Convention would
6 be to provide robust technical, financial, scientific and capacity-building assistance to
7 the developing countries to protect and preserve the marine environment from the
8 impact of climate change. This type of knowledge- and resource-sharing would
9 significantly contribute to the protection and restoration not only of the marine
10 environments of the coastal States most affected by sea-level rise and the effects of
11 climate change, but also likely of the marine environment as a whole.

12
13 I will conclude on this final part of our three fundamental arguments on the
14 precautionary principle, the CBDR principle and the duty to cooperate under
15 UNCLOS and international law, by echoing the African Union’s submission that I now
16 quote: “Climate change is a global problem, and can be addressed effectively only if
17 States act together in a cooperative manner.” Sierra Leone, like probably all African
18 States, could not agree more.

19
20 Mr President, this brings me to the end of my presentation. I wish to conclude my
21 remarks by joining the many speakers before me who have underlined – underlined
22 – the importance of this advisory opinion for the people of the world, especially –
23 especially – those from the Global South.

24
25 With further advisory opinions on climate change, albeit with different scopes, on the
26 horizon, this Tribunal has an opportunity, an historic opportunity, to take the lead
27 through its interpretation of UNCLOS and the other relevant rules of international
28 law. I hope that it will seize that opportunity, as it has done in the past, to make yet
29 another remarkable contribution showing that international law can play a role, as
30 humanity grapples with how best to address the climate change crisis, which is the
31 existential threat of our time.

32
33 Mr President, distinguished members of the Tribunal, I thank you for the opportunity
34 to present Sierra Leone’s views. May I now kindly request you give the floor to my
35 learned colleague, Ms Christina Hioureas. Thank you very much.

36
37 **THE PRESIDENT:** Thank you, Mr Jalloh. I now give the floor to Ms Hioureas to
38 make her statement. You have the floor.

39
40 **MS HIOUREAS:** Mr President, members of the Tribunal, it is an honour to appear
41 before you today on behalf of Sierra Leone. The purpose of my statement is to
42 respectfully request that the Tribunal explicitly recognize that all climate change
43 obligations under UNCLOS are not just obligations, they are also rights. More
44 specifically, Sierra Leone respectfully suggests that the Tribunal reinforce the
45 recognized principle of international law of the margin of appreciation enjoyed by
46 States to regulate in the public interest, including with respect to the protection and
47 preservation of the environment.

48
49 Explicit recognition of the deference owed to the judgment of States in adopting
50 appropriate environmental regulations would allow this advisory opinion to

1 strengthen the capacity of States to protect the marine environment in practice,
2 particularly in the face of claims by foreign investors in reaction to climate change
3 legislation.

4
5 What does this mean? This means that UNCLOS State Parties do not just have the
6 obligation to prevent, reduce and control pollution within their own territories; this
7 means that they do not just have the obligation to protect and preserve the marine
8 environment; they have the right to take measures aimed at doing so. In the context
9 of the due diligence standard, this means that States Parties have the right to take
10 measures to limit global average temperature to 1.5°C above pre-industrial levels.

11
12 So you might ask, why does the explicit recognition of the right to take action to
13 protect and preserve the marine environment matter? It matters because around the
14 world, efforts of States to adopt environmental regulations have faced challenges,
15 particularly in the context of investment treaty arbitrations.

16
17 Take for example, a €1.4 billion suit that was filed against Germany in 2009 – the
18 infamous *Vattenfall* arbitration – in response to its application of environmental
19 regulations to a coal-fired power plant.¹ And in 2019, a coal company sued Canada
20 for US\$ 470 million when a Canadian province took action to phase out
21 anthropogenic greenhouse gas emissions from electricity generation.²

22
23 Even more recently, in 2021, two energy companies sued the Netherlands for a total
24 of €2.4 billion for its decision to phase out coal-fired power by 2030.³ And in 2022,
25 the Republic of Senegal faced an investment treaty claim arising from its change in
26 energy policy following its ratification of the Paris Agreement. Sierra Leone itself has
27 faced claims from foreign investors based on its exercise of regulatory authority.

28
29 So why does the ability of Germany, or of the Netherlands, or of Canada, or of
30 Senegal, matter to a State like Sierra Leone?

31
32 It matters because the threat of such claims is preventing States from doing what
33 they ought to do and what they are legally required to do.

34
35 It matters because a failure of the Global North to act has had, and will continue to
36 have, devastating effects on the Global South.

37
38 It matters because if the right to regulate is not recognized and respected, States will
39 be disincentivized from taking the necessary actions to address this existential crisis.
40 This includes the largest contributors of greenhouse gas emissions that may wish to
41 curtail their emissions, and it includes the Global South that may be penalized for
42 attempting to take its own mitigating steps.

1 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration (30 March 2009), para. 79(ii).

2 *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Notice of Arbitration and Statement of Claim (12 Aug. 2019), para. 111.

3 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22.

1 States have been placed between a rock and a hard place. The message has been,
2 “take actions to curb anthropogenic greenhouse gas emissions as required under
3 international law, but if you do so, you will face investment treaty claims.”
4

5 Mr President, a pronouncement of the obligation of States to adopt measures to
6 combat climate change will only be effective if a corresponding right to take such
7 measures is recognized. What good is an obligation if acting consistently with it
8 results in the breach of another obligation?
9

10 International law has long recognized that States have the inherent right to regulate
11 within their territories in the public interest, also known as the “police powers”
12 doctrine. This is a well-established principle under public international law. This right
13 to regulate is also reflected in investment and trade treaties, including those
14 concluded by both developed and developing States.⁴
15

16 International courts and tribunals, including those interpreting international human
17 rights law,⁵ as well as under the GATT and investment treaties,⁶ have also

⁴ Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part (signed 30 June 2019, entered into force 1 August 2020), art. 2.2(1) (“The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of ... environment ...”); United States of America, Model Bilateral Investment Treaty (2012), Annex B, para. 4(b) (“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as ... the environment ...”); Kingdom of the Netherlands, Model Bilateral Investment Treaty (2019), art. 2(2) (“The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of ... environment ...”); Canada-Chile Free Trade Agreement (modernization of the agreement, signed 5 June 2017, entered into force 5 February 2019, art. G-14 (“Environmental Measures: 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”); General Agreement on Trade and Tariffs, 55 U.N.T.S. 187 (signed 30 October 1947, provisionally applied 1 January 1948), art. XX (“[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources.”); Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019), Preamble (“REAFFIRMING the right of State Parties to regulate within their territories and the State Parties’ flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity”).

⁵ See, e.g., *Powell and Rayner v. the United Kingdom*, ECHR Application No. 9310/81 (A/172), Judgment, Merits, Case No 3/1989/163/219 (21 February 1990), para. 44 (“It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognized as enjoying a wide margin of appreciation.”); *Evans v. the United Kingdom*, ECHR Application No. 6339/05, Judgment (10 April 2007), para. 77 (“There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests”); *Fadeyeva v. Russian Federation*, ECHR Application No. 55723/00, Judgment, Merits and Just Satisfaction (9 June 2005), ECHR 2005-IV, para. 105 (same).

⁶ See, e.g., *Béláné Nagy v. Hungary*, ECtHR Application No. 53080/13, Grand Chamber, Judgment (13 December 2016), para. 113 (“[A]ny interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. ... The Court finds it natural that the margin of appreciation available to the legislature in implementing social and

1 recognized the margin of appreciation enjoyed by States to regulate in the public
2 interest. Prominent judges, arbitrators and commentators have also recognized this
3 right.⁷ In the *Philip Morris v. Uruguay* arbitration, the tribunal, which included the late
4 Judge Crawford, held that “greater deference should be given to governmental
5 judgments of national needs in public policy matters.” As held by another
6 distinguished investment tribunal, chaired by the late Professor David Caron (a
7 personal mentor of mine), “[t]he sole inquiry for the Tribunal ... is whether or not
8 there was a manifest lack of reasons for the legislation.”⁸

9
10 The late Professor Alan Boyle, whose recent passing is a great loss to the
11 international community, also observed that States are entitled to a “wide margin of
12 appreciation ... when balancing economic, environmental and social policy
13 objectives.”⁹

14
15 This right is reaffirmed in the UN General Assembly’s 1974 Charter of Economic
16 Rights and Duties of States, which declared that “[e]ach State has the right ... [t]o
17 regulate and exercise authority over foreign investment within its national jurisdiction

economic policies should be a wide one and will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation.”); *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, IUSCT Case Nos. 128 and 129, Interlocutory Award (Award No. ITL 55-129-3) (17 September 1985), para. 90 (“It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide ‘regulation’ within the accepted police power of states.”); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), para. 262 (“In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.”); *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), paras. 295, 300, 301 (“[A] range of investment decisions have contributed to develop the scope, content and conditions of the State’s police powers doctrine, anchoring it in international law. . . . [T]he police powers doctrine has found confirmation in recent trade and investment treaties. . . . In the Tribunal’s view, these provisions ... reflect the position under general international law.”); *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), para. 7 (“[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”); *Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017), para. 268 (“[A] sovereign state deserves a degree of deference in its determinations of public policies. As stated by the *LIAMCO* tribunal, a State is ‘free to judge for itself what it considers useful or necessary for the public good.’ ... [T]reaty tribunals ought to respect the government’s policy preferences. A number of tribunals have found that it is not for them to second-guess the policy choices of governments.”).

⁷ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (5th ed., CUP 2021), p. 282 (“The idea existed in customary international law that certain measures, such as taxation, the exaction of criminal fines, customs duties and antitrust dissolutions, cannot be regarded as compensable expropriations.”); Catherine Yannaca-Small, “Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law,” *OECD Working Papers on International Investment 2004/04* (September 2004), p. 5, note 10 (“It is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required.”).

⁸ *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, (2008), para 357 (D. Caron, M. Young, K. Hubbard).

⁹ Alan Boyle, “Human Rights and the Environment: Where Next?” 23(3) EJIL (2012) 613, at 641.

1 in accordance with its laws and regulations and in conformity with its national
2 objectives and priorities”.¹⁰

3
4 Importantly, the right to regulate is now widely recognized to apply to matters of
5 environmental regulation specifically. Indeed, many investment treaties¹¹ and arbitral
6 tribunals¹² have expressly recognized this right as to environmental regulation. In
7 other words, if a State is regulating in the public interest, including with respect to the
8 environment, its decisions should not be second-guessed.

9
10 Mr President, in the specific context of the first question posed by COSIS, Sierra
11 Leone observes that articles 207 to 212 of the Convention require States Parties to
12 adopt laws and regulations to prevent, reduce and control anthropogenic
13 greenhouse gas emissions. In so doing, as Professor Tladi explained, they must take
14 into account international rules and standards, such as the UNFCCC and the Paris
15 Agreement. Articles 213 and 222 further require States to enforce these laws and
16 regulations, and to implement international rules and standards.

17
18 These obligations correspond to rights under international law. States thus have the
19 right to adopt and enforce laws that, for example, phase out coal-fired power plants,
20 limit oil and gas exploration, and incentivize the development of clean tech and clean
21 energy.

22
23 Mr President, turning now to the second question posed by COSIS, Sierra Leone
24 observes that it is broader than the first question. The obligation to protect and
25 preserve the marine environment under article 192 goes well beyond the prevention,
26 reduction and control of pollution of the marine environment as referenced in
27 article 194.

28
29 It also encompasses the obligation to take action to minimize the impacts of climate
30 change on biodiversity, habitats, fisheries, ocean acidity and sea level. These
31 obligations also correspond to rights under international law.

32
33 The freedom to enact such laws and regulations is absolutely essential if States are
34 to be expected to fulfil their obligations under the Convention.

¹⁰ UN General Assembly, Resolution 3281 (XXIX), *Charter of Economic Rights and Duties of States*, UN Doc. A/RES/3281(XXIX) (12 December 1974), art. 2(2)(a). According to Article 30 of the same, “The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. *All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility.* The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. *All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.*” *Id.*, art. 30 (emphasis added).

¹¹ See note 8, *supra*.

¹² See, e.g., *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 103 (“[G]overnments must be free to act in the broader public interest through protection of the environment ... and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.”).

1 Mr President, members of the Tribunal, this Tribunal has a unique opportunity today;
2 the opportunity to affirm that international law will be a tool in the fight against climate
3 change and will not be manipulated by corporations seeking to dissuade States from
4 taking the regulatory action that the Law of the Sea Convention requires. The
5 inclusion of such language in an advisory opinion would serve as authoritative
6 guidance for the many investor-State, free trade and regional human rights tribunals
7 that will be adjudicating on States' climate change policies in the future.

8

9 Mr President, distinguished members of the Tribunal, this brings the presentation of
10 the delegation of Sierra Leone to a close. On behalf of the delegation, I thank the
11 Tribunal for its kind attention.

12

13 **THE PRESIDENT:** Thank you, Ms Hioureas.

14

15 This brings us to the end of this morning's sitting. The hearing will be resumed at
16 3 p.m. when we will hear an oral statement from Singapore. This sitting is now
17 closed.

18

19

20

(Lunch adjournment)