

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**



2023

Public sitting

held on Monday, 25 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)**

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**Verbatim Record**

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<i>Present:</i>	President	Albert J. Hoffmann
	Vice-President	Tomas Heidar
	Judges	José Lu�s Jesus
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Boualem Bouguetaia
		Jin-Hyun Paik
		David Joseph Attard
		Markiy�n Z. Kulyk
		Alonso G�mez-Robledo
		�scar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
		Mar�a Teresa Infante Caffi
		Jielong Duan
		Kathy-Ann Brown
		Ida Caracciolo
		Maurice K. Kamga
	Registrar	Ximena Hinrichs Oyarce

*List of delegations:*

## **STATES PARTIES**

### **France**

Ms Sandrine Barbier, Deputy Director of Legal Affairs, Ministry for Europe and Foreign Affairs

Mr Mathias Forteau, Professor, University of Paris Nanterre

Ms Valérie Bore Eveno, Lecturer, University of Nantes

Ms Marie-Pierre Lanfranchi

### **Italy**

Mr Stefano Zanini, Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation

Mr Roberto Virzo, Professor of International Law, University of Messina

### **The Netherlands**

Mr René J.M. Lefeber, Legal Adviser, Ministry of Foreign Affairs

Ms Lotte Kageenaar, Legal Officer, Ministry of Foreign Affairs

### **United Kingdom**

Mr Andrew Murdoch, Legal Director, Foreign, Commonwealth and Development Office

Ms Jennifer Wallace, Assistant Legal Adviser, Foreign, Commonwealth and Development Office

Ms Lowri Mai Griffiths, Head of the Ocean Policy Unit, Foreign, Commonwealth and Development Office

Mr Ben Juratowitch KC, Barrister, Essex Court Chambers

Ms Amy Sander, Barrister, Essex Court Chambers

Ms Belinda McRae, Barrister, Twenty Essex

Ms Courtney Grafton, Barrister, Twenty Essex

1 **THE PRESIDENT:** Good morning. Today we will continue the hearing in the *Request*  
2 *for an Advisory Opinion submitted by the Commission of Small Island States and*  
3 *International Law*. This morning we will hear oral statements from France, Italy, The  
4 Netherlands and the United Kingdom.

5  
6 I now invite the representative of France, Ms Barbier, to make her statement. You  
7 have the floor, Madam.

8  
9 **MS BARBIER** (*Interpretation from French*) : Mr President, distinguished members of  
10 the Tribunal, it is, for me, a great honour to represent my country before the Tribunal.  
11 In participating in these proceedings, it is the opportunity for France to reaffirm its full  
12 support for this Tribunal and the vital role which it plays. It is also the opportunity to  
13 recall our attachment to the international law of the sea and particularly to the  
14 “Constitution of the Oceans” which UNCLOS constitutes.

15  
16 I should also like to express personally, and also on behalf of the French Republic,  
17 our sincere condolences to the family and friends of Professor Alan Boyle, who had  
18 placed his internationally recognized skills at the service of COSIS in these  
19 proceedings.

20  
21 Mr President, distinguished members of the Tribunal, “Humanity has opened the  
22 gates of hell.”<sup>1</sup> This image evoked last week by the UN Secretary-General in his  
23 opening speech of the Climate Ambition Summit mirrors a terrifying reality. Climate  
24 change is causing catastrophes right here and now, to which this summer’s events in  
25 Greece, Turkey, Canada and Libya bear dramatic testimony.

26  
27 Climate change is all the more urgent when twinned with cascade effects which  
28 could threaten the very existence of some States. It is, in particular, the case with the  
29 rise in the level of the oceans. France has vast maritime areas extending over more  
30 than 10 million km<sup>2</sup>; 97 per cent of these areas are situated in France’s overseas  
31 territories, whose sovereignty, let me point out, is not in dispute in the instant  
32 proceedings.<sup>2</sup> But given this rather specific geography, France is thus rather  
33 concerned and worried by these developments and stands in full solidarity in  
34 particular with Small Island Developing States, which are feeling the full force of the  
35 effects of sea-level rise.

36  
37 It is in the context of this urgency that France, like the entire European Union, is  
38 committed to an ambitious climate protection approach, as can be seen from the set  
39 of instruments which we have recently adopted with the aim of cutting our  
40 greenhouse gas emissions by 55 per cent by 2030 and becoming carbon neutral by  
41 2050.<sup>3</sup> The adoption of such instruments is more necessary than ever to protect our  
42 environment as a whole and particularly our seas and oceans.

43  
44 Scientists have been warning us for a long time now that this change was taking  
45 place and we must take heed of these data. The written statements and oral

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<sup>1</sup> <https://www.un.org/sg/en/content/sg/statement/2023-09-20/secretary-generals-opening-remarks-the-climate-ambition-summit>

<sup>2</sup> TIDM/PV.23/C31/9, sitting of 15 September 2023 (a.m.), p. 16, lines 40-42 (Mauritius).

<sup>3</sup> <https://www.statistiques.developpement-durable.gouv.fr/edition-numerique/chiffres-cles-du-climat/22-politiques-de-lutte-contre-le>

1 submissions informed by these scientific findings are evidence of the consensus on  
2 the harmful of effects of rising CO<sub>2</sub> emissions on the seas and oceans, despite the  
3 fact that they play such a key role in climate regulation.

4  
5 In this respect, we welcome the convergence of views between the participants in  
6 these proceedings on the need to rely on available scientific data to establish the  
7 materiality of pollution of the marine environment within the meaning of article 1 of  
8 the Convention and to define the means and techniques available to deal with them.  
9 The reports and the findings of the Intergovernmental Panel on Climate Change  
10 (IPCC) are abundantly quoted in a number of written statements and oral  
11 submissions.<sup>4</sup>

12  
13 Mr President, the instant request for an advisory opinion is fundamental in view of  
14 this urgency, and international law has to play a central role in the protection of the  
15 oceans. The response that the Tribunal is asked to give to this request for an  
16 advisory opinion must bear witness to the strength of multilateralism and the need for  
17 the international community to cooperate effectively and in a spirit of solidarity on  
18 environmental and climate issues – not to protect our own individual homes but the  
19 home to us all, to echo the famous phrase of French President Jacques Chirac in  
20 2002 that “our house is burning and we are looking elsewhere”.<sup>5</sup>

21  
22 These advisory proceedings are taking place in an international context that is  
23 encouraging in many respects. They form part of a widespread awareness of the  
24 vital importance of the oceans and a need to develop the legal framework to better  
25 preserve the marine environment.

26  
27 A first example in this regard is the adoption in June of the agreement on the  
28 conservation and sustainable use of marine biological diversity of areas beyond  
29 national jurisdiction (the BBNJ Agreement). This represents a major step towards  
30 preserving the biological diversity of the high seas and the Area. Last week’s signing  
31 of this Agreement by more than 70 States and the European Union is a very positive  
32 sign of States’ determination to reinforce protection of the marine environment.

33  
34 The Agreement on Fisheries Subsidies concluded on 17 June 2022 at the WTO  
35 represents another encouraging development, given that it will contribute to the  
36 sustainable development of fish stocks. Other equally fundamental negotiations are  
37 still under way: within the International Seabed Authority with regards to the  
38 exploitation of mineral resources in the Area; at the upcoming Dubai Climate Change  
39 Conference (COP28); and within the UN International Negotiating Committee on  
40 Plastic Pollution working towards a plastic pollution treaty with the aim of adopting a

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<sup>4</sup> See, for example, TIDM/PV.23/C31/6, sitting of 13 September 2023 (p.m.), p. 21, lines 20-32 (Bangladesh); TIDM/PV.23/C31/9, sitting of 15 September 2023 (a.m.), p. 18, lines 9-16 (Mauritius); TIDM/PV.23/C31/10, sitting of 15 September 2023 (p.m.), p. 6, lines 10-18 (New Zealand); TIDM/PV.23/C31/12, sitting of 19 September 2023 (a.m.), p. 7, lines 30-36 (Philippines); *ibid.*, p. 28, lines 20-25 (Sierra Leone); TIDM/PV.23/C31/14, sitting of 20 September (a.m.), p. 22, lines 31-37 (Timor Leste); *ibid.*, p. 24, lines 1-19 (European Union).

<sup>5</sup> Statement of Mr Jacques Chirac, President of the Republic, on the critical situation of the global environment and France’s proposals for sustainable development, Johannesburg, 2 September 2002. <https://www.elysee.fr/jacques-chirac/2002/09/02/declaration-de-m-jacques-chirac-president-de-la-republique-sur-la-situation-critique-de-lenvironnement-planetaire-et-les-propositions-de-la-france-pour-un-developpement-durable-johannesburg-le-2-septembre-2002>

1 text before the end of 2024. Lastly, the prospect of the third United Nations Ocean  
2 Conference to be held in Nice in 2025, and co-chaired by France and Costa Rica,  
3 will help to keep marine environmental protection at the top of the political agenda  
4 and bring these different processes together.

5  
6 These advisory proceedings also fit within the context of discussions being held  
7 within the International Law Commission (ILC) on sea-level rise in relation to  
8 international law. This work is essential, in particular to meet the need to secure  
9 maritime area limits of States concerned. France would like to rehearse the written  
10 statement it sent to the ILC on this subject and the fact that it interprets the  
11 Convention as allowing recourse to fixed baselines.<sup>6</sup>

12  
13 Finally, the ICJ has, in parallel, received from the UN General Assembly a request  
14 for an opinion on a question which has a clear nexus with the present proceedings.  
15 The referral for an opinion to the Inter-American Court of Human Rights on 9  
16 January 2023 by Colombia and Chile concerning the climate emergency and human  
17 rights is also in the same vein. This concomitance testifies to the global interest in  
18 the issue of environmental protection in view of the consequences of climate change.

19  
20 In France's opinion, it is essential that the responses provided by international courts  
21 and tribunals should be both convergent and consistent. Nothing would be more  
22 damaging to international climate law and international law for protection of the  
23 marine environment than for States and international organizations to be confronted  
24 with divergent interpretations of the relevant applicable law. At the same time, this  
25 compelling need for legal consistency should not lead to a restrictive interpretation of  
26 the rules in force, which would fail to take into account the contemporary needs of  
27 the international community.

28  
29 Mr President, distinguished members of Tribunal, today's proceedings in which we  
30 are taking part today are in line with this context and they require the full attention of  
31 us all. Our intention this morning isn't to repeat what already appears in France's  
32 written statement – which I'd like to refer the Tribunal to – but to focus on those  
33 points which we deem the most important in these proceedings, be it the jurisdiction  
34 of this Tribunal to hand down the advisory opinion and applicable law – which I will  
35 return to shortly – or certain substantive questions which we will deal with in turn,  
36 together with Professor Forteau.

37  
38 Mr President, I shall say but little on the jurisdiction of your Tribunal to entertain this  
39 advisory opinion, given the numerous discussions that already took place within the  
40 framework of the proceedings that led to your Advisory Opinion of 2015, and  
41 considering the broad consensus on this issue in the written and oral submissions.<sup>7</sup>

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<sup>6</sup> In this sense, see [https://legal.un.org/ilc/sessions/74/pdfs/french/slr\\_france.pdf](https://legal.un.org/ilc/sessions/74/pdfs/french/slr_france.pdf)

<sup>7</sup> See, for example, TIDM/PV.23/C31/5, sitting of 13 September 2023 (a.m.), p. 19, lines 4-5 (Germany); TIDM/PV.23/C31/7, sitting of 14 September 2023 (a.m.), p. 1, lines 39-41 (Chile); TIDM/PV.23/C31/8, sitting of 14 September 2023 (p.m.), p. 6, lines 12-14 (Guatemala); TIDM/PV.23/C31/9, sitting of 15 September 2023 (a.m.), p. 40, lines 11-12 (Federated States of Micronesia); TIDM/PV.23/C31/10, sitting of 15 September 2023 (p.m.), p. 17, lines 1-3 (Republic of Korea); TIDM/PV.23/C31/11, sitting of 18 September 2023 (a.m.), p. 6, lines 32-33 (Mozambique); TIDM/PV.23/C31/12, sitting of 19 September 2023 (a.m.), p. 26, lines 48-50 (Sierra Leone); TIDM/PV.23/C31/14, sitting of 20 September 2023 (a.m.), p. 44, lines 43-46 (Viet Nam); TIDM/PV.23/C31/16, sitting of 21 September 2023 (a.m.), p. 4, lines 34-36 (African Union/Comoros).

1  
2 Contrary to what a handful of States have maintained,<sup>8</sup> France considers that the  
3 Tribunal is competent to deal with the present request for an opinion, but it also  
4 considers that it is important for the Tribunal to seize the opportunity afforded by the  
5 instant case to define the conditions of its advisory jurisdiction more precisely.  
6

7 Now, a request for an opinion may indeed be consensual and useful in one case but  
8 in another could be particularly inappropriate and problematic. It is, therefore, up to  
9 the Tribunal to use appropriate and sufficiently precise criteria to prevent any misuse  
10 the advisory proceedings.  
11

12 In particular, I should like to point out that the Tribunal's jurisdiction is limited *ratione*  
13 *materiae* by the statutory rules governing it and by the question put to it.<sup>9</sup> In the  
14 instant proceedings, this question seeks only to identify the existing and specific  
15 obligations owed under the Convention<sup>10</sup> without this preventing the Tribunal from  
16 referring, for the purposes of interpretation, to other relevant rules of international law  
17 than those cited in the question put to it.<sup>11</sup>  
18

19 In this respect, I would like to return to the question of the relationship between the  
20 Convention and external rules, as this question is particularly important in the context  
21 of the present case and seems to be the subject of differing assessments.  
22

23 Firstly, with regard to the scope of article 237 of the Convention, there are  
24 differences of opinion as to its characterization. Is it a coordinating clause or is it a  
25 *renvoi* clause?  
26

27 In the view of France, article 237 constitutes a coordinating or compatibility clause  
28 between, on the one hand, the Convention on the Law of the Sea, including Part XII  
29 on the general principles and objectives of the Convention and, on the other hand,  
30 the relevant external obligations in accordance with the imperative of consistency  
31 and mutual support.<sup>12</sup>  
32

33 Indeed, the external rules referred to in article 237 are intended solely for the  
34 purposes of the relationship between those rules and the Convention. Moreover, the  
35 same external rules may be relevant to the interpretation of the Convention either  
36 when the Convention refers to them in substantive provisions, for example, in  
37 articles 207 or 212, or under the general rule of interpretation codified in article 31 of  
38 the VCLT (the Vienna Convention on the Law and Treaties), as an element of  
39 context, subsequent practice or relevant rule of international law applicable in  
40 relations between parties.  
41

42 So, it is within this framework that France believes the relationship between  
43 UNCLOS and other relevant international conventions – in particular the Framework

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<sup>8</sup> See, for example, TIDM/PV.22/C31/8, sitting of 14 September 2023 (p.m.), p. 18, lines 2-34 (India); TIDM/PV.23/C31/10, sitting of 15 September 2023 (p.m.), p. 23, lines 40-45 (China); see also written statement of Brazil, pp. 2-3, paras. 6-9.

<sup>9</sup> Written statement of France, p. 5, para. 13.

<sup>10</sup> Written statement of France, p. 6, paras. 15-16.

<sup>11</sup> Written statement of France, p. 7, para. 18.

<sup>12</sup> Written statement of France, pp. 16-17, paras. 43-45.

1 Convention on Climate Change and the Paris Agreement – has to be addressed. It's  
2 an issue that's been assessed in various ways by the participants in the instant  
3 proceedings,<sup>13</sup> and Professor Forteau will return to it.  
4

5 For my part, I would just like to emphasize that the conclusion of the 1992  
6 Framework Convention, like the Paris Agreement, is in line with the general  
7 principles set out in the Convention within the meaning of article 237(1), and that  
8 these conventions are also relevant for the purposes of interpreting the Convention  
9 on the Law of the Sea.<sup>14</sup> This means that the provisions of these climate conventions  
10 may thus help to clarify and inform the content of the specific obligations of States  
11 Parties to the Convention, including by means of an evolutionary approach (in  
12 relation to the deleterious effects that result or are likely to result from climate  
13 change). But they cannot however, impose on these States, under the Convention,  
14 treaty obligations to which they may not have consented.  
15

16 Mr President, distinguished members of the Tribunal, if you allow me, I would now  
17 like to jump into the substantive issues that the instant request raises.  
18

19 The question put to your Tribunal concerns only the obligations – and I would like to  
20 emphasize the word “obligations” – that States are required to undertake under  
21 UNCLOS, to, if I may summarize, protect and preserve the marine environment in  
22 relation to the impacts of climate change.  
23

24 However, among these obligations, the obligation to take the necessary measures to  
25 this end – which Professor Forteau will address – necessarily implies recognition of  
26 the States' right to regulate.<sup>15</sup> This right to regulate appears to be the corollary of the  
27 obligation to act; they are two sides of the same coin. Such recognition by your  
28 Tribunal would be particularly useful in ensuring the full effectiveness of the regime  
29 laid down by the Convention, in particular, Part XII. Indeed, it is in the light of this  
30 inherent right of States to regulate in the public interest – a right well established in  
31 general international law, as Sierra Leone recalled last week<sup>16</sup> – that certain treaty  
32 obligations must be interpreted in accordance with article 31(3)(c) of the VCLT.  
33

34 Here, I would like to focus on the tensions that can arise between foreign investment  
35 law and climate – more generally environmental – policies. For a long time, some  
36 have been tempted to give precedence to economic interests over environmental  
37 protection, which is no longer viable given the state of our planet.  
38

39 Aware of the need for stronger action to achieve the objectives in the fight against  
40 climate change, my government – like other European Union Member States – has  
41 decided to withdraw from the Energy Charter Treaty,<sup>17</sup> effective as of 8 December  
42 2023. The provisions of this treaty are incompatible with the need to protect the

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<sup>13</sup> See, for example, TIDM/PV.23/C31/10, sitting of 15 September 2023 (p.m.), p. 5, lines 36-38 (New Zealand); TIDM/PV.23/C31/13, sitting of 19 September 2023 (p.m.), p. 11, lines 34-37 (Singapore); TIDM/PV.23/C31/14, sitting of 20 September 2023 (a.m.), p. 8, lines 24-29 (Timor Leste). Cf., see in particular, TIDM/PV.23/C31/8, sitting of 14 September 2023 (p.m.), p. 19, lines 7-20 (India).

<sup>14</sup> Written statement of France, p. 15, para. 37.

<sup>15</sup> See, in this sense, written statement of Mozambique, p. 29, para. 3.69.

<sup>16</sup> TIDM/PV.23/C31/12, sitting of 19 September 2023 (a.m.), p. 36, lines 4-6.

<sup>17</sup> <https://www.tresor.economie.gouv.fr/Articles/97189b64-0ff2-42df-8f06-fd6b7ee2b03a/files/a59a9fe0-f41b-4cab-8246-f52b6217dd16>



1 climate and with France's commitments under the Paris Agreement. With this in  
2 mind, we believe that only this measure will guarantee an end to the excessive  
3 protection of fossil fuel production activities that are harmful to the environment.  
4

5 It is also to give priority to the protection of the marine environment that France has  
6 undertaken not to exploit deep sea mineral resources. Even if the solution should  
7 certainly not be sought in unilaterally. Ecosystems and the marine environment know  
8 no national boundaries, and the solution must be found collectively within a  
9 multilateral framework.  
10

11 This brings me to my final point to highlight the essential nature of the duty to  
12 cooperate. Cooperation is, of course, the path that we must take because it's a  
13 political imperative and because we are legally bound to it. And we are delighted that  
14 the participants in these proceedings are largely in agreement on this point.<sup>18</sup> As  
15 your Tribunal described in 2001 in the *Mox Plant* case, the Convention establishes  
16 the duty to cooperate as a "fundamental principle in the prevention of pollution of the  
17 marine environment",<sup>19</sup> not only by devoting the entirety of Section 2 of Part XII to it  
18 but also in that this duty informs a large number of other provisions of the  
19 Convention. The importance of this duty to cooperate was also reiterated by the ICJ  
20 in the *Pulp Mills on the River Uruguay* case back in 2010<sup>20</sup> and by the *South China*  
21 *Sea Arbitration* award in 2016.<sup>21</sup>  
22

23 Of crucial importance to the effective implementation of the regime to protect and  
24 preserve the marine environment,<sup>22</sup> the duty to cooperate also responds to a strong  
25 logical and social need. Because of the cumulative impact and the unity of the  
26 marine environment, damage to the environment resulting from greenhouse gas  
27 emissions generates environmental problems on a global scale common to all States  
28 on the planet. Let me give you an example: this need is the basis for the duty to  
29 cooperate, laid down in guideline 8(1) of the draft guidelines on the protection of the  
30 atmosphere adopted by the International Law Commission on second reading in  
31 2021.<sup>23</sup>  
32

33 Cooperation isn't a pipe dream; it allows, in practical terms, the establishment of the  
34 normative framework needed to protect the marine environment, and it testifies to

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<sup>18</sup> See, for example, TIDM/PV.23/C31/4, sitting of 12 September 2023 (p.m.), p. 10, lines 10-24 (COSIS); TIDM/PV.23/C31/5, sitting of 13 September 2023 (a.m.), p. 114, lines 16-30 (Australia); *ibid.*, p. 26, lines 26-33 (Saudi Arabia); TIDM/PV.23/C31/7, sitting of 14 September 2023 (a.m.), p. 18, lines 34-37 (Portugal); TIDM/PV.23/C31/10, sitting of 15 September 2023 (p.m.), p. 8, lines 21-27 (New Zealand).

<sup>19</sup> *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, p. 110, para. 82.

<sup>20</sup> ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, I.C.J. Reports 2010, p. 49, para. 77; <https://icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-FR.pdf>

<sup>21</sup> *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*, PCA No. 2013-19, Award of 12 July 2016, para. 985, *PCA Award Series*, vol. XXXIII, p. 539, available at [https://legal.un.org/riaa/cases/vol\\_XXXIII/153-617.pdf](https://legal.un.org/riaa/cases/vol_XXXIII/153-617.pdf)

<sup>22</sup> See, in particular, written statement of New Zealand, paras. 45, 55, 59, 64.

<sup>23</sup> International Law Commission, Draft guidelines on the protection of the atmosphere, guideline 8, paragraph 1, *in* Report of the International Law Commission on the work of its seventy-second session (2021), A/76/10, p. 12, available at [https://legal.un.org/ilc/reports/2021/french/a\\_76\\_10.pdf](https://legal.un.org/ilc/reports/2021/french/a_76_10.pdf); see also commentary, pp. 37-41.

1 our determination to strike a balance between our own interests as States and our  
2 mutual interests as a community. To quote Judge Wolfrum: “The duty to cooperate  
3 denotes an important shift in the general orientation of the international legal order. It  
4 balances the principle of the sovereignty of States and thus ensures that community  
5 interests are taken into account vis-à-vis individualistic State interests”.<sup>24</sup>  
6

7 The various processes I mentioned earlier, such as the conclusion of the BBNJ  
8 Agreement or the ongoing negotiations on the plastic pollution treaty, are a perfect  
9 illustration of this willingness to find such compromises to ensure better protection of  
10 the environment, in particular the marine environment.  
11

12 The duty to cooperate requires us, as a community, to define environmental  
13 protection rules on the basis of available scientific knowledge. It is, therefore, an  
14 effective means of preventing and adapting to potential or proven disturbances of the  
15 marine environment. The preservation of ecosystems depends on this adaptability.  
16 Risks and damage are both evolving and, as I said earlier, the marine environment  
17 knows no boundaries.  
18

19 Targeted, individual measures are useful and even essential for preserving the  
20 marine environment, but they will not suffice to contain its degradation. We need to  
21 act collectively. This is true, firstly, from a strictly normative point of view and we fully  
22 share COSIS’s assertion that “GHG emissions call for a sophisticated regulatory  
23 response supported by international coordination informed by internationally agreed  
24 standards.”<sup>25</sup>  
25

26 This is also true in a broader perspective. The major challenge we face requires us  
27 to scale up and have a different conception of our international solidarity. That was  
28 the aim of the Summit for a New Financial Pact held in Paris in June, which clearly  
29 highlighted the fact that the fight against climate change requires an overhaul of our  
30 global financial system, in particular with a view to helping developing countries meet  
31 their obligations in this respect, but also by adapting our policies for financing and  
32 taxing carbon-based activities. In this sense, this summit is in line with the Paris  
33 Agreement which puts mitigation, adaptation and financing on an equal footing in the  
34 fight against climate change, whereas the Framework Convention 1992 favoured  
35 mitigation.  
36

37 For France, this solidarity is expressed in concrete terms through climate financing  
38 for developing countries to the tune of EUR 7.6 billion in 2022, including EUR 2.6  
39 billion for adaptation, as recalled at the Climate Ambition Summit last week.<sup>26</sup> This  
40 financial commitment goes beyond what was planned at COP21 in 2015. This  
41 solidarity is also expressed by the proposal supported by France, together with the

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<sup>24</sup> *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, *Order of 3 December 2001*, separate opinion of Judge Wolfrum, *ITLOS Reports 2001*, p. 135, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/published/A10-O-3\\_dec\\_01-SO\\_W.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/A10-O-3_dec_01-SO_W.pdf)

<sup>25</sup> Written statement of COSIS, p. 89, para. 316.

<sup>26</sup> <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/climat-et-environnement/actualites-et-evenements/2023/article/la-france-depasse-largement-ses-engagements-en-matiere-de-financements-pour-le>

1 European Union and its Member States, to set up an unprecedented mandatory  
2 financing mechanism for a capacity-building fund as part of the BBNJ Agreement.

3  
4 Mr President, distinguished members of the Tribunal, I would like to thank you for  
5 your patient and kind attention, and I would now give the floor, if you allow me,  
6 to Professor Mathias Forteau for the remainder of the speaking time allotted to  
7 France.

8  
9 **THE PRESIDENT:** Thank you, Ms Barbier. I now invite Mr Forteau to make his  
10 statement. You have the floor, Sir.

11  
12 **MR FORTEAU** (*Interpretation from French*) : Thank you, Mr President. Mr President,  
13 distinguished members of the Court, it is a great honour for me to appear before you  
14 today and to speak in these proceedings on behalf of my country.

15  
16 This morning I am going to go through a number of substantive elements in addition  
17 to the important observations that have just been made by the Agent for France. Of  
18 course, it is impossible in the time allotted to us to go over all of the arguments  
19 exchanged in the course of these proceedings. Moreover, it is not useful nor  
20 expedient to do so, because a lot has already been said over the last two weeks of  
21 hearings, and we think that the Tribunal would be grateful at this stage in the  
22 proceedings to see us go straight to the heart of the matter and to keep it as succinct  
23 as possible.

24  
25 I shall, therefore, confine myself to a number of observations on points that strike us  
26 as being the most important, without any prejudice to France's position concerning  
27 the other points under discussion.

28  
29 I shall go through five points in turn, beginning with a number of observations on  
30 what is covered by the first question, in other words, whether greenhouse gas  
31 emissions and the deleterious effects of climate change constitute pollution of the  
32 marine environment within the meaning of the UN Convention on the Law of the Sea.

33  
34 To begin with, we have to start by identifying what constitutes the marine  
35 environment. The States Parties to these proceedings seem to be in agreement that  
36 we should apply an inclusive interpretation of this expression that encompasses both  
37 its geographical and material aspects.

38  
39 Geographically, the marine environment comprises all of the maritime areas  
40 governed by the Convention, both within and beyond national jurisdiction, from  
41 internal waters to the high seas and the Area. These areas include not just the water  
42 column but also estuaries and the coastline (at least as regards its relation with  
43 maritime areas for the latter). They also include the seabed and its subsoil.<sup>1</sup>

44  
45 Materially, the marine environment is not just an area but also an ecosystem that's  
46 characterized by the wealth of its biodiversity of which the numerous components  
47 interact with each other.<sup>2</sup> Now, this "ecosystemic" approach was largely shared by

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<sup>1</sup> Written statement of France, pp. 18-20, paras. 48-50.

<sup>2</sup> Written statement of France, pp. 20-21, paras. 51-52.

1 other States in their written statements and during the hearings and so I will not go  
2 over them again. Pollution of the marine environment is, thus, likely to affect  
3 biodiversity and the functioning and the balance of marine ecosystems, all at once.

4  
5 As regards the sources of pollution affecting the marine environment, France  
6 considers, like the vast majority of the participants in these proceedings, that  
7 anthropogenic greenhouse gas emissions are a source of pollution of the marine  
8 environment, and that, consequently, the obligations under Part XII do apply  
9 thereto.<sup>3</sup>

10  
11 Similarly, there is a broad consensus among the participants in these proceedings  
12 that greenhouse gas emissions are included under different forms of pollution  
13 covered by the Convention, in particular, pollution from land-based sources as set  
14 out in article 207, and pollution from and through the atmosphere, which is provided  
15 for under article 212.<sup>4</sup>

16  
17 In addition, as regards the concept of harm to the marine environment, we should  
18 recall that article 1 of the Convention adopts a broad definition of pollution of the  
19 marine environment. Without going over the different points set out in our written  
20 statement,<sup>5</sup> it is important to recall here that the expression “results or is likely to  
21 result” in article 1 presupposes consideration of the effects that are both proven or  
22 certain, and of potential deleterious effects.

23  
24 When the potential effects are also concerned, the precautionary approach comes  
25 into play. As we set out in our written statement, scientific considerations such as the  
26 assessments of IPCC play a decisive role here.<sup>6</sup> When the information available is  
27 insufficient to allow us to assess the potentially deleterious effect on the marine  
28 environment of a planned conduct, that conduct should be avoided. That is what  
29 explains the need for seabed mining activities in the Area to be prohibited, as France  
30 recalled at the 28<sup>th</sup> session of the International Seabed Authority in July.<sup>7</sup>

31  
32 Protection of the marine environment must remain an imperative in carrying out  
33 activities in the Area, insofar as the ecosystem of the deep sea is essential to  
34 stabilize the climate and protect marine biodiversity. As a consequence, it is  
35 particularly necessary that account be taken of the major uncertainties surrounding  
36 the consequences of deep seabed mining that could affect the important role of the  
37 oceans.

38  
39 Having clarified that, there are differing views among the participants in these  
40 proceedings as to the scope of damage covered by the request for an opinion. It is  
41 our view that all effects of pollution of the marine environment do not necessarily

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<sup>3</sup> Written statement of France, p. 23, para. 57.

<sup>4</sup> Written statement of France, pp. 28-31, paras. 67-71.

<sup>5</sup> Written statement of France, p. 35, para. 80. See also, for example, written statement of Singapore, para. 14; written statement of Chile, para. 30; written statement of Rwanda, para. 89; written statement of the Democratic Republic of the Congo, para. 42.

<sup>6</sup> Written statement of France, p. 41, para. 92.

<sup>7</sup> Statement of France of 26 July 2023 on point 8 of the agenda, Assembly, 28th session of the International Seabed Authority, pp. 3-4, available at <https://www.isa.org.jm/wp-content/uploads/2023/07/France.pdf>

1 come under the definition of “pollution of the marine environment” within the meaning  
2 of UNCLOS.

3  
4 For instance, the fact that climate change leads to ocean warming and, as a result,  
5 can jeopardize the right to food because of the potential loss of fishing resources,  
6 does not mean a violation of the right to food is pollution of the marine environment  
7 that would be covered by the relevant obligation under UNCLOS – I repeat,  
8 obligations *under UNCLOS*. Of course, this is without any prejudice to the situation  
9 of other international rules that do not fall under the jurisdiction *ratione materiae* of  
10 this Tribunal.

11  
12 These advisory proceedings are limited to the obligations incumbent upon the parties  
13 under UNCLOS, and consequently to the damage caused to the marine environment  
14 as such. In saying this, I do not mean that other effects or other damage might not  
15 be covered by the scope of other international rules such as the right to a healthy  
16 environment or the right to food. It simply means that this does not fall within the  
17 scope of the question put to the Tribunal nor of its jurisdiction.

18  
19 Mr President, this brings me to my second point. One of the questions that has been  
20 the subject of much debate before you, and where there is division among the  
21 participants,<sup>8</sup> deals with the nature of the obligations laid down by Part XII of the  
22 Convention: are these obligations of conduct or obligations of result?

23  
24 The discussions around this point have somewhat been obscured by the fact that  
25 there is a conceptual confusion surrounding this distinction.<sup>9</sup> What is more, different  
26 definitions have been given at different times, *inter alia*, during the work carried out  
27 by the International Law Commission, as has been observed quite rightly by certain  
28 authors.<sup>10</sup> So, we have to begin by clarifying what exactly is meant today by  
29 “obligation of conduct” and “obligation of result”.

30  
31 The fundamental difference between them is that, with an obligation of conduct, the  
32 obligation is not to reach a result in every single case. The obligation of conduct is an  
33 obligation to take all measures necessary to avoid an event or damage from  
34 occurring but without necessarily guaranteeing that it is not going to happen.<sup>11</sup>

35  
36 Given this definition, there is no doubt in our minds – and this is true of the majority  
37 of those taking part in these proceedings<sup>12</sup> – that the substantive obligations under  
38 Part XII of the Convention (the situation is different for certain procedural obligations)

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<sup>8</sup> See, for example, ITLOS/PV.23/C31/9, sitting of 15 September 2023 (a.m.) (English version), p. 13, line 6 (Latvia) and p. 27, lines 7-10 (Mauritius); ITLOS/PV.23/C31/11, sitting of 18 September 2023 (a.m.) (English version), p. 13, lines 31-33 (Mozambique); *ibid.*, p. 40-41, lines 29 *et s.* (Belize).

<sup>9</sup> See the second report of the Special Rapporteur of the ILC, James Crawford, on the responsibility of States, A/CN.4/498 and Add. 1 to 4, 1999, paras. 52-92.

<sup>10</sup> V.P. d'Argent, “Les obligations internationales”, *Recueil des cours de l'Académie de droit international de La Haye*, tome 417, 2021, p. 150 *et s.*; C. Economidès, “Content of the Obligation: Obligations of Means and Obligations of Result”, in J. Crawford, A. Pellet, S. Olleson (dir.), *The Law of International Responsibility*, OUP, 2010, p. 374 *et s.*

<sup>11</sup> Written statement of France, pp. 47-48, paras. 103-104.

<sup>12</sup> See, for example, ITLOS/PV.23/C31/13, sitting of 19 September 2023 (p.m.), p. 2, lines 21-26 (Singapore) or ITLOS/PV.23/C31/14, sitting of 20 September 2023 (a.m.) (English version), p. 44, lines 5-13 (Viet Nam).

1 are obligations of conduct. The Seabed Disputes Chamber recognized this in its  
2 Advisory Opinion of 2011,<sup>13</sup> as did the International Law Commission in its  
3 commentary on article 3 of the 2001 Articles on the Prevention of Transboundary  
4 Harm from Hazardous Activities.<sup>14</sup>

5  
6 This observation also applies to article 194(1) of UNCLOS. Indeed, this provision  
7 does not lay down an “obligation to prevent, reduce and control pollution of the  
8 marine environment”, as suggested by COSIS during the hearings.<sup>15</sup> The  
9 grammatical structure of paragraph 1 of article 194 is different: what this article lays  
10 down is an obligation to *take all measures necessary to prevent, reduce and control*  
11 *pollution of the marine environment*. This formulation is typical of obligations of  
12 conduct and this is confirmed by the reference that follows immediately in the same  
13 provision where it refers to using the “best practicable means” that States have at  
14 their disposal.

15  
16 Conversely, trying to turn this obligation of conduct into an obligation of result would  
17 imply a commitment on *each* State to ensure that the marine environment is *never*  
18 contaminated by *any* pollution which, assuming that this obligation even made  
19 sense, would not correspond to existing law, either at global, regional or national  
20 level.

21  
22 Having clarified this, there are four fundamental points to be specified.

23  
24 First of all, there is nothing disparaging or pejorative in characterizing an obligation  
25 as an obligation of conduct rather than an obligation of result. And as others have  
26 already noted, there are obligations of result that are vague or ambiguous as there  
27 are obligations of conduct that are extremely precise.<sup>16</sup>

28  
29 Second, invoking obligations of conduct is particularly appropriate in the context of  
30 climate change. As indicated by COSIS, “climate change is a moving target”,<sup>17</sup> thus  
31 we must focus on the measures to be taken and the need to adapt or toughen them  
32 in order to provide an effective response to the worsening and evolving situation of  
33 climate change. In 2011, your Tribunal confirmed this when it said that the concept of  
34 an obligation of conduct is “a variable concept” and that “[i]t may change over time  
35 as measures considered sufficiently diligent at a certain moment may become not  
36 diligent enough in light, for instance, of new scientific or technological knowledge. It  
37 may also change in relation to the risks involved in the activity.”<sup>18</sup>

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<sup>13</sup> *Responsibilities and obligations of States with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, pp. 41-42, paras. 110-113.

<sup>14</sup> ICL, Draft articles on the Prevention of Transboundary Harm from Dangerous Activities, article 3 and paragraphs 7-8 of the commentary, *Yearbook of the ICL 2001*, Vol. II(2), p. 164-165.

<sup>15</sup> TIDM/PV.23/C31/3, sitting of 12 September 2023 (a.m.), French version, p. 18, lines 44-45 (“Article 194, paragraph 1, posits, therefore, a compound duty: that of preventing, reducing and controlling pollution of the marine environment ....”) (COSIS).

<sup>16</sup> M. Forteau, A. Miron and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ-lextenso, Paris, 2022, p. 1092, No. 732.

<sup>17</sup> ITLOS/PV.23/C31/4, sitting of 12 September 2023 (p.m.) (English version), p. 34, lines 9-10 (COSIS).

<sup>18</sup> *Responsibilities and obligations of States with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117.

1 Obligations of conduct by their very nature have a twofold advantage in that they are  
2 legally binding on States and in a way that evolves and is adaptable to situations.<sup>19</sup>  
3 In the face of changing threats and effects of climate change, these obligations of  
4 conduct are central. They are all the more so since they make it possible to focus  
5 attention on the measures to be taken now before it's too late, before the "fateful  
6 moment" referred to last Thursday by the Democratic Republic of the Congo.<sup>20</sup>  
7

8 Third, as the International Law Commission correctly pointed out in 1977, the  
9 distinction between obligations of conduct and of result "must not obscure the fact  
10 that every international obligation has an object or, one might say, a result, including  
11 the obligations called obligations 'of conduct' or 'of means'".<sup>21</sup> As regards article 194  
12 of the Convention, such a purpose is clearly identified: we must take "all measures"  
13 that are "necessary to prevent, reduce and control pollution of the marine  
14 environment".  
15

16 Fourth, we are in full agreement with COSIS that an assessment of what constitutes  
17 a necessary measure to this end is determined objectively and cannot be left to the  
18 sole discretion of States.<sup>22</sup>  
19

20 These different elements have led France to underscore in its written statement that  
21 obligations of conduct laid down by UNCLOS are in the context of climate change  
22 are "exigent" and "particularly severe".<sup>23</sup> In light of the serious and urgent nature of  
23 the situation, we have to go further than a general obligation of conduct. There has  
24 to be a more "severe" approach in terms of diligence.<sup>24</sup>  
25

26 This brings me to my third point: the principle of common but differentiated  
27 responsibilities. The substance of this principle confirms that we are indeed talking  
28 about obligations of conduct, as these can vary in what is imposed upon each State  
29 in the light of its specific situation. As underscored by the Seabed Disputes  
30 Chamber, the criteria for implementing the obligation of precaution "may be stricter"  
31 for developed States than for developing States,<sup>25</sup> and France confirms that that is  
32 indeed the case.<sup>26</sup>  
33

34 Agreements on climate change that have been adopted since the 1992 Rio  
35 Declaration have gradually made it possible to have a more precise understanding of  
36 the meaning of the principle of CBDR and respective capabilities. Based on the

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<sup>19</sup> See ITLOS/PV.23/C31/4, sitting of 12 September 2023 (p.m.) (English version), p. 30, lines 16-27 (COSIS).

<sup>20</sup> TIDM/PV.23/C31/16, sitting of 21 September 2023 (a.m.) (French version), p. 27, lines 32-35 (p. 25, lines 18-29 of the English version) (Democratic Republic of the Congo).

<sup>21</sup> *Yearbook of the ILC*, 1977, Vol. II, para. 8, commentary of draft article 20 on the responsibility of States, p. 13: "The distinction referred to above must not obscure the fact that every international obligation has an object or, one might say, a result, including the obligations called obligations 'of conduct' or 'of means'".

<sup>22</sup> TIDM/PV.23/C31/3, sitting of 12 September 2023 (a.m.), French version, pp. 20-21 (COSIS).

<sup>23</sup> Written statement of France, p. 47, para. 103, and p. 49, para. 107.

<sup>24</sup> Written statement of France, p. 71, para. 144.

<sup>25</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 54, para. 161.

<sup>26</sup> Written statement of France, p. 54, para. 113.

1 objective disparity of the economic development levels of countries, and appealing to  
2 equity, this principle is necessary so that each country, at its own level, can  
3 contribute to the climate targets set by the Paris Agreement.

4  
5 The countries that have historically been the greatest GHG emitters and the largest  
6 consumers of abiotic resources have a particular responsibility to bear in reducing  
7 their impact on the environment. The other countries are entitled to pursue their  
8 legitimate economic and social development. The principle of CBDR acknowledges  
9 this by allowing for a more flexible and balanced approach that takes account of the  
10 specific requirements and capabilities of each nation.

11  
12 This being said, it should be pointed out, as the European Union did last week,<sup>27</sup> that  
13 this principle should not be used as a pretext to escape the responsibility that weighs  
14 on all States, both individually and collectively, to protect oceans against climate  
15 change.

16  
17 We note that COSIS has been very clear that it is not just developed States that bear  
18 the responsibility to take action – even if they are called on to “continue taking the  
19 lead”, according to the wording of the Paris Agreement.<sup>28</sup> According to COSIS, it is  
20 for each State “to do their fair share to protect the marine environment.” COSIS has  
21 moreover made it clear that the “major polluters are not limited to developed  
22 States.”<sup>29</sup> At the same time, and as provided for by the Paris Agreement, due  
23 account has to be taken of the situation of the least developed countries and Small  
24 Island Developing States which are particularly vulnerable in the face of climate  
25 change and its effects.

26  
27 Mr President, I would like to move now to my fourth point concerning environmental  
28 impact assessments. As we underscored in our written statement, the BBNJ  
29 Agreement contains a section on environmental impact assessment, the purpose  
30 being to operationalize and give concrete form to the obligation set out in article 206  
31 of UNCLOS. In this regard, the BBNJ Agreement defines, taking full account of the  
32 climate changes and their effects, the means to implement the obligation to conduct  
33 environmental impact assessments for activities that are planned in international  
34 maritime areas and that are likely to cause significant and harmful changes to the  
35 marine environment.<sup>30</sup>

36  
37 The BBNJ Agreement lays down in particular – and this is worth pointing out here –  
38 the obligation to ensure that *cumulative* impacts of planned activities should be  
39 examined and evaluated when conducting an environmental impact assessment.<sup>31</sup>  
40 Consideration of the cumulative aspect of damage to the marine environment should  
41 – to our mind – be included in contemporary international case law on the obligation

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<sup>27</sup> ITLOS/PV.23/C31/14, sitting of 20 September 2023 (a.m.) (English version), p. 27 (lines 8-27) (EU).

<sup>28</sup> Article 4, para. 4, Paris Agreement; see also the last preambular paragraph and article 9, para. 3.

<sup>29</sup> TIDM/PV.23/C31/1, sitting of 11 September 2023 (a.m.) (French version), p. 28, lines 36-39 (COSIS) (for the English version, see ITLOS/PV.23/C31/1/Corr.1, p. 25, lines 35-38); see also, for example, ITLOS/PV.23/C31/12, sitting of 19 September 2023 (a.m.) (English version), p. 31, lines 33-35 (Sierra Leone); ITLOS/PV.23/C31/14, sitting of 20 September 2023 (a.m.) (English version), p. 18, lines 17-26 (Timor Leste). See also, *inter alia*, written statement of Portugal, paras. 38-41.

<sup>30</sup> Written statement of France, p. 61, para. 124; p. 82, para. 160.

<sup>31</sup> BBNJ Agreement, article 31(1)(c).



1 to carry out environmental impact assessments and should be given due account by  
2 this Tribunal in these advisory proceedings.<sup>32</sup>

3

4 I come now, Mr President, to my fifth and final point: the relationship between  
5 UNCLOS and the Paris Agreement. It would seem that there are two conflicting  
6 views here. You have those who see in the Paris Agreement a limit beyond which  
7 UNCLOS should not venture and those who consider that the Convention goes  
8 beyond the Paris Agreement.<sup>33</sup>

9

10 In truth, this is not the best way to set out the terms of the debate. It is not a question  
11 of choosing between these two treaties, nor to decide whether one affords greater  
12 protection than the other. Indeed, it is a rather dangerous game to play trying to  
13 denigrate the Paris Agreement to better draw out, in contrast, the possibilities that  
14 UNCLOS would offer. Some speakers have suggested that, contrary to UNCLOS,  
15 the Paris Agreement doesn't contain real obligations.<sup>34</sup> In the view of France, the  
16 Paris Agreement is indeed a source of legally binding obligations, and in these  
17 advisory proceedings it is vital not to undermine the authority of that agreement.

18

19 Having made that clear, I think I can say that things are both simple and harmonious,  
20 and France would like to clarify its position on this score because it would seem that  
21 it was misinterpreted by one of the participants in the proceedings last week.<sup>35</sup>

22

23 On the one hand, each of the relevant treaties – UNCLOS and climate commitments,  
24 starting first and foremost with the Paris Agreement – contains its own obligations,  
25 independently, and each of these treaties, each of these obligations counts, is  
26 important and must be respected. *Pacta sunt servanda*. It is all the more so because  
27 the different agreements and obligations do not contradict each other, as recalled by

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<sup>32</sup> ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, *I.C.J. Reports 2010*, p. 83, para. 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015, *I.C.J. Reports 2015*, pp. 705-707, paras. 101-105, pp. 719-723, paras. 146-162. See also ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, *Advisory Opinion*, 1 February 2011, *ITLOS Reports 2011*, pp. 49-52, paras. 141-150.

<sup>33</sup> See, for example, ITLOS/PV.23/C31/5, sitting of 13 September 2023 (a.m.) (English version), p. 6, lines 13-19, p. 9, lines 23-26 and p. 16, lines 20-26 (Australia); ITLOS/PV.23/C31/8, sitting of 14 September 2023 (p.m.) (English version), p. 17, lines 30-38 (India); ITLOS/PV.23/C31/9, sitting of 15 September 2023 (a.m.) (English version), p. 34, lines 37-38 (Mauritius); ITLOS/PV.23/C31/10, sitting of 15 September 2023 (p.m.) (English version), p. 27, lines 37-46 (China); ITLOS/PV.23/C31/11, sitting of 18 September 2023 (a.m.) (English version), p. 30 *et s.*, lines 19 *et s.* (Belize); ITLOS/PV.23/C31/14, sitting of 20 September 2023 (a.m.) (English version), p. 16-17, lines 13 *et s.* (Timor Leste).

<sup>34</sup> ITLOS/PV.23/C31/4, sitting of 12 September 2023 (p.m.) (English version), p. 28, lines 33-38 (COSIS); or TIDM/PV.23/C31/16, sitting of 21 September 2023 (a.m.) (French version), p. 24, lines 34-37 (p. 22, lines 42-43, of the English version) (Democratic Republic of the Congo).

<sup>35</sup> ITLOS/PV.23/C31/11, sitting of 18 September 2023 (a.m.) (English version), p. 35, lines 23-33 (Belize).

1 the European Union,<sup>36</sup> Comoros<sup>37</sup> and the African Union.<sup>38</sup> So, it is not a question of  
2 making a choice from among them as if they were mutually exclusive. On the  
3 contrary, they should be applied together *in their full complementarity*, in awareness  
4 of the fact that they mutually bolster each other for the purpose of ocean protection.  
5

6 On the other hand, when the provisions of these agreements overlap, it is important  
7 to embark upon a consistent and harmonious interpretation.<sup>39</sup> This is the case, *inter*  
8 *alia*, when determining, under the obligations of conduct of UNCLOS, the quantified  
9 targets to be pursued in the global response to the threat of climate change.

10 Reference should be made to the Paris Agreement here because it is this agreement  
11 that has set a specific global limit for the Earth's maximum temperature increase that  
12 all States must make efforts to pursue.<sup>40</sup>  
13

14 Once again and to conclude, Mr President, that does not mean that the Paris  
15 Agreement would, by this very fact, set aside the specific obligations under  
16 UNCLOS. These specific obligations continue to apply to the protection and  
17 preservation of the marine environment in all their scope and rigour in a  
18 complementary fashion to what is provided for under the Paris Agreement.  
19

20 Mr President, distinguished members of the Tribunal, this brings me to the end of the  
21 oral statement by the French Republic, and on behalf of the French delegation, I  
22 would like to thank you most warmly for your patient and careful attention. Thank  
23 you.  
24

25 **THE PRESIDENT:** Thank you, Mr Forteau. I now invite the representative of Italy,  
26 Mr Zanini, to make his statement. You have the floor, Sir.  
27

28 **MR ZANINI:** Mr President, distinguished members of the Tribunal, it is an honour for  
29 me to appear before you, and to do so on behalf of Italy.  
30

31 I will be addressing the Tribunal mainly on matters of procedure. With your  
32 permission, Mr President, Professor Roberto Virzo will then follow with some more  
33 comments concerning the applicable law.  
34

35 The issues of jurisdiction have been addressed in our written statement.<sup>1</sup> In the  
36 present submission, therefore, I will not repeat the detail of all we argued there,  
37 although Italy maintains it in full. I will simply reiterate that, in Italy's view, the  
38 Tribunal may also exercise an advisory jurisdiction in this case. In fact, the combined  
39 provisions of article 21 of the Statute of the Tribunal and the ones contained in the  
40 pertinent "other agreement" expressly conferring advisory jurisdiction on the Tribunal

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<sup>36</sup> ITLOS/PV.23/C31/14, sitting of 20 September 2023 (a.m.) (English version), pp. 25-26, starting on line 45 (EU).

<sup>37</sup> ITLOS/PV.23/C31/16, sitting of 21 September 2023 (a.m.) (English version), p. 6, lines 27-31 (Comoros).

<sup>38</sup> ITLOS/PV.23/C31/17, sitting of 21 September 2023 (p.m.) (English version), pp. 4-5, lines 31 *et s.* (AU).

<sup>39</sup> Written statement of France, p. 15, para. 38.

<sup>40</sup> See, for example, in this sense, written statement of Bangladesh, para. 42 and paras. 46-48; or ITLOS/PV.23/C31/13, sitting of 19 September 2023 (p.m.) (English version), pp. 7-9 (starting on line 36) (Singapore).

<sup>1</sup> Italy, written statement (WS), 15 June 2023, paras. 5-11.

1 constitute the legal basis of such jurisdiction. As the Tribunal itself made clear in its  
2 advisory opinion of 2015: “Article 21 and the ‘other agreement’ conferring jurisdiction  
3 on the Tribunal are interconnected”.<sup>2</sup> Consequently, Italy qualifies article 21 of the  
4 Statute as an “enabling *renvoi* clause”.

5  
6 I also confirm that, in Italy’s view, the request in the present Case No. 31 seems to  
7 satisfy all the conditions required by article 138 of the Rules of the Tribunal.<sup>3</sup>  
8 Therefore, Italy shares the view of other States Parties<sup>4</sup> that no compelling reasons  
9 exist in the present case for the Tribunal to decline its power to give the advisory  
10 opinion requested.

11  
12 I would like to add a few observations concerning the role of the States Parties to  
13 United Nations Convention on the Law of the Sea in both written and oral  
14 proceedings.

15  
16 As a starting point, it is worth recalling that as one of the results of the “enabling  
17 *renvoi* clause”, the legal questions on which the Tribunal may give an advisory  
18 opinion cannot but be formulated by the body authorized by or in accordance with  
19 the “other agreement”. Hence, the States Parties to UNCLOS not members of the  
20 organization which submitted the request for the advisory opinion do not take part in  
21 the drafting of the legal questions.<sup>5</sup>

22  
23 Precisely with regard to the legal questions asked to the Tribunal, I would like to  
24 focus on the role of the States Parties to UNCLOS invited to submit written  
25 statements and take part in the oral proceedings, as well as the function of their  
26 written and oral statements.

27  
28 Mr President, members of the Tribunal, Italy considers that this role could be twofold:  
29 namely, States can express their views both on the request for an advisory opinion  
30 and on the specific legal questions asked.

31  
32 Regarding the first role, States Parties to UNCLOS may present their general views  
33 on the request for the advisory opinion. This is, of course, not a matter of expressing  
34 a form of consent, which indeed, as the Tribunal also clarified, is “not relevant”.<sup>6</sup> Italy  
35 is aware that the a-consensual basis is one of the hallmarks of the advisory  
36 jurisdiction of international courts and tribunals.

37  
38 However, especially when the request is made by an organization or body with a  
39 relatively small number of members, the statements submitted to the Tribunal may,

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<sup>2</sup> ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 58.

<sup>3</sup> *Ibidem*, para. 59.

<sup>4</sup> See, for example, Germany, WS, 14 June 2023, para. 28; New Zealand, WS, 15 June 2023, para. 29.

<sup>5</sup> With reference to the specificities of Case No. 21, see ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission, Declaration of Judge Cot*, para. 8: “The request was written by the States of the [Sub-Regional Fisheries Commission], representing the interests, clearly legitimate interests, of coastal States. On the other hand, flag States did not take part in drafting the questions.” See also France, WS, 16 June 2023, para. 22.

<sup>6</sup> ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, para. 76.

1 *inter alia*, indicate whether there is a widespread interest in the request of the  
2 advisory opinion among the other States Parties to UNCLOS.

3  
4 The greater the number of States Parties which feel the need for the advisory  
5 opinion or consider it appropriate, the more it can be deemed that the very interest in  
6 the advisory opinion is not confined to the requesting body. It could also be inferred  
7 that a significant number of States Parties recognize a substantial interconnection  
8 between the UNCLOS and the other agreement conferring advisory jurisdiction on  
9 the Tribunal.

10  
11 A different situation would be if the statements submitted did not show that the other  
12 States Parties felt the need for or desirability of the advisory opinion. Although this,  
13 as stated above, in no way affects the possible existence of the advisory jurisdiction,  
14 it would be perceived, first, that the Tribunal is asked to give an advisory opinion on  
15 legal issues considered relevant mainly, if not exclusively, under the “other  
16 agreement”. Secondly, that the interconnection between UNCLOS and the “other  
17 agreement” conferring advisory jurisdiction on the Tribunal is merely formal.

18  
19 With specific reference to the present case, most of the States Parties to UNCLOS  
20 that submitted written statements recognized that the requested advisory opinion  
21 may be of not exclusively interest to the Commission of Small Island States on  
22 Climate Change and International Law (COSIS).

23  
24 Some States expressed a genuine endorsement in favour of an advisory opinion of  
25 the Tribunal in Case No. 31.<sup>7</sup> I would recall here, for example, that the Federated  
26 States of Micronesia strongly encouraged the Tribunal to give the requested advisory  
27 opinion. According to the Federated States of Micronesia; such an advisory opinion  
28 could represent

29  
30 a vital tool in support of efforts by COSIS and other members of the  
31 international community to protect present and future generations – and the  
32 natural environments bequeathed to us by our ancestors – from the  
33 scourge of anthropogenic greenhouse gas emissions, particularly on the  
34 marine environment.<sup>8</sup>

35  
36 For its part, Italy concluded its written statement by emphasizing that

37  
38 The Tribunal could assist COSIS Member States and, more generally, all  
39 other States Parties to UNCLOS to correctly implement Part XII provisions  
40 also in the light of other existing obligations under international  
41 environmental law emerged since 1982.<sup>9</sup>

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<sup>7</sup> See, for example, Bangladesh, WS, 16 June 2023, para. 53; Belize, WS, 16 June 2023, para. 4; Mauritius, WS, 16 June 2021, para. 90; Mozambique, WS, 16 June 2023, para. 1.7; Nauru, WS, 15 June 2023, para 67; Norway, WS, 15 June 2023, para. 2.5; Sierra Leone, WS, 16 June 2023, para. 8.

<sup>8</sup> Federated States of Micronesia, WS, 16 June 2023, para. 69.

<sup>9</sup> Italy, WS, 15 June 2023, para. 20. See also, for example, The Netherlands, WS, 16 June 2023, para. 7.1.: “The Netherlands considers that, through its advisory opinion, the Tribunal could raise awareness and provide guidance on the protection and preservation of the marine environment and/or the prevention, reduction and control of pollution of the marine environment. In this manner, the advisory opinion could contribute to the interpretation and application of the obligations arising from the Convention, in particular the obligations arising from Part. XII of the Convention”.

1  
2 Regarding the role of UNCLOS and Member States on the specific legal questions  
3 asked, Italy respectfully recalls that, through their written and oral statements, the  
4 States Parties to UNCLOS have the possibility to express their views on the specific  
5 legal questions asked, as well as on the law applicable by the Tribunal. While  
6 Professor Virzo, with your permission, Mr President, will deal with the latter, I will  
7 briefly focus on the object and purpose of the legal questions submitted to the  
8 Tribunal.

9  
10 Italy considers that the legal questions legitimately formulated by COSIS, in a fully  
11 autonomous manner, are aimed at the identification by the Tribunal of certain  
12 obligations of the States Parties to UNCLOS.

13  
14 Although in the exercise of its advisory jurisdiction, the Tribunal may “even  
15 reformulate the question”,<sup>10</sup> this does not seem strictly necessary in the present  
16 case. In Italy’s view, the legal questions asked have a clear<sup>11</sup> and unambiguous  
17 object and purpose. More precisely, the real legal questions upon which the advisory  
18 opinion of the Tribunal is sought are the mere identification and “elucidation”<sup>12</sup> of  
19 specific obligations of States Parties to UNCLOS concerning the protection and  
20 preservation of the marine environment.

21  
22 Appropriately, it was not asked by COSIS: “What are the legal responsibilities of  
23 States Parties to UNCLOS with respect to the deleterious effects that result or are  
24 likely to result from climate change, including through ocean warming and sea-level  
25 rise, and ocean acidification, which are caused by anthropogenic greenhouse  
26 emissions into the atmosphere?”

27  
28 Nor was it asked: “What are the legal consequences for States Parties to UNCLOS  
29 arising from the deleterious effects that result or are likely to result from climate  
30 change, including through ocean warming and sea-level rise, and ocean  
31 acidification, which are caused by anthropogenic greenhouse emissions into the  
32 atmosphere?”

33  
34 Accordingly, Italy respectfully contends that issues of international responsibility –  
35 which indeed were not even expressly requested by COSIS during these oral  
36 hearings – should not be relevant at all in ITLOS Case No. 31.<sup>13</sup>

37  
38 With these remarks, Mr President, on the object and purpose of the legal questions  
39 submitted in the present case to the Tribunal, my intervention ends.

40  
41 Mr President, distinguished members of the Tribunal, I thank you for your kind  
42 attention and would now request that you give the floor to Professor Roberto Virzo.

43  
44 **THE PRESIDENT:** Thank you, Mr Zanini. I now invite Mr Virzo to make his  
45 statement. You have the floor, Sir.

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<sup>10</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 38.

<sup>11</sup> See also Germany, WS, 14 June 2023, para. 30.

<sup>12</sup> COSIS, WS, 16 June 2023, para. 427.

<sup>13</sup> See also Australia, WS, 16 June 2023, para. 19; Portugal, WS, 16 June 2023, para. 5.

1  
2 **MR VIRZO:** Mr President, distinguished members of the Tribunal, it is an honour to  
3 appear before you, and to do so on behalf of Italy. My task today is to address  
4 certain issues of applicable law.

5  
6 At the outset, I would respectfully point out that the authoritative identification and  
7 “elucidation”<sup>1</sup> of the obligations pertaining to climate change impacts – *currently*  
8 falling within the scope of the UNCLOS – would also serve for the purpose of the  
9 proper fulfilment of the Convention.

10  
11 Like any international treaty in force, the UNCLOS “must be performed” by the  
12 States Parties to it in good faith. This second part of the customary rule codified in  
13 article 26 of the Vienna Convention on the Law of Treaties (VCLT) establishes an  
14 obligation of conduct and expresses, *inter alia*, the dynamic conception of treaties as  
15 living instruments. Continuous and dynamic performance in good faith covers most  
16 of the treaty provisions. It also extends to, among others: (a) international rules and  
17 standards existing at the time of the *actual* application of the treaty and to which  
18 specific treaty clauses refer; (b) where provided for, coordination clauses with other  
19 international treaties, including *subsequent* treaties.

20  
21 That said, Italy shares the view of other States Parties<sup>2</sup> that “climate change and  
22 ocean acidification caused by the introduction of anthropogenic greenhouse gas  
23 emissions into the atmosphere fall within the meaning of “pollution of the marine  
24 environment” for the purposes of article 1(1)(4) of UNCLOS”.<sup>3</sup> Accordingly, although  
25 not expressly mentioned, these types of pollution of marine environment, are likely to  
26 fall within the scope of Part XII of the Convention.

27  
28 While there seems to be no doubt on this point, it is nevertheless necessary to  
29 identify what “specific obligations” exist in this regard for States Parties to UNCLOS.  
30 It is, indeed, with respect to this question that COSIS ultimately “seek[s] guidance”.<sup>4</sup>

31  
32 Mr President, members of the Tribunal, Italy, maintaining in full what it argued in the  
33 written statement, considers that, for the purposes of identifying such obligations, the  
34 interpretative criterion of systemic integration and the coordination clause contained  
35 in article 237 of the Convention may also be relevant.

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<sup>1</sup> COSIS, WS, 16 June 2023, para. 427.

<sup>2</sup> See, for example, Australia, WS, 16 June 2023 para. 24; Bangladesh, WS, 16 June 2023, para. 30; Belize, WS, 16 June 2023, para. 52; Canada, WS, 16 June 2023, para. 16; Democratic Republic of the Congo, WS, 13 June 2023, para. 187; Egypt, WS, 16 June 2023, para. 26; European Union, WS, 15 June 2023, para 42; Federates States of Micronesia, WS, 16 June 2023, para. 31; France, WS, 16 June 2023; para. 78; Mauritius, WS,16 June 2023, para. 72; Mozambique, WS, 16 June 2023, para. 3.19; Nauru, WS, 15 June 2023, para. 38; New Zealand, WS, 15 June 2023, para. 39; Portugal, WS, 16 June 2023, para. 71; Republic of Korea, 16 June 2023, para. 12; Rwanda, WS, 17 June 2023, para. 214; Sierra Leone, WS, 16 June 2023, para. 58; Singapore, WS, 16 June 2023, para. 18; The Netherlands, WS, 16 June, para. 4.7; Vietnam, WS, 16 June 2023, para. 1.3.

<sup>3</sup> United Kingdom, WS, 16 June 2023, para. 42.

<sup>4</sup> To repeat *mutatis mutandis* ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 76.

1 Apropos of systemic integration, for the sake of brevity and opportunity, I respectfully  
2 refer here to what Italy argued in the written statement.<sup>5</sup> Instead, as to article 237 of  
3 UNCLOS, I will, first, briefly recall the three core points we made there.  
4 Subsequently, I will address some additional remarks concerning the possible  
5 application of this provision to the case at hand.  
6

7 In Italy's view, first, article 237 contains a treaty coordination clause which confines  
8 its scope to the relationship that can be established between Part XII of UNCLOS  
9 and certain categories of international treaties.  
10

11 Second, unlike the subordination and non-incompatibility clauses laid down in  
12 article 30(2) of the Vienna Convention on the Law of Treaties, article 237 does not  
13 state that "the provisions of [the] other treaty prevail"; rather, in coordinating Part XII  
14 with other treaties, it establishes a "double relationship of compatibility".<sup>6</sup> More  
15 precisely, the provisions of Part XII are without prejudice to those treaties, but the  
16 obligations assumed under the latter "should be carried out in a manner consistent  
17 with the general principles and objectives"<sup>7</sup> of UNCLOS.  
18

19 Third, article 237 allows a constant opening of UNCLOS to any special convention  
20 and agreement that is likely to better protect and preserve the marine environment.  
21

22 Mr President, members of the Tribunal, I now turn to my additional remarks.  
23

24 Two international agreements on which – given the object, purpose and scope of the  
25 questions submitted – the Tribunal could provide guidance to States Parties on  
26 whether and to what extent it is possible, under article 237 of UNCLOS, to  
27 coordinate them with Part XII of the Convention are: the 1992 United Nations  
28 Framework Convention on Climate Change (UNFCCC) and the 2015 Paris  
29 Agreement.  
30

31 Both are subsequent to the UNCLOS. Consequently, it should first be assessed  
32 whether they fall within the category covered by article 237(1) of agreements  
33 "concluded in furtherance of the general principles set forth" in the Convention.  
34

35 In this regard, it does not seem relevant that the agreements falling into this category  
36 have, as their main object and purpose, the protection and preservation of the  
37 marine environment. In order to make the coordination clause operational, it is only  
38 required that States Parties to UNCLOS assume "specific obligations [under these  
39 agreements] with respect to the protection and preservation of the marine  
40 environment".  
41

42 It is not even necessary that the treaties in question are formally – as, for example, in  
43 the case of the 1995 agreement on management and conservation of straddling and  
44 highly migratory fish stocks – "agreements for the implementation" of certain  
45 UNCLOS provisions; rather, in order to make the coordination clause operational, it  
46 is required that the substantial obligations concerning the protection and

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<sup>5</sup> Italy, WS, 15 June 2023, paras. 15-23.

<sup>6</sup> Italy, WS, 15 June 2023, para. 13. See also, New Zealand, oral statement, 15 September 2023: ITLOS/PV.23/C31/10, p. 4, lines 11-12 (Hallum).

<sup>7</sup> UNCLOS, Article 237(2).

1 preservation of the marine environment established by the subsequent treaties  
2 implement “the general principles set forth” in the Convention.

3  
4 Hence, in Italy’s view, both the UNFCCC and the Paris Agreement may be qualified  
5 as agreements “concluded in furtherance of the general principles set forth” in the  
6 Convention, within the meaning of article 237(1) of UNCLOS.

7  
8 An additional factor that the Tribunal might consider is specifically related to the case  
9 at hand. It consists of the *ratione personae* scope of the external multilateral  
10 agreement.

11  
12 In fact, unlike a contentious case submitted to an UNCLOS court or tribunal, where it  
13 is sufficient to find that the pertaining agreements falling within the categories of  
14 article 237 are in force between the parties to the dispute; and, unlike an advisory  
15 proceeding where the questions asked to the Tribunal expressly concern the  
16 interaction of a specific multilateral environmental treaty with the UNCLOS,  
17 regardless of whether there is a coincidence of contracting parties between that  
18 multilateral treaty and the Convention, in the present case, at least for reasons of  
19 judicial propriety, it should be ascertained that the agreement to be coordinated with  
20 the Convention through article 237 binds almost all States Parties to UNCLOS.

21  
22 Mr President, members of the Tribunal, the condition just mentioned exists with  
23 regard to both the UNFCCC and the Paris Agreement. All States Parties to UNCLOS  
24 are also parties to the UNFCCC and, with one exception, to the Paris Agreement.

25  
26 In the light of the foregoing, Italy considers that, for the purposes of these advisory  
27 proceedings, article 237 allows the coordination of the UNCLOS with the UNFCCC  
28 and the Paris Agreement.

29  
30 Let me now respectfully return to one of the core points made in our written  
31 statement. Article 237 does not affirm the prevalence of external agreements but  
32 aims, precisely, at coordinating them with the UNCLOS. It is, therefore, a question of  
33 clarifying how– to borrow Professor Mbengue’s suggestion – the relationship of  
34 “complementarity and mutual supportiveness”<sup>8</sup> between the UNCLOS and the  
35 pertaining external agreements is concretely established.

36  
37 In Italy’s view, with reference to the case at hand, it could first be determined in  
38 relation to which “specific obligations, assumed by States” under the UNFCCC and  
39 the Paris Agreement, Part XII is “without prejudice”, so that they might be included  
40 among the specific obligations that COSIS seeks to identify in its request. Second, it  
41 could be provided guidance on how those specific obligations “should be carried out  
42 in a manner consistent with the general principles and objectives”<sup>9</sup> of the  
43 Convention, and in order “to produce a coherent system of obligations”.<sup>10</sup>

44  
45 That leads to my final remarks.  
46

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<sup>8</sup> COSIS oral statement, 11 September 2023: ITLOS/PV.23/C31/2, p. 30, line 36 (Mbengue).

<sup>9</sup> UNCLOS, Article 237(2).

<sup>10</sup> New Zealand, oral statement, 15 September 2023: ITLOS/PV.23/C31/10, p. 5, lines 4-5 (Hallum).



1 The complementary relationship between the UNCLOS, on the one hand, and both  
2 the UNFCCC and the Paris Agreement, on the other, should also be considered in  
3 light of the “legal order for the seas and oceans”.<sup>11</sup>

4  
5 In the 2015 Advisory Opinion, the Tribunal clarified that

6  
7 laws and regulations adopted by the Coastal State in conformity with the  
8 provisions of the Convention for the purposes of conserving the living  
9 resources and protecting and preserving the marine environment within its  
10 exclusive economic zone, constitute part of the legal order for the seas and  
11 oceans established by the Convention.<sup>12</sup>

12  
13 Coherently, even “obligations under other conventions on the protection and  
14 preservation of the marine environment”,<sup>13</sup> consistent with the UNCLOS, and other  
15 rules of international law not incompatible with the Convention, which may be taken  
16 into account by means of the interpretative criterion of systemic integration, also  
17 reflected in article 293 of UNCLOS, could “constitute part of the legal order for the  
18 seas and oceans”.<sup>14</sup>

19  
20 The latter is a living legal order, open to new values emerging in the international  
21 community and in which the UNCLOS, the “Constitution of the Oceans”,<sup>15</sup> is central.  
22 The mentioned other sources that may constitute part of it complement the  
23 Convention and dynamically contribute to the progressive “achievement of [its]  
24 goals”<sup>16</sup> including the “equitable utilization of [marine] resources, the conservation of  
25 the [marine] living resources and the study, protection and preservation of the marine  
26 environment”.<sup>17</sup> In addition, for the achievement of these goals, “the interest and  
27 needs of mankind as whole, and, in particular the special interests and needs”<sup>18</sup> of  
28 small island States adversely affected by sea-level rise and climate change should  
29 not be disregarded.<sup>19</sup>

30  
31 Mr President, distinguished members of the Tribunal, this concludes the oral  
32 statement of Italy in these advisory proceedings. I deeply thank you for your kind  
33 attention.

34  

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<sup>11</sup> UNCLOS, Preamble (4).

<sup>12</sup> ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 102.

<sup>13</sup> UNCLOS, Article 237.

<sup>14</sup> ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 102.

<sup>15</sup> TOMMY KOH, *A Constitution for the Oceans*, in UN, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), xxxiii.

<sup>16</sup> UNCLOS, Preamble (5).

<sup>17</sup> UNCLOS, Preamble (4).

<sup>18</sup> UNCLOS, Preamble (5).

<sup>19</sup> According to some States Parties to UNCLOS, the principle “in no case may a people be deprived of its own means of subsistence” – codified in Common Article 1(2) of the 1966 International Covenant and Civil Rights and of the 1966 International Covenant on Economic, Social and Cultural Rights – could be relevant in order to take into account such special interests and needs. See Chile, oral statement, 14 September 2023: ITLOS/PV.23/C31/16, p. 12, lines 16-29 (Fuentes Torrijco); Nauru, oral statement, 14 September 2023: ITLOS/PV.23/C31/18, p. 29, lines 24-27 (Bjorge); Mauritius, oral statement, 15 September 2023: ITLOS/PV.23/C31/19, p. 15, lines 39-42 (Koonjul).

1 **THE PRESIDENT:** Thank you, Mr Virzo, for your statement. We have now  
2 reached 11:17.

3  
4 May I get an indication from the representative from the Netherlands if you wish to  
5 take the floor now? If you wish, Mr Lefeber, I give you the floor.

6  
7 **MR LEFEBER:** Thank you, Mr President. Mr President, distinguished members of  
8 the International Tribunal for the Law of the Sea, it is an honour to appear before you  
9 today on behalf of the Kingdom of the Netherlands to participate in this hearing with  
10 regard to the *Request for an Advisory Opinion on Climate Change and International*  
11 *Law*. I will present to you, further to its written comments submitted on 16 June 2023,  
12 some additional observations of the Kingdom with respect to this request.

13  
14 The Kingdom would first like to refer to the advisory proceedings before the  
15 International Court of Justice on climate change and international law, for which the  
16 deadline for the submission of written statements is 22 January 2024. The Kingdom  
17 has co-sponsored the request for this advisory opinion to be given by the  
18 International Court of Justice. Given that both requests for an advisory opinion  
19 before the Tribunal and before the International Court of Justice relate to climate  
20 change and international law, the Kingdom would like to encourage the timely  
21 delivery of an advisory opinion by this Tribunal. This will ensure that this advisory  
22 opinion can inform the advisory proceedings before the International Court of  
23 Justice.

24  
25 The Kingdom would further like to highlight that as a Member State of the European  
26 Union, it aligns itself with the written and oral statements presented on behalf of the  
27 European Union.

28  
29 Mr President, the Kingdom would like to turn to the substance of the questions posed  
30 in the present request for an advisory opinion, starting with the scientific basis  
31 underlying the request.

32  
33 Along with air pollution and the loss of biological diversity, the Kingdom recognizes  
34 climate change as one of the three planetary crises. The Kingdom believes that this  
35 triple planetary crisis and its deleterious effects can and should be addressed in a  
36 holistic and integrated manner. This is thus the approach taken by the Kingdom in  
37 these advisory proceedings.

38  
39 Like others that have presented statements to the Tribunal, the Kingdom takes the  
40 work of the Intergovernmental Panel on Climate Change as the basis for its  
41 statements. In this respect, the Kingdom would like to express its appreciation to the  
42 Commission of Small Island States on Climate Change and International Law for its  
43 extensive scientific presentation during its oral statement.

44  
45 On the basis of the work of the Intergovernmental Panel on Climate Change, it is  
46 evident that both the process of the absorption of energy leading to ocean warming,  
47 as well as the process of the absorption of carbon dioxide resulting in ocean  
48 acidification, negatively impact the marine environment.

49

1 It is becoming clear in these proceedings that there is a widely shared view that  
2 human activities directly or indirectly cause the climate to change. This view finds its  
3 basis in the United Nations Framework Convention on Climate Change, which  
4 defines climate change as a change of climate which is attributed directly or  
5 indirectly to human activity. This framing is important for the remainder of our  
6 statement.

7  
8 Mr President, it is the view of the Kingdom that the Convention was designed to be a  
9 “living treaty”. This means that the Convention serves as a “framework” for the  
10 coordination between and harmonization of the Convention and other relevant  
11 existing and future legal instruments and frameworks.

12  
13 The Kingdom notes that many statements refer to this open, dynamic and  
14 progressive character of the Convention, thereby acknowledging that the Convention  
15 is designed to leave room for the development and substantiation of its provisions in  
16 a variety of manners. As expressed by the European Union in its oral statement, the  
17 architecture of the Convention is not one of an isolated regime. This means that its  
18 provisions are intended to enable the interaction with other rules and principles of  
19 international law.

20  
21 The Kingdom does therefore not share the views expressed by some participants  
22 that no specific obligations can be derived from the Convention with respect to  
23 climate change, because climate change was not discussed during the negotiations  
24 of the Convention.

25  
26 In fact, as many participants have argued, the open, dynamic and progressive  
27 character of the Convention leaves room for the further development of general  
28 obligations enshrined in the Convention, such as articles 192 and 194.

29  
30 Mr President, these provisions are at the heart of this request for an advisory  
31 opinion. In this respect, like others, the Kingdom wishes to highlight the European  
32 Union’s view that the different legal regimes are to be applied in conjunction. This  
33 means that it is not necessary to apply the principle of *lex specialis*, as that principle  
34 is used to resolve treaty conflicts, whereas no conflict exists between the rules  
35 concerned, as I will address in more detail shortly.

36  
37 In addition, the Kingdom wishes to emphasize that it shares the view that the global  
38 climate regime does not prevent the Tribunal from interpreting the obligations  
39 relating to climate change and its effects upon the marine environment flowing from  
40 the Convention.

41  
42 Mr President, I will now turn to the substance of the provisions that are central to  
43 these advisory proceedings, and, to be specific, those are articles 192 and 194 of the  
44 Convention.

45  
46 It is undisputed that article 192 establishes the general obligation of Parties to  
47 protect and preserve the marine environment, which, in the view of the Kingdom,  
48 reflects customary international law. This obligation applies to all marine areas, both  
49 within and beyond national jurisdiction, as was confirmed by the arbitral tribunals in  
50 the *Iron Rhine Arbitration* and the *South China Sea Arbitration*.

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Mr President, the Kingdom notes that the content of article 192 of the Convention is further developed in the subsequent provisions of Part XII of the Convention. This includes article 194. This article establishes the obligation for States to take measures to prevent, reduce and control pollution of the marine environment. I will turn to the meaning of “pollution” shortly. For now, it suffices to say that, through article 194, States are obliged to take measures, be it individually or collectively, to achieve the goal of this provision; that is, to prevent, reduce and control pollution.

Both articles 192 and 194 of the Convention are obligations of conduct. The Kingdom underscores some of the views presented that measures *need* to be taken in order to prevent, reduce and control pollution of the marine environment. The wording of article 194 is “States shall take” and “to ensure”. Such wording assumes that such measures *must* be taken. However, contrary to what has been argued by some participants before this Tribunal, this in itself does not lead to the conclusion that this is an obligation of result.

Mr President, in this respect, it follows from the *Advisory Opinion of the Seabed Disputes Chamber on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* that the obligation “to ensure”, as enshrined in paragraph 2 of article 194 of the Convention, “is not an obligation to achieve”. Rather, in the wording of the Seabed Disputes Chamber, “it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”. In the present proceedings, the result to be obtained relates to the prevention, reduction and control of pollution in accordance with article 194.

This also follows from the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay*. Here, the Court stated that an obligation to adopt regulatory or administrative measures, and enforce them, is an obligation of conduct, and, because of its characterization as an obligation of conduct, the Court concluded that it is also an obligation of due diligence.

That the obligation is one of conduct, and thus to exercise due diligence, does not, in any way, mean that it results in a low level of environmental protection. The question then arises, what precisely is the specific content of this due diligence obligation?

In its Advisory Opinion, the Seabed Disputes Chamber determined that the content of the due diligence obligation cannot be described in precise terms; rather, it is a variable concept. In this sense, the content of the obligation and the measures that need to be taken so as to comply with the obligation of due diligence, may vary according to circumstances. It may, for example, change in relation to the risks involved in an activity, and the standard of due diligence has to be more severe for riskier activities.

In particular, scientific or technological knowledge is very important to establish the standard of due diligence that needs to be acted upon. As the Seabed Disputes Chamber stated: “Due diligence may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge”.

1  
2 This is clearly applicable to climate change. The Kingdom wishes to note the  
3 importance of the precautionary principle, meaning that lack of full scientific certainty  
4 shall not be used as a reason for postponing cost-effective measures to prevent  
5 environmental degradation. This should thus be taken into account in determining  
6 the standard of due diligence exercised.

7  
8 Mr President, the Kingdom agrees with other participants that the obligation to  
9 exercise due diligence under articles 192 and 194 of the Convention applies to every  
10 single State. The Kingdom also shares the views expressed that capabilities of  
11 States differ. In this respect, the Kingdom would like to refer to the work of the  
12 International Law Commission on the Prevention of Transboundary Harm from  
13 Hazardous Activities.

14  
15 In its commentaries, it observed that

16  
17 the degree of care expected of a State with a well-developed economy and  
18 human and material resources and with highly evolved systems and  
19 structures of governance is different from States which are not so well  
20 placed. Even in the latter case, vigilance, employment of infrastructure and  
21 monitoring of hazardous activities in the territory of the State, which is a  
22 natural attribute of any Government, are expected.

23  
24 These observations are also relevant for climate change law and policy, in particular  
25 the adoption of mitigation and adaptation measures, to which I will now turn your  
26 attention.

27  
28 Mr President, mitigation and adaptation measures find their origin in the United  
29 Nations Framework Convention on Climate Change and related instruments, such as  
30 the Paris Agreement. In the view of the Kingdom, the obligations enshrined in  
31 articles 192 and 194 of the Convention include the adoption of such mitigation and  
32 adaptation measures.

33  
34 Whereas mitigation measures seek to regulate the concentration of greenhouse  
35 gases in the atmosphere that have an anthropogenic origin, adaptation measures  
36 are intended to respond to actual or expected impacts of climate change, including  
37 on the marine environment.

38  
39 In the context of mitigation measures, the principle of common but differentiated  
40 responsibilities and respective capabilities is relevant, as reflected in the system of  
41 nationally determined contributions under the Paris Agreement. This system has not  
42 only been designed to reflect differentiated responsibilities and historical emissions,  
43 but also to reflect respective capabilities. This should be taken into account in the  
44 degree of care expected of States to comply with their international obligations. In  
45 complying with these obligations, States should, individually or collectively,  
46 implement mitigation measures.

47  
48 In the context of adaptation measures, the principle of common but differentiated  
49 responsibilities and respective capabilities is relevant as well. Bearing in mind this  
50 principle, the international community, including coastal States as well as all States  
51 with respect to the Area, are responsible for the implementation of adaptation

1 measures to enhance the climate resilience of the marine environment. Such  
2 measures will vary from State to State depending on State-specific circumstances,  
3 including the conditions of their natural environment and their socioeconomic status.

4  
5 As for the European part of the Kingdom, of which a substantial part is situated  
6 below sea level, it requires the Netherlands to consider how to continue to manage  
7 its coast with sand nourishment in the coming decades, in order to guarantee the  
8 safety of the Netherlands in the future. As for the Caribbean part of the Kingdom,  
9 which have some of the most pristine coral reefs in the world, it requires enhancing  
10 the resilience of those reefs to protect them against ocean warming and ocean  
11 acidification.

12  
13 An example of a *collective* measure enhancing the climate resilience of the marine  
14 environment is the designation and management of marine protected areas, as well  
15 as other area-based management tools, including in accordance with the Agreement  
16 under the United Nations Convention on the Law of the Sea on the Conservation and  
17 Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

18  
19 Mr President, the applicability of article 194 of the Convention is based on the  
20 occurrence of pollution of the marine environment and the prevention, reduction and  
21 control thereof. In its written statement, the Kingdom explained why it considers the  
22 deleterious effects of climate change and ocean acidification, as well as the harm  
23 resulting from such effects, to fall within the meaning of the phrase “pollution to the  
24 marine environment” as defined in article 1(4). The Kingdom has not been convinced  
25 by the view, expressed by a few participants, suggesting otherwise, nor does it agree  
26 with the view that the obligations under article 194 do not relate to climate change,  
27 its effects and ocean acidification.

28  
29 Furthermore, the Kingdom took note of statements that merely focused on land-  
30 based sources of pollution and sources of pollution from or through the atmosphere  
31 in response to the questions before the Tribunal. As a consequence, these  
32 statements only address the interaction between the obligations related to these  
33 sources under the Convention and the obligations under the United Nations  
34 Framework Convention on Climate Change and related instruments.

35  
36 In the view of the Kingdom, other sources of pollution mentioned in the Convention  
37 may also contribute to climate change and ocean acidification, such as pollution by  
38 dumping, pollution from vessels, and pollution from installations and devices in the  
39 exploitation of the natural resources of the seabed and subsoil.

40  
41 Accordingly, the Kingdom has addressed the interaction between the obligations  
42 related to *all these* sources with other instruments, frameworks and bodies. These  
43 do not only include the United Nations Framework Convention on Climate Change  
44 and its related instruments; they also include instruments under the auspices of  
45 international organizations, in particular the International Maritime Organization and  
46 the International Civil Aviation Organization.

47  
48 These organizations have assumed responsibilities for reducing emissions from  
49 greenhouse gases from shipping and aviation, respectively, and are pursuing

1 strategies to achieve such reductions. This has also been convincingly illustrated by  
2 the International Maritime Organization in its statements before the Tribunal.

3  
4 Mr President, such initiatives are examples of the furtherance of the general  
5 principles and objectives set forth in this Convention relating to the protection and  
6 preservation of the marine environment and the protection, reduction and control of  
7 pollution thereto in accordance with article 237 of the Convention.

8  
9 Several participants have referred to the general duty of cooperation enshrined in  
10 article 197 of the Convention in respect of the marine environment and consider this  
11 duty to be a fundamental principle of international environmental law. The Kingdom  
12 agrees, as the Tribunal held, in the case concerning the *Mixed Oxide Fuel Plant*, that  
13 cooperation is a “fundamental principle in the prevention of pollution of the marine  
14 environment under Part XII of the Convention and general international law and that  
15 rights arise therefrom”.

16  
17 Furthermore, some participants have referred to loss and damage to the marine  
18 environment resulting from the adverse effects of climate change. The Kingdom  
19 would observe that this issue has not been explicitly raised in the questions posed in  
20 the request for an advisory opinion. However, the issue becomes pertinent once the  
21 implementation of mitigation measures and adaptation measures have not proven  
22 effective to prevent damage to the marine environment, including the loss of marine  
23 biological diversities, in areas within and in areas beyond the limits of national  
24 jurisdiction.

25  
26 The Kingdom wishes to note that the issue of loss and damage resulting from  
27 climate change is being addressed under the United Nations Framework Convention  
28 on Climate Change, which includes decisions on the establishment of the Warsaw  
29 International Mechanism for Loss and Damage Associated with Climate Change  
30 Impacts, as well as on Funding Arrangements for Responding to Loss and Damage  
31 Associated with the Adverse Effects of Climate Change, including a Focus on  
32 Addressing Loss and Damage.

33  
34 The Kingdom considers that damage to the marine environment, including the loss of  
35 marine biological diversities, in areas within and in areas beyond the limits of  
36 national jurisdiction, could be addressed under these initiatives relating to loss and  
37 damage resulting from the adverse effects of climate change.

38  
39 In this context, the Kingdom considers that particular relevance should be given to  
40 the obligation, under the Convention on Biological Diversity, to rehabilitate and  
41 restore degraded ecosystems and promote the recovery of threatened species, *inter*  
42 *alia*, through the development and implementation of plans or other management  
43 strategies.

44  
45 Mr President, distinguished members of the Tribunal, the Kingdom considers that,  
46 through its advisory opinion, the Tribunal has a unique opportunity to raise  
47 awareness and provide guidance on the protection and preservation of the marine  
48 environment and/or the prevention, reduction and control of the pollution of the  
49 marine environment.

1 In this manner, the advisory opinion will contribute to the interpretation and  
2 application of the obligations arising from the Convention, in particular the obligations  
3 arising from Part XII of the Convention. This would also contribute to the  
4 advancement of the holistic implementation, in a coherent and cooperative manner,  
5 of the obligations under the Convention and the obligations under other relevant  
6 legal instruments and frameworks and relevant global, regional, subregional and  
7 sectoral bodies.

8  
9 Mr President, honourable members of this Tribunal, I now conclude my presentation.  
10 The Kingdom would like to thank the Tribunal for her time and attention and looks  
11 forward to its Advisory Opinion on Climate Change and International Law. I thank  
12 you.

13  
14 **THE PRESIDENT:** Thank you, Mr Lefeber, for your statement. We have now  
15 reached 11:45. At this stage, the Tribunal will withdraw for a break of 30 minutes. We  
16 will continue the hearing at 12:15.

17  
18 *(Pause)*

19  
20 **THE PRESIDENT:** I now invite Mr Juratowich to make his statement on behalf of the  
21 United Kingdom. You have the floor, Sir.

22  
23 **MR JURATOWITCH:** Mr President, members of the Tribunal, it is an honour to  
24 appear before you to seek to assist you with the task that lies ahead of you. That  
25 task is simultaneously very broad and very delicate.

26  
27 In this final session, the United Kingdom seeks to assist the Tribunal by identifying  
28 the considerable common ground, and then focusing on the central issues with  
29 which the Tribunal will need to grapple. The United Kingdom emphasizes six areas  
30 of common ground.

31  
32 The first concerns the definition in article 1(1)(4). Nearly all participants accept that  
33 the actual or likely deleterious effects on the marine environment caused by  
34 anthropogenic greenhouse gas emissions constitute “pollution of the marine  
35 environment”.<sup>1</sup> This, of course, means that the pollution regime in Part XII is  
36 engaged by greenhouse gas emissions. If the Tribunal endorses this approach, that  
37 alone will be significant.<sup>2</sup>

38  
39 The second concerns the scope of the Tribunal’s enquiry. Whilst, in theory, the  
40 request goes beyond Part XII, no party has seriously engaged with any provision  
41 outside it and the associated definitional provisions. The Tribunal can thus limit its  
42 opinion to relevant obligations in Part XII.

43  

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<sup>1</sup> Cf India Oral Submissions, ITLOS/PV.23/C31/8, p. 17 (lines 40-49) (Rangreji); China Oral Submissions, ITLOS/PV.23/C31/10, p. 28 (lines 1-50) – p. 29 (lines 1-9) (Ma); see further Indonesia written statement, paras. 58 and 81.

<sup>2</sup> See generally Commission of Small Island States on Climate Change and International Law (‘COSIS’) Oral Submissions, ITLOS/PV.23/C31/4, p. 25 (lines 40-43) (Lowe).



1 The third concerns the character of the obligations in Part XII. It is common ground  
2 that articles 192 and 194 are governed by the due diligence standard. The same is  
3 true for the duties to take cooperative action under Part XII.<sup>3</sup>

4  
5 The fourth is that the IPCC's reports emerging from its Sixth Assessment Cycle  
6 reflect best available science on the issues of climate change and ocean  
7 acidification, and their effects on the marine environment. The Tribunal endorsing  
8 this common ground would also be a significant result.

9  
10 The fifth is that the UNFCCC and the Paris Agreement are relevant to the  
11 interpretation of obligations in Part XII. How they are relevant is a different matter  
12 and I will ultimately focus on that.

13  
14 The sixth concerns the approach to the dispositive part of the Tribunal's forthcoming  
15 opinion. The Tribunal may recall, having seen slides during the presentation of  
16 COSIS, the proposed dispositive part. The Tribunal may also recall the level of  
17 generality of those paragraphs. COSIS asks the Tribunal for a dispositive part that  
18 takes the terms of the relevant Part XII provisions and recognizes that they are  
19 engaged by anthropogenic greenhouse gas emissions. That much is common  
20 ground. The common ground ends where COSIS adds to what UNCLOS says by  
21 including the 1.5°C temperature goal and a stipulation as to timing, and to that I will  
22 also come.

23  
24 Conscious of that significant common ground, the United Kingdom will use its time  
25 today on three subjects: first, jurisdiction, discretion, and characterization of the  
26 request; second, States' obligations to take "necessary measures" under articles 194  
27 and 212; and third, the duty of cooperation.

28  
29 Ms Sander will address you on the duty of cooperation, and I will deal with the first  
30 two subjects.

31  
32 Before I do, the United Kingdom pays tribute to Professor Alan Boyle who passed  
33 away during the course of this hearing. He will be greatly missed.

34  
35 Members of the Tribunal, like most participants, the United Kingdom does not  
36 challenge the existence of the Tribunal's advisory jurisdiction. It recognizes the  
37 Tribunal's finding in *SRFC* that it had such a jurisdiction.<sup>4</sup>

38  
39 The United Kingdom shares the views of several States<sup>5</sup> that the Tribunal could take  
40 this opportunity to elaborate on the basis of its advisory jurisdiction. In particular, the  
41 United Kingdom seeks clarification as to how an agreement empowering an

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<sup>3</sup> See, e.g., COSIS written statement, paras. 319-320 and 327.

<sup>4</sup> See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 ('*SRFC Advisory Opinion*'), Operative Clause, para. 1.

<sup>5</sup> Germany Oral Submissions, ITLOS/PV.23/C31/5, p. 19 (lines 31-35) (Von Uslar-Gleichen); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 24 (lines 29-31) (Mohammed Algethami); Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 5 (lines 40-44) (Ortega Lemus); India Oral Submissions, ITLOS/PV.23/C31/8, p. 16 (lines 21-23) (Rangreji); Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 6 (lines 21-24) (Jalloh); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 21 (lines 26-35) (Motzfeldt Kravik).

1 international organization to seek an advisory opinion confers jurisdiction on the  
2 Tribunal to issue one for the purposes of article 21 of its Statute.<sup>6</sup>

3  
4 Turning to discretion, the Tribunal is now faced with a request in very different  
5 circumstances from *SRFC*.

6  
7 Unlike the *SRFC*,<sup>7</sup> the type of international organization making the request is not  
8 expressly referred to in UNCLOS. Nor are its functions described in UNCLOS.  
9 Instead, COSIS was created by two States,<sup>8</sup> without consultation with all other  
10 UNCLOS States Parties. Nonetheless, prominent among the purposes and activities  
11 of COSIS is seeking advisory opinions from the Tribunal concerning the obligations  
12 of *all* States Parties to UNCLOS.

13  
14 In *SRFC*, the Tribunal found that the object of the *SRFC*'s request was "to seek  
15 guidance in respect of its own actions".<sup>9</sup> Here, the Commission does not seek  
16 guidance in respect of its own actions, but on the obligations of all UNCLOS States  
17 Parties in relation to climate change and ocean acidification.

18  
19 The United Kingdom considers that risks arise from a small group of States being  
20 able to request ITLOS advisory opinions through a treaty of restricted membership  
21 devised for that principal purpose. This is all the more so when the questions posed  
22 concern the obligations of all States Parties to UNCLOS. To use the words of Judge  
23 Cot in *SRFC*, there are "dangers of abuse and manipulation" in future cases.<sup>10</sup>  
24 These are dangers that are not protected against by article 21 of the Statute,  
25 article 138 of the Rules or the Tribunal's approach to its advisory jurisdiction in  
26 *SRFC*.

27  
28 The United Kingdom therefore invites the Tribunal to identify parameters governing  
29 the exercise of its discretion for the purpose of both this and future cases, as set out  
30 in paragraph 20 of its written statement. Two are particularly relevant to this case.

31  
32 The first concerns the content of the question and the scope of the answer. The  
33 request must ask a legal question that is framed with enough specificity to ensure  
34 that in answering it, the Tribunal acts compatibly with its judicial function. The  
35 Tribunal was explicit in *SRFC* that a request must be "clear enough to enable it to  
36 deliver an advisory opinion".<sup>11</sup> It is implicit that the scope of the question cannot go  
37 beyond what can feasibly and properly be addressed in advisory proceedings. This  
38 is not just a matter of focusing only on Part XII. The Tribunal will wish to keep in mind  
39 the procedure it has adopted in this case when determining the scope of, and level of  
40 detail in, its opinion.

41  

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<sup>6</sup> United Kingdom written statement, para. 15.

<sup>7</sup> UNCLOS, article 118.

<sup>8</sup> The COSIS Agreement entered into force with the signatures of Antigua and Barbuda and Tuvalu on 31 October 2021 (see article 4(2) providing that "[t]his Agreement shall enter into force upon signature by two or more States"). Membership of COSIS now also includes Palau, Niue, Vanuatu, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, and the Bahamas.

<sup>9</sup> *SRFC* Advisory Opinion, para. 76.

<sup>10</sup> See Separate Declaration of Judge Cot in the *SRFC* Advisory Opinion proposing that the Tribunal "provide a procedural framework" and establish "a coherent system" (paras. 9 and 13).

<sup>11</sup> *SRFC* Advisory Opinion, para. 72.

1 Distinguished Judges:  
2

3 33 States and 10 intergovernmental organizations filed written statements, spanning  
4 nearly 1,500 pages.  
5

6 Participants were not afforded an opportunity to file a reply statement, although  
7 several States requested that opportunity.  
8

9 COSIS was granted two full days to make its oral submissions. That allowed it to  
10 make 20 separate presentations from 20 individual advocates. Two of those  
11 advocates were testifying scientific experts. They appeared despite the well-  
12 established and important distinction between expert evidence and advocacy in  
13 international practice,<sup>12</sup> and despite the lack of notice to States that this would occur.  
14 The United Kingdom's position is that this approach to expert evidence is contrary to  
15 principle and should be avoided in any future case.  
16

17 Each State Party has been allotted a maximum of just one hour to make its oral  
18 submissions. That is not enough time to respond to all relevant points arising from  
19 the extensive written submissions or the extensive oral submissions of COSIS.  
20

21 The United Kingdom respectfully invites the Tribunal to take this procedural context  
22 into account when considering the appropriate ambit of its advisory opinion.  
23

24 The second factor on discretion is the importance of the request comprising a legal  
25 question concerning one or more obligations under UNCLOS, or an agreement  
26 implementing it. The Tribunal is not the appropriate forum for the interpretation or  
27 application of other treaties. This factor is of real significance in the present case,  
28 given the specialized climate treaty regime.  
29

30 We come now to a point about the objective characterization of the request. The  
31 Tribunal is asked to identify the "specific obligations" under Part XII that are relevant  
32 to climate change and ocean acidification. This requires the Tribunal to identify and  
33 to describe the content and meaning of those obligations. The Tribunal is not asked  
34 to identify means by which States may comply with those obligations. The Tribunal  
35 will have recognized that a number of arguments made to it have nonetheless  
36 focused on what would be necessary to comply with obligations in light of scientific  
37 evidence, rather than on the identification, content and meaning of the relevant  
38 obligations.  
39

40 While I am on matters outside scope, the United Kingdom notes that the Falkland  
41 Islands have been raised before you.<sup>13</sup> The United Kingdom's position is well known  
42 and so I need say nothing further on it.  
43

44 Distinguished Judges, that brings us to my second subject: what is meant by  
45 "necessary measures" in articles 194 and 212.  
46

47 To resolve that issue in this context, the Tribunal will need to consider two questions.

---

<sup>12</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 ('*Pulp Mills*'), Separate Opinion of Judge Greenwood, para. 27.

<sup>13</sup> Argentina's Oral Submissions, ITLOS/PV.23/C31/6, p. 11 (lines 28-41) (Herrera).

1  
2 First, what is the relationship between best available science and States' legal  
3 obligations to take "necessary measures" to prevent, reduce and control climate  
4 change and ocean acidification?

5  
6 Second, what is the relevance of the specialized climate treaty regime to UNCLOS,  
7 and in particular, to articles 194 and 212?

8  
9 I turn first to best available science.

10  
11 The Seabed Disputes Chamber has already acknowledged that best available  
12 science is relevant to obligations that are subject to a due diligence standard. In its  
13 2011 Opinion, the Chamber considered the content of obligations in article 139(1)  
14 and article 4(4) of Annex III "to ensure" a particular state of affairs.<sup>14</sup> It held that  
15 these were "obligations 'of conduct' and not 'of result'".<sup>15</sup> It also held that the concept  
16 of due diligence may vary with "new scientific or technical knowledge".<sup>16</sup> The  
17 Chamber referred to article 194(2) as an example of a provision falling within that  
18 category of obligations.<sup>17</sup> In doing so, it rightly drew no relevant distinction between  
19 the language of article 194(2) and that of article 139(1).<sup>18</sup>

20  
21 This brings us to the role of the current IPCC reports in the present case.

22  
23 The approach of COSIS is that "[s]ettled scientific conclusions based on current and  
24 best available evidence dictate what is 'necessary'".<sup>19</sup> "Dictate" is a strong word. You  
25 have also been told that you must "follow the science".<sup>20</sup>

26  
27 This line of argument has the practical effect of seeking to elevate the findings and  
28 recommendations made in the current Panel reports to the status of binding legal  
29 obligations through the operation of articles 194 and 212. That, with respect, is not a  
30 permissible approach, for two reasons.

31  
32 First, asking the Tribunal to declare what States must do because of what the  
33 science says is not asking the Tribunal to declare the content or meaning of  
34 UNCLOS obligations, "specific" or otherwise. It is asking the Tribunal to explain what  
35 States must do at the present time to comply with those obligations in light of  
36 particular scientific evidence. That, members of the Tribunal, is not what the request,  
37 objectively characterized, calls for.

38  
39 The second reason would only become relevant if the Tribunal were nonetheless to  
40 consider compliance to be a matter within scope. It is that both the precise content of

---

<sup>14</sup> *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 ('*Activities in the Area, Advisory Opinion*'), para. 107 and following.

<sup>15</sup> *Activities in the Area, Advisory Opinion*, para. 110.

<sup>16</sup> *Activities in the Area, Advisory Opinion*, para. 117.

<sup>17</sup> *Activities in the Area, Advisory Opinion*, para. 113.

<sup>18</sup> Cf COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 21 (lines 18-35) (Thouvenin).

<sup>19</sup> COSIS written statement, para. 338.

<sup>20</sup> Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 21 (lines 11 and 40), p. 22 (line 2), p. 30 (line 28) (Sands).

1 the due diligence standard and its application to any given facts ultimately remain  
2 legal questions, not scientific ones.

3  
4 The United Kingdom accepts that the recommendations in the current IPCC reports  
5 are a highly relevant factor when a State is assessing what measures are objectively  
6 necessary for the purposes of complying with its obligations under articles 194 and  
7 212. But the Panel reports are not the beginning and end of the enquiry.

8  
9 Pursuant to the plain terms of UNCLOS and the established jurisprudence, there are  
10 factors relevant to a State's assessment of "necessary measures" beyond best  
11 available science. Some of those factors may point in different directions from  
12 others, and a State must weigh them in any particular circumstance. I will identify  
13 eight.

14  
15 First, practical considerations are crucial. Article 194(1) makes clear that States are  
16 to use "the *best practicable means* at their disposal" and act "in accordance with their  
17 *capabilities*". An assessment of what is "necessary" cannot be separated from  
18 practical realities. A State is permitted to consider economic, political, social and  
19 other factors that may affect what is practicable for a particular State at a particular  
20 time.

21  
22 Second, the *degree of risk of harm* generated by any particular conduct is a relevant  
23 consideration. This is consistent with the Chamber's recognition, which you have  
24 heard many times, that "the standard of due diligence has to be more severe for  
25 riskier activities",<sup>21</sup> as emphasized by many participants.<sup>22</sup>

26  
27 Third, States' obligations to take necessary measures under Part XII include a duty  
28 to avoid activities causing damage to other States. Article 194(2) makes this  
29 express.

30  
31 Fourth, the concept of *effectiveness* reinforces the need to take measures under  
32 Part XII that are targeted, timely and as far-reaching and efficacious as possible.<sup>23</sup>  
33 On this, the Panel's recognition of the need for deep, rapid and sustainable cuts to  
34 emissions and to have regard to tipping points<sup>24</sup> is particularly significant, but it is not  
35 the entire test.

36  
37 Fifth, within UNCLOS, the *precautionary principle*<sup>25</sup> remains relevant insofar as there  
38 is any remaining scientific uncertainty as to the character or extent of the likely harm,

---

<sup>21</sup> *Activities in the Area*, Advisory Opinion, para. 117.

<sup>22</sup> See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 9 (lines 3-5) and p. 10 (lines 1-2) (Brunnée); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 20 (lines 30-31) (Sands); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 2 (lines 33-37) (Yee); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 27 (lines 29-30) (Bouquet).

<sup>23</sup> See further United Kingdom written statement, paras. 85-87.

<sup>24</sup> For the climate system, 'tipping points' refers to a critical threshold when global or regional climate changes from one stable state to another stable state: IPCC, 2019: Glossary, p. 699.

<sup>25</sup> As explained in the United Kingdom written statement at para. 76, the precise status and content of the principle are unsettled.

1 the risk of it eventuating, or the efficacy of mitigatory measures.<sup>26</sup> This means that  
2 any such uncertainty cannot justify inaction or more limited action.

3  
4 Sixth, the results of *monitoring and assessment* conducted by a State pursuant to  
5 articles 204 or 206, and any reports made available to States Parties pursuant to  
6 article 205, may also be relevant to an assessment of what measures are necessary.

7  
8 Seventh, under article 194(1) States shall take measures “individually or jointly as  
9 appropriate” and “shall endeavour to harmonize their policies”. UNCLOS does not  
10 divorce what is necessary from what is capable of being agreed.

11  
12 Related to that, eighth, the provisions of *the specialized climate treaty regime* inform  
13 the content of the due diligence standard under Part XII, and I will return to the  
14 question of how they do so.

15  
16 Distinguished Judges, that best available science is not the only relevant factor is  
17 illustrated by the issue of the significance to be given to the 1.5-degree temperature  
18 goal.

19  
20 Several participants take the view that “necessary measures” under UNCLOS must  
21 be aimed at limiting average global temperature rise specifically to 1.5 degrees  
22 above pre-industrial levels. This is on the basis that the IPCC has concluded that  
23 limiting temperature rise to this level would significantly reduce the risks and harm of  
24 climate change.<sup>27</sup>

25  
26 This, with respect, incorrectly seeks to elevate scientific information to the status of a  
27 legal obligation under UNCLOS, without accounting for the other factors I have  
28 identified.

29  
30 The United Kingdom accepts that the Panel has, with medium to high confidence,  
31 identified a 1.5-degree rise as the threshold which, if exceeded, causes the risk of  
32 extreme effects of climate change to begin to move from moderate to high.<sup>28</sup> The  
33 United Kingdom also accepts that this scientific conclusion is a highly relevant factor  
34 to take into account when States are assessing what steps they must take to comply  
35 with articles 194 and 212.

36  
37 But the Panel reports are one of many factors that States must consider. To focus  
38 exclusively on the science on 1.5 degrees is to underestimate the complex and  
39 competing factors that States must weigh in practice.

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<sup>26</sup> See further United Kingdom written statement, paras. 75-78; cf Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 28 (lines 10-13) (Jalloh).

<sup>27</sup> See e.g., African Union written statement, paras. 202 and 220-221; Bangladesh written statement, paras. 35, 42, 45-48; COSIS written statement, para. 425; IUCN written statement, para. 108; Micronesia written statement, para. 51; Mozambique written statement, para. 3.65; Nauru written statement, paras. 56 and 66; COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 30 (lines 30-35) (Amirfar) and ITLOS/PV.23/C31/4, p. 29 (lines 25-28) (Lowe); Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 12 (lines 37-41) (Okowa); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 24 (lines 16-19) and p. 27 (lines 29-35) (Tladi).

<sup>28</sup> See 2018 Special Report on Global Warming of 1.5°C, p. 11, figure SPM.2.

1 Treating 1.5 degrees as a limit with the force of law derived from Part XII also  
2 ignores the character of the relevant obligations. They are due diligence obligations.  
3 There is common ground on the due diligence character of articles 192, 194, and  
4 197 through to 204.<sup>29</sup> The same characterization also applies to articles 206, 207,  
5 212, 213 and 222. They are all obligations of *conduct*, not of *result*.<sup>30</sup> As the Tribunal  
6 has heard many times, this means that States are obliged to “deploy adequate  
7 means, to exercise best possible efforts, to do the utmost, to obtain [the relevant]  
8 result”.<sup>31</sup>

9  
10 Those participants that are seeking to give the 1.5-degree goal legal significance  
11 through the rubric of “necessary measures” assume that the “result” towards which  
12 States must exercise “best efforts” under UNCLOS is the 1.5-degree goal. It is not.

13  
14 In *Activities in the Area*, the “result” was the sponsored contractors’ compliance with  
15 article 139(1) and article 4(4) of Annex III.<sup>32</sup> That is clear from the terms of those  
16 provisions.

17  
18 In the context of article 194(1), the relevant “result” is also clear on the face of the  
19 provision. It is the prevention, reduction and control of pollution. The Netherlands  
20 made the same point this morning. For article 194(2), the result is that activities  
21 within a State’s jurisdiction or control do not cause damage by pollution. The  
22 meaning of article 194 is not that a number identified by best available science at a  
23 given point in time is the result towards which States must expend their efforts. Any  
24 result at which States must aim under article 194 cannot be so specifically described.

25  
26 As the Tribunal has in mind, however the result at which States must aim is  
27 described, the content of the obligation is to exercise due diligence to achieve it.  
28 There is no legal obligation to achieve it.

29  
30 The attempt to give 1.5 degrees legal significance under UNCLOS is further  
31 undermined by the words used in the provision of the Paris Agreement that refers to  
32 1.5 degrees, which is article 2(1)(a).

33  
34 It is to the relationship between the climate change treaties and the due diligence  
35 standard in UNCLOS that I now turn.  
36

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<sup>29</sup> COSIS written statement, paras 319-320 and 327; see also, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 10 (lines 28-30) and page 13 (lines 18-20) (Brunneé) (in respect of articles 192 and 194), New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 12 (lines 10-11) (Skerten) (in respect of articles 192 and 194); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 18 (lines 5-6) (Hwang) (in respect of articles 192 and 194); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 13 (lines 1-11) (Paparinskis) (in respect of “key rules”, e.g., articles 194, 204, 206, and 207); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 9 (lines 5-8) (Middleton), p. 15 (lines 30-33) (Stoeger) and p. 20 (lines 28-39) (Bouquet) (in respect of articles 192, 194 and 197).

<sup>30</sup> See, para. 18 above; see further *Activities in the Area*, Advisory Opinion, para. 110; endorsed by the Tribunal in *SRFC* Advisory Opinion, paras. 128-129.

<sup>31</sup> *Activities in the Area*, Advisory Opinion, para. 110; endorsed by the Tribunal in *SRFC* Advisory Opinion, paras. 128-129.

<sup>32</sup> *Ibid.*

1 Like many participants,<sup>33</sup> the United Kingdom’s position is that the UNFCCC and the  
2 Paris Agreement have primary importance in the context of climate change. The  
3 provisions of those treaties inform the content of States’ obligations under Part XII of  
4 UNCLOS.

5  
6 The Tribunal will provide significant guidance by being specific about how and why  
7 the Framework Convention and the Paris Agreement are relevant to the questions  
8 before it. There are five different and complementary bases for such relevance.

9  
10 First, they contain specific rules that elaborate the “general obligation” in article 192  
11 to preserve the marine environment.

12  
13 Second, they are an example of “joint” measures for the reduction of greenhouse  
14 gas emissions for the purposes of article 194(1).

15  
16 Third, they contain internationally agreed rules or standards for the purposes of  
17 article 212(1). UNCLOS States Parties are obliged to take them into account in  
18 adopting domestic laws and regulations under article 212.

19  
20 Fourth, they contain relevant rules of international law to be taken into account in the  
21 interpretation of Part XII of UNCLOS, by operation of the rule reflected in  
22 article 31(3)(c) of the Vienna Convention. The United Kingdom of course recognizes  
23 that the Framework Convention and the Paris Agreement, on the one hand, and  
24 UNCLOS on the other, are separate treaties, with separate obligations.<sup>34</sup> The  
25 essential point is that the Tribunal will wish to interpret Part XII so that its meaning is  
26 harmonious with the climate change treaties. This is not a case of different treaties  
27 being in conflict. It is a case in which States are to be presumed to intend coherence  
28 and consistency across their treaty obligations.

29  
30 Fifth, they are additionally relevant because of their creation of relevant fora for  
31 international cooperation, including for the purposes of articles 197 and 212(1) of  
32 UNCLOS. Article 222 then requires States to implement legal obligations agreed in  
33 those fora by adopting appropriate domestic laws and regulations.

34  
35 I have already analyzed the 1.5-degree goal in the context of best available science.  
36 I return to it now to illustrate the more general relevance of the Paris Agreement to  
37 the interpretation of Part XII obligations.

38  
39 Some participants have relied on the Paris Agreement’s reference to the 1.5-degree  
40 goal as constituting an “agreed” threshold and thus an “internationally agreed ...

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<sup>33</sup> See European Union written statement, paras. 28 and 93; IUCN written statement, paras. 96 and 194; Mauritius written statement, paras. 47 and 50-51; Norway written statement, p. 3; Portugal written statement, para. 65; Singapore written statement, para. 38; see also Australia written statement, paras. 31, 39 and 41; Micronesia written statement, para. 47; New Zealand written statement, para. 94(f). See also, e.g., Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 17 (lines 6-7) (Koonjul); Indonesia Oral Submissions, ITLOS/PV.23/C31/9, p. 6 (lines 24-26) (Jinangkung); China Oral Submissions, ITLOS/PV.23/C31/10, p. 23 (lines 36-37) - p.24 (lines 1-2) (Ma); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 26 (lines 10-12) (Motzfeldt Kravik).

<sup>34</sup> COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 28 (lines 15-21) (Lowe), Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 3 (line 24) (Yee).



1 standard” for the purposes of articles 207(1) and 212(1). This is said to require  
2 “necessary measures” to be targeted at the 1.5-degree goal.<sup>35</sup>

3  
4 There are two key difficulties with this approach.

5  
6 First, the obligation in articles 207(1) and 212(1) – where the phrase “internationally  
7 agreed ... standards” is found – is limited in character. It only concerns the adoption  
8 of domestic laws and regulations and it is only to “take into account” relevant  
9 internationally agreed rules and standards. That is not an obligation to take  
10 necessary measures.

11  
12 Second, it is not clear on what basis the reference in article 2(1)(a) of the Paris  
13 Agreement to the 1.5-degree goal could be said to constitute an “internationally  
14 agreed standard” when one considers, even superficially, what it actually says and  
15 the context in which it says it. Article 2(1) addresses the Paris Agreement’s “aims”. In  
16 that context, article 2(1)(a) refers to: “Holding the increase in global average  
17 temperature to well below 2°C ... and pursuing efforts to limit the temperature  
18 increase to 1.5°C.” The reference to 1.5 degrees in the Paris Agreement cannot be  
19 isolated from the true sense of the provision in which it occurs. International law  
20 abhors cherry-picking.

21  
22 The primary relevance of the Paris Agreement to this case is in construing the terms  
23 of articles 194 and 212(2). The United Kingdom’s interpretative case is *not* that  
24 articles 194 and 212(2) contain a *renvoi* to the Paris Agreement that operates to  
25 deprive them of any meaningful independent effect.<sup>36</sup> Nor has the United Kingdom  
26 said that the Paris Agreement constitutes a “subsequent agreement” or “subsequent  
27 practice” between the parties to UNCLOS.<sup>37</sup> Nor do any provisions of UNCLOS  
28 incorporate any provisions of the Framework Convention or Paris Agreement so as  
29 to make them also obligations pursuant to UNCLOS.<sup>38</sup>

30  
31 The United Kingdom’s case is straightforward: like many participants,<sup>39</sup> it contends  
32 that the obligation to take “necessary measures” should be interpreted taking into  
33 account the Framework Convention and the Paris Agreement as required by the rule  
34 in article 31(3)(c) of the Vienna Convention. That is not a matter of limiting, diluting or  
35 “neutralizing”<sup>40</sup> UNCLOS, but of interpreting it harmoniously with the relevant, more  
36 specialized treaty on climate change. The contentious question is what this means in  
37 practice.  
38

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<sup>35</sup> COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 30 (lines 4-10) and p. 34 (lines 12-25) (Amirfar). As to the 1.5 degree goal under the Paris Agreement representing a “standard” under articles 207 and 212 more generally, see, e.g., Bangladesh Oral Submissions, ITLOS/PV.23/C31/6, p. 20 (lines 9-11) (Amirfar); Comoros Oral Submissions, ITLOS/PV.23/16, p. 9 (lines 10-20) (Coppens); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 26 (lines 11-13) (Sands); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 7 (lines 18-23) (Yee).

<sup>36</sup> Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 30 (line 14) - p. 32 (line 9) (Aughey).

<sup>37</sup> Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 33 (lines 8-12) (Aughey).

<sup>38</sup> Cf Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 8 (lines 14-17) (Okowa).

<sup>39</sup> See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/2, pp. 35 (lines 24-28) (Mbengue); Mozambique Oral Submissions, ITLOS/PV.23/C31/11 p. 12 (lines 33-35); Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 33 (lines 18-23) (Aughey).

<sup>40</sup> Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 30 (lines 32-35) (Aughey).

1 The United Kingdom's position is that the Paris Agreement can be taken to reflect a  
2 near-universal consensus on the measures that States must take to combat climate  
3 change in view of best available science. Those measures are introduced by a  
4 preamble expressly "recognizing the need for an effective and progressive response  
5 to the urgent threat of climate change on the basis of the best available scientific  
6 knowledge". Notwithstanding that preamble, the Paris Agreement does not go on to  
7 impose a binding temperature rise limit of 1.5 degrees, as the Tribunal is effectively  
8 being asked to impose through UNCLOS. The way that the Paris Agreement does  
9 treat the temperature rise goal should inform what legal meaning is to be given to  
10 what is "necessary" under articles 194 and 212.

11  
12 Members of the Tribunal, the general words of articles 194 and 212 of UNCLOS  
13 cannot credibly be interpreted as imposing more stringent or more specific  
14 obligations than the Paris Agreement, which is the specialist climate change treaty  
15 specifically addressing the measures to be taken.

16  
17 If States are to be obliged to take measures that collectively reduce emissions to a  
18 level that ensures that the increase to global average temperatures is limited to  
19 1.5 degrees, or to reach global peaking of greenhouse gases within a certain time  
20 period, States can, of course, collectively agree to that, including by way of  
21 amendment to the Paris Agreement pursuant to its article 22.

22  
23 The invitation to ITLOS appears to be to impose through advisory proceedings  
24 concerning the very general obligations in Part XII of UNCLOS a precise limit that  
25 has thus far not been agreed in the forum dealing specifically with the topic. That is  
26 both wrong as a matter of law, and would risk undermining rather than enhancing  
27 cooperation on this vital issue in practice.

28  
29 Like several other States,<sup>41</sup> the United Kingdom's position is that it is unnecessary  
30 and would be inappropriate for the Tribunal to offer an interpretation of any provision  
31 of the Framework Convention or the Paris Agreement.

32  
33 The interpretation and implementation of those treaties involve highly technical  
34 matters, the relevance and impact of which extend far beyond the law of the sea,  
35 and on which the Tribunal has not received full submissions. They are also matters  
36 that it is unnecessary for the Tribunal to opine on in order to answer the request  
37 made to it, which focuses exclusively on UNCLOS obligations. It is sufficient for the  
38 Tribunal to recognize the primary importance of those treaties and their relationship  
39 with the relevant provisions in Part XII.

40  
41 The United Kingdom does, however, invite the Tribunal to bear a number of  
42 important points in mind concerning the climate change treaties:

43  
44 The Framework Convention, the Paris Agreement, the annual decisions of the  
45 Conferences of the Parties under their auspices and their multitude of implementing  
46 decisions that exist already and that will be created in the future constitute a dynamic  
47 system. That system is the product of regular negotiations resulting in careful

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<sup>41</sup> Brazil written statement, para. 20; Canada written statement, para. 61; Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 23 (lines 15-21) and p. 28 (lines 22-23) (Mohammed Algethami). See also France written statement, para. 18.

1 compromise between States that can shift over time. It is through that vital process  
2 that States cooperate to reach consensus on the complex matters with which they  
3 are confronted at any given time.

4  
5 That careful compromise reflects a balance of competing objectives and interests  
6 both within and between States, and, accordingly, the Tribunal is invited to have  
7 careful regard to the scope of its judicial function, appreciating the delicate balances  
8 inherent in and managed through the global treaty regime concerning climate  
9 change.

10  
11 The United Kingdom recognizes that some States, including but not only small island  
12 States, are very understandably of the view that those treaties and processes are not  
13 moving fast enough or doing enough in the light of the dangers they, in particular,  
14 already face and will continue to face. The United Kingdom agrees that  
15 comprehensive action needs to be taken quickly through the Framework Convention  
16 and Paris Agreement processes, and other fora dealing with greenhouse gas  
17 emissions, and that existing commitments need to be honoured and improved if the  
18 world is to keep within the Paris Agreement temperature goal.

19  
20 But this is all a matter of painstaking detailed negotiations within the forum dedicated  
21 to them, and the implementation of what is agreed in that forum. ITLOS cannot  
22 accept an invitation, no matter how understandable its motivation, effectively to  
23 trump the treaties and the forum dedicated specifically to climate change on the  
24 basis of the very general obligations found in UNCLOS.

25  
26 What the Tribunal can and should recognize is that it is through States' collective  
27 efforts to implement their commitments and enhance their ambition in the climate  
28 change treaty framework that we will resolve the global challenge presented for the  
29 marine environment by climate change and ocean acidification.

30  
31 On that note, Mr President, I invite you to call upon Ms Sander to address the most  
32 important aspect of these proceedings, which is the duty of cooperation. I thank you  
33 for your attention.

34  
35 **THE PRESIDENT:** Thank you, Mr Juratowitch, for your statement. I now invite  
36 Ms Sander to make her statement. You have the floor, Madam.

37  
38 **MS SANDER:** Mr President, members of the Tribunal, good morning. It is an honour  
39 to appear before you.

40  
41 Before diving into the specifics of the duty of cooperation under Part XII, I consider a  
42 broader question: why is the United Kingdom focusing on this duty? In short:  
43 because of its importance to Part XII of UNCLOS and because of its importance to  
44 the specific context of this case, as reflected in its prominence in the submissions in  
45 these proceedings.<sup>1</sup>

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<sup>1</sup> See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 9 (line 10) – p. 14 (line 14) (Blake); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 4 (lines 1-6) (Donaghue); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 25 (lines 18-22) (Mohammed Algethami); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 2 (lines 6-9) (Herrera); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 12 (lines 11-21) (Paparinskis); Mauritius Oral Submissions,

1  
2 It is well-trodden ground that in many respects UNCLOS is a framework convention  
3 that, at various junctures, provides for the development of more detailed regulation  
4 and guidance by States. To ensure the effectiveness of many of its terms, States  
5 Parties must cooperate to establish the necessary legal rules and practices on  
6 specific issues, and Part XII is no exception to this. Of course, there are certain  
7 specific individual obligations on States set out in Part XII,<sup>2</sup> but the United Kingdom  
8 agrees with COSIS that cooperation is a “core normative thread”,<sup>3</sup> and with the  
9 African Union that it is a “cornerstone principle”.<sup>4</sup> Indeed, numerous references have  
10 been made in these proceedings to the Tribunal’s description in *Mox Plant* of the  
11 duty as “a fundamental principle”.<sup>5</sup>

12  
13 But it is the particular significance of the duty to cooperate under UNCLOS in the  
14 *specific* context of this case – and its critical role in realizing the obligations under  
15 articles 192 and 194(1) – that the Tribunal is invited to expressly recognize and  
16 elucidate.

17  
18 As Mr Juratowitch foreshadowed, cooperation leading to effective collective action is  
19 key to addressing the acute challenges of climate change impacts on the marine  
20 environment. That is a view reflected in the submissions of Argentina,<sup>6</sup> Australia,<sup>7</sup>  
21 Brazil,<sup>8</sup> Canada,<sup>9</sup> Chile,<sup>10</sup> Comoros,<sup>11</sup> Djibouti,<sup>12</sup> the European Union,<sup>13</sup>

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ITLOS/PV.23/C31/9, p. 28 (lines 12-17) (Sands); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 7 (lines 40-44) - p. 8 (lines 1-16) (Hallum); China Oral Submissions, ITLOS/PV.23/C31/10, p. 26 (lines 10-21) (Ma); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 32 (lines 22-42) (Jalloh); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (lines 13-25) (Yee); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 22 (lines 28-32) (Bouquet); African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 15 (lines 39-47) - p. 16 (lines 1-2) (Raju).

<sup>2</sup> See COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 13 (lines 34-40) (Blake).

<sup>3</sup> COSIS written statement, para. 316.

<sup>4</sup> African Union written statement, para. 263; Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 12 (lines 26-29) (Connolly).

<sup>5</sup> *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, p. 95, para. 82 cited as follows: COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 14 (lines 10-12) (Blake); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 14 (lines 35-38) (Parlett); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 2 (lines 6-9) (Herrera); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 8 (lines 5-8) (Hallum); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 28 (lines 15-17) (Sands); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 25 (lines 20-22) (Mohammed Algethami); Djibouti Oral Submissions, ITLOS/PV.23/C31/7, p. 31 (lines 8-9) (Yusuf); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 12 (lines 11-13, fn 18) (Paparinskis); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 19 (lines 40-43, fn 76) (Hwang); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 33 (lines 7-11) (Jalloh); European Union, ITLOS/PV.23/C31/14, p. 34 (lines 6-7) (Bouquet); Mozambique Oral Submissions, ITLOS/PV.23/C31/11 p. 19 (lines 33-35) (Loewenstein); Philippines Oral Submissions, ITLOS/PV.23/C31/12, p. 14 (lines 32-35) (Sorreta).

<sup>6</sup> Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 8 (lines 31-33) (Herrera).

<sup>7</sup> Australia written statement, para. 59; Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 15 (lines 34-37) (Parlett).

<sup>8</sup> Brazil written statement, para. 14.

<sup>9</sup> Canada written statement, para. 10.

<sup>10</sup> Chile written statement, para. 81.

<sup>11</sup> Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 12 (lines 26-29) (Connolly).

<sup>12</sup> Djibouti Oral Submissions, ITLOS/PV.23/C31/7, p. 31 (lines 15-20) (Yusuf).

<sup>13</sup> European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 22 (lines 28-32) (Bouquet).

1 Guatemala,<sup>14</sup> India,<sup>15</sup> Mauritius,<sup>16</sup> New Zealand,<sup>17</sup> Portugal,<sup>18</sup> Sierra Leone,<sup>19</sup>  
2 Singapore,<sup>20</sup> and Timor-Leste,<sup>21</sup> as well as COSIS<sup>22</sup> and the African Union.<sup>23</sup> The  
3 United Kingdom adds its voice to that chorus and considers it important to do so.  
4

5 However, to adopt the words of Judge Paik from his Separate Opinion in the *SRFC*  
6 advisory proceedings, “simply emphasizing the obligation of cooperation ... would  
7 hardly be sufficient”.<sup>24</sup>  
8

9 Rather, the question for ITLOS is: what is the specific content of the obligation of  
10 cooperation in the present context? It is the United Kingdom’s response to that  
11 question to which I now turn. Happily, there is a large degree of consensus among  
12 participants in these proceedings in this regard, and so my task primarily involves  
13 identifying points of common ground.  
14

15 The key relevant obligation in Part XII is article 197, addressing the formulation and  
16 elaboration of international rules, standards, and recommended practices and  
17 procedures. The Tribunal will be familiar with its plain terms, and so I highlight three  
18 key elements of that provision that it is understood are not controversial.  
19

20 First, flexibility as to format: whilst cooperation must be global, and can also be  
21 regional as appropriate, cooperation may be bilateral or multilateral –  
22

23 **THE PRESIDENT:** I am sorry to interrupt. There seems to be no interpretation at the  
24 moment, so can you bear with us for a second and see if we can resolve that.  
25

26 **MS SANDER:** Of course, Mr President. I am in your hands.  
27

28 **THE PRESIDENT:** Thank you very much. Thank you.  
29

30 (Pause)  
31

32 **THE PRESIDENT:** Thank you, Ms Sander, please proceed.  
33

34 **MS SANDER:** If I may backtrack just to locate it in my submissions.  
35

36 **THE PRESIDENT:** Yes.  
37

38 **MS SANDER:** Article 197, I am highlighting three key elements of that provision that  
39 is understood and not controversial.  
40

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<sup>14</sup> Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 12 (lines 38-42) (Neumann).

<sup>15</sup> India Oral Submissions, ITLOS/PV.23/C31/8, p. 20 (lines 9-10) (Rangreji).

<sup>16</sup> Mauritius written statement, para. 76.

<sup>17</sup> New Zealand written statement, para. 59.

<sup>18</sup> Portugal Oral Submissions, ITLOS/PV.23/C31/7, p. 18 (lines 33-36) (Teles).

<sup>19</sup> Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 32 (lines 22-24) (Jalloh).

<sup>20</sup> Singapore written statement, para. 42.

<sup>21</sup> Timor-Leste Oral Submissions, ITLOS/PV.23/C31/14, p. 20 (lines 20-23) (Sthoeger).

<sup>22</sup> COSIS Oral Submissions, ITLOS/PV.23/C31/4, pp. 9 (lines 15-22) (Blake).

<sup>23</sup> African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 15 (lines 43-44) (Raju).

<sup>24</sup> Separate Opinion of Judge Paik in the *SRFC* Advisory Opinion, p. 102, para. 34.

1 First, flexibility as to format: whilst cooperation must be global and can also be  
2 regional as appropriate, cooperation may be bilateral or multilateral.

3  
4 Second, flexibility as to forum: multilateral cooperation may take place through  
5 competent international organizations, be they established under the auspices of  
6 UNCLOS, or outside of it.

7  
8 Third, flexibility as to objective, to a degree. The purpose of international cooperation  
9 is law and policy-making. Its result may have the status of a legally binding treaty, or  
10 'soft law instruments' or a recommended practice or procedure. But those laws,  
11 practices or procedures must be consistent with UNCLOS and have the protection  
12 and preservation of the marine environment as their aim.

13  
14 Beyond these textual features, the duty of international cooperation in article 197 has  
15 three facets:

16  
17 First, it is an obligation of conduct, rather than result. Article 197, on its plain terms,  
18 does not oblige States Parties to reach an agreed position, and it is recalled that  
19 COSIS emphasized the due diligence nature of cooperative action under Part XII.<sup>25</sup>

20  
21 Second, it is a continuing obligation, as others have noted.<sup>26</sup> Depending on the  
22 circumstances, article 197 may require an ongoing dialogue<sup>27</sup> or may require a  
23 subject to be reassessed or revisited at a later date.

24  
25 Third, it is an obligation which requires States Parties to engage with one another in  
26 good faith.<sup>28</sup> As the ICJ has recognized, this reflects the "trust and confidence  
27 inherent in international co-operation".<sup>29</sup> The ICJ's observation that parties must  
28 engage "with a genuine intention to achieve a positive result"<sup>30</sup> is equally apt in the  
29 context of cooperation under article 197.

30  
31 Further, the United Kingdom considers that, consistent with the position set out by  
32 New Zealand in its written statement<sup>31</sup> and indicated by Sierra Leone in its oral  
33 submissions,<sup>32</sup> what States are required to do by the duty to cooperate – to engage  
34 in good faith – should be assessed in a proportional manner relative to the degree of  
35 risk at issue. This is consistent with the observation in the *Activities in the Area*

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<sup>25</sup> COSIS written statement, paras. 319-320 and 327; cf International Union for the Conservation of Nature Oral Submissions, ITLOS/PV.23/C31/16, p. 35 (lines 14-17) (Payne).

<sup>26</sup> New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 38) (Skerten); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 12 (line 25) (Yee).

<sup>27</sup> New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p.12 (lines 1-3) (Skerten).

<sup>28</sup> E.g.: COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 9 (line 42-43) (Blake); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 41) - p.12 (lines 1-3) (Skerten); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (line 15) (Yee).

<sup>29</sup> *Pulp Mills* para. 145, citing *Nuclear Tests Case, Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49.

<sup>30</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, para. 87.

<sup>31</sup> New Zealand written statement, para. 62.

<sup>32</sup> Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p.32 (lines 22-24) ("The gravity of the effects of climate change justifies the highest levels of cooperation among all").

1 Advisory Opinion that “the standard of due diligence has to be more severe for riskier  
2 activities”.<sup>33</sup>

3  
4 Of course, the content of article 197 informs and is informed by its surrounding  
5 provisions. Those provisions have been categorized in different ways during these  
6 proceedings.<sup>34</sup> I will address those provisions in two categories: those relating to law  
7 and policy-making, and those going beyond law and policy-making.

8  
9 Turning to the first category, the general obligation in article 197 addressing law and  
10 policy-making is reinforced by three further provisions that apply in this context:

11  
12 First, article 212(3) requires States Parties to endeavour to establish “global and  
13 regional rules, standards and recommended practices and procedures to prevent,  
14 reduce and control” pollution from or through the atmosphere, and article 207(4)  
15 echoes that wording.

16  
17 Next, as Mr Juratowitch mentioned, article 194(1) obliges States Parties to cooperate  
18 in two ways. It requires measures to be taken “jointly” where “appropriate”, thus  
19 contemplating individual and joint measures being taken concurrently. Article 194(1)  
20 also obliges States to “endeavour to harmonize their policies” relating to those  
21 measures, with article 207(3) echoing this language.

22  
23 Finally, article 201 specifically focuses on the development of scientific criteria  
24 relevant to the global and regional legal frameworks developed pursuant to  
25 articles 197 and 212(3).

26  
27 I turn to the second category of obligations going beyond law and policy-making, and  
28 it is here perhaps that one gets a bit closer to answering the plea to pin down  
29 specifically the content of the cooperation duty. These obligations also serve as  
30 useful concrete examples of how best available science is relevant to informing  
31 aspects of cooperation under UNCLOS.<sup>35</sup>

32  
33 Most relevantly, States Parties are obliged to cooperate on the following:

34  
35 the undertaking of scientific research and exchange of information and data (I refer  
36 to article 200);

37  
38 the provision of scientific and technical assistance to developing States (I refer to  
39 articles 202 and 203);

40  
41 the monitoring of the risks or effects of pollution, including the effects of any activities  
42 which they permit or engage in (I refer to both paragraphs in article 204);

43  
44 finally, the communication of reports pursuant to that monitoring as well as to after  
45 the assessment of planned activities under a State’s jurisdiction or control where a  
46 State has reasonable grounds to believe that those activities may cause substantial

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<sup>33</sup> *Activities in the Area*, Advisory Opinion, para. 117.

<sup>34</sup> E.g., COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 10 (lines 1-4) (Blake).

<sup>35</sup> United Kingdom written statement, para. 89(c); COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 33 (lines 26-29) (Amirfar).

1 pollution of, or significant and harmful changes to, the marine environment (I refer to  
2 articles 205 and 206).

3  
4 I pause here with two observations on article 206.

5  
6 First, the United Kingdom agrees that the existence of “reasonable grounds” for the  
7 purposes of article 206 provides for an objective assessment of State conduct.<sup>36</sup>

8  
9 Second, the United Kingdom highlights that there is a threshold for the application of  
10 article 206 of “substantial pollution of” or “significant and harmful changes to” the  
11 marine environment.<sup>37</sup> That threshold is clearly not to be equated to a threshold of  
12 “more than minor or transitory”, as was indicated in certain submissions,<sup>38</sup> and that  
13 distinction is reflected in the plain terms of article 30 of the BBNJ Agreement.<sup>39</sup>

14  
15 Mapping the various provisions to the present context, and taking into account the  
16 submissions made over the last two weeks, the United Kingdom’s position is that  
17 States Parties to UNCLOS have a continuing obligation to engage with one another  
18 in good faith in at least five different ways.

19  
20 First, States Parties must cooperate by undertaking *scientific research* on climate  
21 change and ocean acidification. States Parties’ good faith participation in the IPCC  
22 process is key in this regard.

23  
24 Second, States Parties must cooperate in *monitoring* the risks or effects of climate  
25 change and ocean acidification on the marine environment, including through the  
26 IPCC. They must also monitor the effects of activities that they permit or engage in.  
27 The objective of this surveillance links to the assessment obligation under  
28 article 206.

29  
30 Third, States Parties must cooperate in the *exchange of reports, information and*  
31 *data* produced pursuant to articles 200 and 205, with this aspect of transparency of  
32 critical importance to the effective functioning of the protections in Part XII in the  
33 present context.

34  
35 Fourth, States Parties must cooperate by providing technical, scientific and other  
36 *assistance to developing States*, either bilaterally, or through international  
37 organizations, such as the Conference of the Parties of the UNFCCC. The United  
38 Kingdom recognizes the particularly vulnerable position of small island States, as  
39 reflected in its Small Island Developing States Strategy.<sup>40</sup> The United Kingdom has  
40 noted the expert report of Dr Maharaj highlighting that States require assistance in  
41 building capacity to address chronic data gaps.<sup>41</sup> As recognized by COSIS, “different

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<sup>36</sup> Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 37 lines 26-27 (Wordsworth).

<sup>37</sup> Cf Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 27 (lines 41-44) - p. 28 (lines 6-9) (Sands).

<sup>38</sup> Cf International Union for the Conservation of Nature written statement, paras. 153 and 161; Belize written statement, para. 80f.

<sup>39</sup> Agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

<sup>40</sup> United Kingdom written statement, para. 5.

<sup>41</sup> COSIS Annex 5, paras. 8-12; Sierra Leone written statement, para. 88; Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 22 (lines 43-45) (Sorreta).



1 forms of international assistance, financial and non-financial” is required “as is  
2 appropriate in each case”.<sup>42</sup>

3  
4 Finally, States Parties must cooperate by participating in *discussions* with three  
5 aims:

6  
7 (a) to formulate and elaborate rules, standards and recommended practices and  
8 procedures consistent with UNCLOS to protect and preserve the marine  
9 environment from the threat of climate change and ocean acidification;

10  
11 (b) to establish appropriate scientific criteria for the formation and elaboration of the  
12 subset of those instruments specifically addressing the prevention, reduction and  
13 control of climate change and ocean acidification, as forms of pollution;

14  
15 (c) to devise specific and effective measures to prevent further harm to the marine  
16 environment and to mitigate existing harm where possible.

17  
18 The United Kingdom makes two further observations with respect to those  
19 discussions.

20  
21 The first observation is that it recognizes, as have other States,<sup>43</sup> that the principal  
22 relevant fora for those discussions are those established pursuant to the UNFCCC  
23 framework and also specialist bodies that address sector or pollutant-specific  
24 emissions, such as the IMO, ICAO and the Montreal Protocol’s Meeting of the  
25 Parties.

26  
27 In its written statement, the United Kingdom made express reference to the relevant  
28 COP under each of the UNFCCC, the Kyoto Protocol and the Paris Agreement,  
29 which operate as the supreme decision-making bodies of those treaties. The United  
30 Kingdom takes this opportunity to confirm two points of agreement.

31  
32 The first concerns Singapore’s written statement that highlighted, as regards the  
33 establishment of appropriate scientific criteria, the discussions of the Subsidiary  
34 Body for Scientific and Technological Advice (the SBSTA).<sup>44</sup> That body, one of just  
35 two permanent subsidiary bodies established under the UNFCCC, supports the work  
36 of the relevant COP through the provision of timely information and advice in  
37 scientific and technological matters. The SBSTA is, of course, informed by the work  
38 of the IPCC, with that body, or the COP more broadly, sometimes requesting specific  
39 scientific information, analysis or reporting from the IPCC.

40  
41 This illustrates an important reality that, central to discussions under the auspices of  
42 the UNFCCC is scientific and technical expertise; it is not just lawyers and diplomats  
43 gathered around the table but is a process underpinned by serious expert input and  
44 dialogue.

45  

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<sup>42</sup> COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 13 (lines 11-15) (Blake).

<sup>43</sup> Australia written statement, para. 61; Canada written statement, paras. 48-52. See also Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (line 21) (Yee).

<sup>44</sup> Singapore written statement, para. 48.

1 The second point of agreement is with the position set out by the EU and Norway  
2 that the Ocean and Climate Change Dialogue is a relevant forum in the present  
3 context.<sup>45</sup> Mandated at COP25 in 2019, this is an example of how, pursuant to the  
4 UNFCCC framework, discussions are held as to effective measures to prevent and  
5 mitigate harm to the *marine environment* specifically. The SBSTA Chair has also  
6 been mandated to strengthen ocean-based action.<sup>46</sup> These serve as examples of the  
7 “augmenting” of the existing UNFCCC framework with respect to the marine  
8 environment, as urged by the African Union.<sup>47</sup>

9  
10 Furthermore, the United Kingdom highlights that in addition to COP, there is a range  
11 of bodies and events which are regularly convened, and which serve as  
12 complementary fora for cooperation on climate change. Examples include the  
13 Petersberg Climate Dialogue, the Ministerial on Climate Action and the Climate  
14 Ambition Summit. Looking ahead, the United Kingdom agrees that there will be also  
15 cooperative work upon the BBNJ Agreement coming into force.<sup>48</sup>

16  
17 The United Kingdom’s second observation with respect to discussions is to  
18 emphasize that States Parties’ participation in any discussions must be  
19 meaningful,<sup>49</sup> and that this is an aspect that is a serious one.<sup>50</sup> As the Tribunal  
20 recognized in a different context in the *SRFC* advisory proceedings, this means  
21 “substantial effort should be made by all States concerned, with a view to adopting  
22 effective measures”.<sup>51</sup> This is a requirement of obvious direct and immediate  
23 significance in the present context. The United Kingdom acknowledges the immense  
24 challenges with respect to the progress of UNFCCC processes. But as recognized  
25 by so many in these proceedings, key to addressing climate change impacts on the  
26 marine environment is enhancing cooperation, not eschewing it. The United  
27 Kingdom agrees with France and other States that the BBNJ Agreement is a timely  
28 example of the value of international cooperation in oceans governance.<sup>52</sup>

29  
30 In conclusion on the matter of international cooperation, the United Kingdom invites  
31 the Tribunal:

32  
33 first, to confirm the paramount importance of that duty in the context of climate  
34 change and ocean acidification; and,

35  
36 second, to give it appropriately precise and practical content in the present context  
37 by recognizing the five incidents of the duty I have just outlined.  
38

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<sup>45</sup> EU written statement, para. 63; Norway written statement, para. 2.4.

<sup>46</sup> Decision 1/CP.26 (Glasgow Climate Pact), para. 61.

<sup>47</sup> African Union written statement, para. 267; Comoros Oral Submissions, ITLOS/PV.23/C31/16 p. 12 (lines 36-38) (Connolly).

<sup>48</sup> Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (lines 21-23) (Yee).

<sup>49</sup> New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 41) – p.12 (lines 1-3) (Skerten).

<sup>50</sup> United Kingdom written statement, para. 84.

<sup>51</sup> *SRFC* Advisory Opinion, para. 210; also cited Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p.33 (lines 13-15).

<sup>52</sup> Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 1 (lines 42-45) (Clarke); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 13 (lines 1-9) (Skerten); International Union for the Conservation of Nature Oral Submissions, ITLOS/PV.23/C31/16, p 35 (lines 17-20) (Payne); European Union Oral Submissions, ITLOS/PV.23/C31/14 p. 38 (lines. 22-25) (Jalloh).

1 Mr President, members of the Tribunal, the United Kingdom reiterates its recognition  
2 of the severe impact of anthropogenic climate change and ocean acidification on the  
3 marine environment, and that UNCLOS obliges States Parties to take certain  
4 affirmative steps to protect and preserve the marine environment from that impact.<sup>53</sup>  
5

6 The United Kingdom has sought to assist the Tribunal in its task of addressing the  
7 broad questions presented by COSIS by identifying the relevant specific obligations  
8 under Part XII and elaborating on their precise content, in particular teasing out the  
9 key contested issues and, significantly, the substantial common ground that has  
10 emerged over the past two weeks.

11  
12 Mr President, members of the Tribunal, that brings the submissions of the United  
13 Kingdom to a close. I thank you for your attention.  
14

15 **THE PRESIDENT:** Thank you, Ms Sander, for your statement. You may step down.  
16

17 This concludes the oral presentations of today and also brings us to the end of the  
18 oral proceedings in Case No. 31.  
19

20 I wish to seize this opportunity to thank all delegations who have addressed the  
21 Tribunal for the high quality of their statements made in the course of these 10 days.  
22 In addition, the Tribunal would also like to convey its appreciation to all delegations  
23 for the great professionalism and courtesy shown during the hearing. I also thank  
24 the 34 States Parties and 9 organizations participating in the written proceedings.  
25

26 The Registrar will now address the questions in relation to transcripts.  
27

28 **THE REGISTRAR:** Mr President, pursuant to article 86(4) of the Rules of the  
29 Tribunal, representatives who have participated in the hearing may, under the  
30 supervision of the Tribunal, make corrections to the transcript of their oral  
31 statements, but in no case may such correction affect the meaning and scope  
32 thereof. The corrections relate solely to the statements in the original language used  
33 during the hearing. The corrections should be submitted to the Registry as soon as  
34 possible and, in any event, by Wednesday, 4 October 2023 at 5 p.m. Hamburg time  
35 at the latest.  
36

37 Thank you, Mr President.  
38

39 **THE PRESIDENT:** Thank you, Madam Registrar. The Tribunal will now withdraw to  
40 deliberate on the case. The advisory opinion will be read on a date to be notified to  
41 all participants.  
42

43 In accordance with the usual practice, I request the participants to kindly remain at  
44 the disposal of the Tribunal in order to provide any further assistance and information  
45 that it may need in its deliberation prior to the delivery of its advisory opinion.  
46

47 I thank you in advance. The hearing is now closed.  
48

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<sup>53</sup> United Kingdom written statement, paras. 4 and 8.

*(The hearing closed)*