

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Tuesday, 12 September 2023, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Albert J. Hoffmann presiding

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

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

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

List of delegations:

REQUESTING ORGANIZATION

Commission of Small Island States on Climate Change and International Law (COSIS)

Mr Gaston Browne, Prime Minister of Antigua and Barbuda, Co-Chair of COSIS

Mr Kausea Natano, Prime Minister of Tuvalu, Co-Chair of COSIS

Mr Arnold Kiel Loughman, Attorney General, Republic of Vanuatu

Mr Ronald Sanders, Ambassador to the United States of America and the Organization of American States and High Commissioner to Canada of Antigua and Barbuda

Mr Tufoua Panapa, Chief Advisor to the Prime Minister, Tuvalu

Mr Kevon Chand, Senior Legal Advisor, Permanent Mission of Vanuatu to the United Nations

Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario

Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law

Mr Conway Blake, Debevoise & Plimpton LLP; solicitor advocate of the senior courts of England and Wales; member, Bar of the Eastern Caribbean Supreme Court

Ms Jutta Brunnée, Dean, Faculty of Law, University of Toronto; University Professor; associate member, Institut de droit international

Mr Eden Charles, Special Representative of the Secretary-General, International Seabed Authority; Lecturer of Law, University of the West Indies; Chair, Advisory Board, One Ocean Hub, UK Research and Innovation

Ms Naima Te Maile Fifita, Founder, Moana Tasi Project; 2023 Sue Taei Ocean Fellow

Mr Vaughan Lowe KC, Emeritus Chichele Professor of International Law, University of Oxford; barrister, Essex Court Chambers; member, Institut de droit international; member, Bar of England and Wales

Mr Makane Moïse Mbengue, Professor of International Law, University of Geneva; member, Curatorium of the Hague Academy of International Law; associate member, Institut de droit international

Mr Brian McGarry, Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University; member, Bar of New York

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Mr Zachary Phillips, Crown Counsel, Attorney General's Chambers, Ministry of Legal Affairs, Antigua and Barbuda; member, Bar of Antigua and Barbuda

Mr Jean-Marc Thouvenin, Professor, University Paris Nanterre; Secretary-General, The Hague Academy of International Law; associate member, Institut de droit international; member, Paris Bar; Sygna Partners

Ms Philippa Webb, Professor of Public International Law, King's College, London; Barrister, Twenty Essex; member, Bar of England and Wales; member, Bar of New York; member, Bar of Belize

Ms Margaretha Wewerinke-Singh, Associate Professor of Sustainability Law, University of Amsterdam; Adjunct Professor of Law, University of Fiji; member, Bar of Vanuatu; Blue Ocean Law

Ms Sarah Cooley, Director of Climate Science, Ocean Conservancy

Ms Shobha Maharaj, Science Director, Terraformation

Mr Falefou Tapugao, Private Secretary to the Prime Minister, Tuvalu

Mr Penivao Penete, Private Secretary to the Prime Minister, Tuvalu

Mr Alan Boyle, Emeritus Professor of Public International Law, Edinburgh Law School

Mr David Freestone, Adjunct Professor and Visiting Scholar, George Washington University School of Law; Co-Rapporteur of the International Law and Sea-Level Rise Committee, International Law Association; Executive Secretary, Sargasso Sea Commission

Ms Rozemarijn Roland-Holst, Assistant Professor in International Environmental Law, Durham Law School

Ms Jessica Joly Hébert, Ph.D. candidate, Université Paris Nanterre; member, Bar of Quebec

Ms Charlotte Ruzzica de la Chaussée, member, Bar of New York

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Ms Perpétua B. Chéry, Debevoise & Plimpton LLP; member, Bar of New York

Ms Sara Kaufhardt, Debevoise & Plimpton LLP; member, Bar of New York

Ms Evelin Caro Gutierrez, Debevoise & Plimpton LLP; member, Bar of New York

Ms Alix Meardon, Debevoise & Plimpton LLP; member, Bar of New York

1 **THE PRESIDENT:** Good morning. The Tribunal will now continue its hearing in the
2 Request for an Advisory Opinion submitted by the Commission of Small Island
3 States on Climate Change and International Law. This morning we will hear further
4 oral statements on behalf of the Commission of Small Island States on Climate
5 Change and International Law.
6

7 Before I give the floor to the first speaker, I would like to inform you that questions
8 from a Judge were communicated to two delegations in writing yesterday. The text of
9 the questions was also posted on the website of the Tribunal. I now give the floor to
10 Mr McGarry to make his statement.
11

12 You have the floor.
13

14 **MR MCGARRY:** Mr President, distinguished members of the Tribunal, it is an honour
15 to appear before you this morning on behalf of COSIS – the Commission of Small
16 Island States on Climate Change and International Law.
17

18 At the close of yesterday’s hearing, Professor Mbengue showed how the object and
19 purpose of the United Nations Convention on the Law of the Sea, or UNCLOS, are
20 inseparable from the factual and legal problems posed by climate change. And as
21 our colleagues will demonstrate today, obligations under UNCLOS to protect and
22 preserve the marine environment are also inseparable from the impacts of climate
23 change upon the uses and resources of our shared ocean.
24

25 It thus falls quite plainly within the Tribunal’s mandate, as the guardian of this
26 “constitution for the ocean”,¹ to clarify these obligations in regard to a dire threat to
27 the health and sustainability of the ocean. Indeed, the vast majority of States Parties
28 to UNCLOS have either expressly agreed that the Tribunal has and should exercise
29 jurisdiction in these proceedings, or else have not challenged this point.
30

31 I will therefore briefly address two threshold questions that have not been seriously
32 contested before the Tribunal: firstly, that you have jurisdiction to render your
33 advisory opinion in these proceedings; and secondly, that the request submitted by
34 COSIS is admissible and should be answered.
35

36 As the Tribunal observed in its 2015 advisory opinion – and as emphasized
37 yesterday by Professor Akhavan – the Rules of the Tribunal outline three
38 prerequisites for the exercise of its advisory jurisdiction.²
39

40 The first prerequisite is that “an international agreement related to the purposes of
41 the Convention specifically provides for the submission to the Tribunal of a request
42 for an advisory opinion.”³ This is satisfied by article 1 of COSIS’s constitutive
43 Agreement, as the Tribunal can see on the screen.

¹ See Tommy T.B. Koh, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. I (Myron H. Nordquist et al. eds.1985), p. 34.

² *Contra* Brazil Written Statement, para. 8; China Written Statement, paras. 6-25; India Written Statement, paras. 5-8.

³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 (“SRFC Advisory Opinion”), para. 60; see also ITLOS, Rules of the Tribunal, articles 138(1); COSIS Written Statement, para. 40.

1 Article 1(3) establishes COSIS’s mandate, in keeping with Part XII of UNCLOS, “to
2 promote and contribute to the definition, implementation and progressive
3 development of rules and principles of international law concerning climate change,
4 including, but not limited to, the obligations of States relating to the protection and
5 preservation of the marine environment.” This mandate is why the International Court
6 of Justice in June of this year considered COSIS “likely to be able to furnish
7 information on the question before the Court” in its own advisory proceedings
8 relating to climate change.⁴

9
10 The second prerequisite is that “the request must be transmitted to the Tribunal by a
11 body authorized by or in accordance with the agreement.”⁵ This is satisfied by
12 COSIS’s unanimous decision authorizing its Co-Chairs to submit the present request
13 to the Tribunal in accordance with articles 2(2), 3(3), and 3(5) of the COSIS
14 Agreement.

15
16 The final prerequisite is that the requested opinion is “given on ‘a legal question’.”⁶
17 The questions submitted to the Tribunal concern obligations under UNCLOS, which
18 are inherently legal obligations. As the International Court of Justice and the Seabed
19 Disputes Chamber of this Tribunal have found, “questions ‘framed in terms of law
20 and raising problems of international law [...] are by their very nature susceptible of a
21 reply based on law’.”⁷

22
23 In its 2015 advisory opinion, the Tribunal observed that a “further question” may
24 arise under article 21 of its Statute, as to whether “the questions posed [...]”
25 constitute matters which fall within the framework” of the requesting organization’s
26 constitutive agreement.⁸ No such issue arises here, as there is plainly a “sufficient
27 connection” between the submitted request and the “purposes and principles” of
28 COSIS’s constitutive Agreement,⁹ which anchor its ongoing work as an organization
29 grappling with an intergenerational threat to the health of our ocean. By virtue of its
30 representation of small island States, the relationship between the mandate of
31 COSIS and the submitted request could not be clearer.

32
33 In light of the States Parties’ overwhelming consensus regarding the singular import
34 of the questions before the Tribunal, there is simply no doubt as to your competence
35 here. As I will now show the Tribunal, the admissibility of the questions before you,
36 like your jurisdiction, is also a straightforward matter.

⁴ Letter from Philippe Gautier, Registrar of the International Court of Justice, to the Commission of Small Island States on Climate Change and International Law, No. 159614, 19 June 2023.

⁵ SRFC Advisory Opinion, para. 60; see also ITLOS, Rules of the Tribunal, articles 138(2); COSIS Written Statement, para. 41.

⁶ *Id.*; see also ITLOS, Rules of the Tribunal, articles 138(1); COSIS Written Statement, para. 42.

⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 403, para. 25; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 39.

⁸ SRFC Advisory Opinion, para. 67.

⁹ *Id.*, para. 68 (quoting *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 66, para. 22).

1 As both the Tribunal and the International Court of Justice have observed, a request
2 for an advisory opinion should not be refused except for “compelling reasons.”¹⁰ The
3 present proceedings do not give the Tribunal any such basis to decline to answer
4 these questions. To the contrary, there are clearly compelling reasons for you to
5 answer them. Indeed, the request submitted by COSIS is not merely admissible – it
6 is necessary.

7
8 Simply put, that is the end of the matter. Yet a few States Parties have offered three
9 ways to complicate the Tribunal’s analysis on this point.

10
11 Firstly, some have queried whether the submitted questions concern existing law in
12 force, *lex lata*, or else the law as it “ought” to be, *lex ferenda*.¹¹ Quite evidently, a
13 request to clarify the current obligations of States Parties does not require the
14 Tribunal to adopt a legislative role. Rather, as we heard yesterday – and as will be
15 elaborated by my colleagues today – the answers to the submitted questions are
16 found in the text and history of UNCLOS and the rules and principles reflected
17 therein.

18
19 Secondly, a few States consider that the questions concerned are overly broad.
20 They thus ask the Tribunal to judge the clarity of these questions not by their terms,
21 but by their scope.¹² On this point, some contend that these questions should have
22 referred to specific provisions of the COSIS Agreement – a more formalistic standard
23 than the Tribunal applied in its 2015 advisory opinion.¹³ As the Tribunal found, “[t]he
24 questions need not necessarily be limited to the interpretation or application of any
25 specific provision” of the treaty at hand, as “there is no reason why [...] article 21 of
26 the Statute should be interpreted restrictively.”¹⁴

27
28 A request submitted to the Tribunal on “the specific obligations of States Parties”¹⁵
29 regarding the marine environment is, in the words of the Tribunal, “clear enough to
30 enable it to deliver an advisory opinion.”¹⁶ The terms of the questions before you are
31 indeed clear, as is the crucial importance of your answer.

32
33 Finally, it is irrelevant that third States did not participate in the drafting and adoption
34 of these questions.¹⁷ The Tribunal and the International Court of Justice have made
35 clear that the authorization of third States is not required before seeking an advisory
36 opinion,¹⁸ a particularly impractical threshold for clarifying general obligations under

¹⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, para. 14; *SRFC Advisory Opinion*, para. 71. See also COSIS Written Statement, paras. 45-46.

¹¹ See France Written Statement, para. 15; United Kingdom Written Statement, para. 24.

¹² See United Kingdom Written Statement, paras. 22-23.

¹³ See France Written Statement, para. 16.

¹⁴ *SRFC Advisory Opinion*, para. 68.

¹⁵ Request for an Advisory Opinion of 12 December 2022, p. 2.

¹⁶ *SRFC Advisory Opinion*, para. 72 (citing *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 57, 61. See also COSIS Written Statement, para. 47.

¹⁷ *Contra* Brazil Written Statement, para. 9; France Written Statement, paras. 22–24; United Kingdom Written Statement, paras. 18–19.

¹⁸ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, 71; *SRFC Advisory Opinion*, para. 76; *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment, ITLOS Reports 2020-2021*, p. 17, paras. 202–203.

1 a Convention with 169 parties. The only notable limitation in this respect arises when
2 the questions address an exclusively bilateral dispute¹⁹ – a far cry from proceedings
3 relating to climate change and other common concerns of humankind.

4
5 COSIS submitted the present request based on its aforementioned mandate to
6 “promote and contribute to the definition [...] of rules and principles of international
7 law concerning climate change.”²⁰ This follows from the principle of common but
8 differentiated responsibilities, under which all States, however small, have
9 obligations to implement regarding climate change.

10
11 There is no question as to the urgency of the crisis that has led to COSIS’s creation,
12 nor to the essential nature of this organization’s purposes and functions. As
13 previously noted, the International Court of Justice recognized COSIS’s character as
14 an international organization when it admitted it to participate in the Court’s own
15 advisory proceedings. This is consistent with the Court’s longstanding approach of
16 assessing an organization’s “purposes and functions as specified or implied in its
17 constituent documents and developed in practice.”²¹

18
19 The object and purpose of the COSIS Agreement is reflected in its Preamble’s call to
20 “take immediate action to protect and preserve the climate system and marine
21 environment.”²² As explained earlier, the Agreement gives effect to these purposes
22 by setting out the functions of COSIS in article 1 and expressly specifying these
23 functions in article 2.²³

24
25 This was clearly confirmed in practice during the first year of the organization’s
26 existence, when it unanimously adopted the present request in furtherance of these
27 purposes and functions.²⁴ Since taking that decision, COSIS has tripled its
28 membership and now includes more parties than the Sub-Regional Fisheries
29 Commission that requested and received the Tribunal’s 2015 advisory opinion.

30
31 Mr President, members of the Tribunal, whatever questions might arise in future
32 proceedings, there can be no question as to the legitimacy of the present
33 proceedings. Nine States, having joined COSIS to combine their efforts to protect
34 and preserve the marine environment from a common threat, have accordingly
35 fulfilled the requirements to stand before the Tribunal today. After negotiating for 30
36 years as this threat endangered its members’ way of life – and indeed, very
37 existence – COSIS asks the Tribunal to assist it in the performance of its vital
38 functions²⁵ and to authoritatively interpret the Constitution for the Ocean.

¹⁹ See *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, paras. 33, 38; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136, paras. 47, 50.

²⁰ COSIS Agreement, articles 1(3).

²¹ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, 180.

²² COSIS Agreement, Preamble.

²³ See COSIS Agreement, articles 1(3), 2(2).

²⁴ See Decision of the Third Meeting of the Commission of Small Island States on Climate Change and International Law, 26 August 2022.

²⁵ See *SRFC Advisory Opinion*, para. 77; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, paras. 76, 88.

1 In conclusion, there are no compelling reasons to decline to exercise your well-
2 founded jurisdiction over this request. To the contrary, there is a critical need to
3 contribute your expertise, rigour and scrutiny to these questions, to clarify specific
4 obligations regarding the marine environment, and to safeguard the health of our
5 ocean and the sustainability of the most vulnerable coastal populations.

6
7 The few objections posed in these proceedings have sought to complicate this
8 simple legal analysis while obscuring the gravity and inequity of the specific threats
9 facing small island States. In contrast, a diverse and nearly unanimous majority of
10 States Parties agree that the Tribunal should proceed to directly answer the
11 questions at hand.

12
13 Mr President, honourable members of the Tribunal, this will close my presentation. I
14 thank you for your attention and ask that you please give the floor to Professor Jutta
15 Brunnée, who will begin to detail COSIS's position on the urgent questions before
16 you.

17
18 **THE PRESIDENT:** Thank you. Mr McGarry, I now give the floor to Ms Brunnée to
19 make her statement.

20
21 You have the floor.

22
23 **MS BRUNNÉE:** Mr President, distinguished members of the Tribunal, it is an honour
24 to appear before you on behalf of COSIS.

25
26 My presentation will focus on a matter that is uniquely within the purview of this
27 Tribunal: the due diligence that is required of States Parties in the context of their
28 obligations under Part XII of UNCLOS to protect and preserve the marine
29 environment in the face of climate change. This presentation will be the first of a
30 series of three, together with the presentations of Professor Jean-Marc Thouvenin
31 and Ms Catherine Amirfar, formulating COSIS's position on the first question before
32 the Tribunal. I will proceed as follows:

33
34 First, I will outline the key parameters of the due diligence incumbent upon States
35 under Part XII, highlighting the significant degree of agreement on those parameters
36 in the written statements submitted to the Tribunal.

37
38 Second, I will show that, in the context of the high probability of disastrous harm from
39 climate change, these parameters of due diligence entail objective and stringent
40 requirements for the conduct of States Parties.

41
42 Third, due diligence is not a matter of unbounded national discretion. While the
43 requirements of due diligence in the context of Part XII may be modulated by factors
44 that are specific to the obligated State, the relevant factors, once again, are objective
45 ones.

46
47 In sum, due diligence entails binding, objective standards of conduct. It is for this
48 Tribunal, building on its jurisprudence on Part XII of UNCLOS, to specify what due
49 diligence requires of States in the face of the high probability of disastrous harm to
50 the marine environment from greenhouse gas emissions and climate change.

1 Part XII of UNCLOS is dedicated to the protection and preservation of the marine
2 environment. Prior jurisprudence has confirmed that due diligence provides the
3 standard of conduct in this context, as is helpfully set out in the *South China Sea*
4 arbitral award.¹

5
6 The *South China Sea* tribunal considered that the content of the general obligation in
7 article 192 is informed by the corpus of international law.² It cited with approval the
8 conclusion of the International Court of Justice (ICJ) in its *Nuclear Weapons*
9 Advisory Opinion that States are required to “ensure that activities within their
10 jurisdiction or control respect the environment of other States or of areas beyond
11 national control.”³ The arbitral tribunal went on to observe that “the content of the
12 general obligation in Article 192 is further detailed in subsequent provisions of
13 Part XII, including Article 194.”⁴ For present purposes, the main point is that
14 articles 192 and 194(2) entail “obligations not only in relation to activities directly
15 taken by States and their organs, but also in relation to ensuring activities within their
16 jurisdiction and control do not harm the marine environment.”⁵ The arbitral tribunal
17 observed that this Tribunal’s *Fisheries* Advisory Opinion, in drawing on the ICJ’s
18 *Pulp Mills* judgment and the Seabed Chamber’s *Area* Advisory Opinion, noted that
19 “the obligation to ‘ensure’” requires States to exercise due diligence.⁶

20
21 The written statements of States and international organizations evidence broad
22 agreement around the proposition that various provisions in Part XII are expressions
23 of the obligation under general international law to prevent harm to the environment,⁷
24 and that at least some of the provisions require States to exercise due diligence.⁸

¹ *South China Sea Arbitration (Republic of the Philippines v. People’s Republic of China)*, PCA Case No 2013–19, Award on the Merits, 12 July 2016 (“*South China Sea Award*”).

² *Id.*, para. 941.

³ *Id.* (citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226 (“*Nuclear Weapons Advisory Opinion*”), para. 29).

⁴ *Id.*, para. 942.

⁵ *Id.*, paras. 943, 944.

⁶ *Id.*, para. 944; see also *SRFC Advisory Opinion*, paras. 131, 132 (citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Reports 2010*, p. 14) (“*Pulp Mills Judgment*”), para. 197; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, ITLOS Reports 2011*, p. 4 (“*Area Advisory Opinion*”), para. 117).

⁷ See e.g., African Union Written Statement, paras. 14–15; Canada Written Statement, para. 55; Democratic Republic of the Congo Written Statement, para. 171; Republic of Djibouti Written Statement, paras. 48, 51, 53–55; Egypt Written Statement, para. 40; European Union Written Statement, para. 24; France Written Statement, paras. 101, 102; Indonesia Written Statement, para. 67; International Union for Conservation of Nature Written Statement, para. 137; New Zealand Written Statement, para. 69; Mauritius Written Statement, para. 78; Micronesia Written Statement, para. 60; Mozambique Written Statement, paras. 3.47, 3.85; Portugal Written Statement, para. 64; Rwanda Written Statement, paras. 177–181; Singapore Written Statement, para. 30; United Kingdom Written Statement, para. 65.

⁸ See e.g., African Union Written Statement, para. 169; Bangladesh Written Statement, para. 37; Belize Written Statement, paras. 59(c), 68; Canada Written Statement, paras. 54, 62(v); Chile Written Statement, para. 48; Democratic Republic of the Congo Written Statement, para. 141; Egypt Written Statement, para. 30; European Union Written Statement, para. 14; France Written Statement, paras. 103, 143; International Union for Conservation of Nature Written Statement, para. 75; Korea Written Statement, paras. 10, 15, 29; Latvia Written Statement, paras. 14, 18; Mauritius Written Statement, paras. 68, 79; Micronesia Written Statement, para. 39; Mozambique Written Statement, paras. 3.56, 3.61, 3.87(d); Nauru Written Statement, para. 52; The Netherlands Written Statement, para. 3.2; New Zealand Written Statement, para. 69; Portugal Written Statement, para. 63; Rwanda

1 The relevant obligations to prevent harm to the marine environment are triggered by
2 the risk of such harm.⁹ And, as affirmed in many of the written statements, their
3 stringency is determined in important part by the degree of risk and the foreseeability
4 and severity of potential harm.¹⁰ As a result, States are subject to a stringent
5 obligation, to quote the Seabed Chamber, “to deploy adequate means, to exercise
6 best possible efforts, to do the utmost.”¹¹

7
8 This obligation to do the utmost must be understood in the context of the goal of
9 protecting and preserving the marine environment, bearing in mind that “the
10 environment is not an abstraction but represents the living space, the quality of life
11 and the very health of human beings, including generations unborn.”¹² And so
12 “vigilance and prevention are required on account of the often irreversible character
13 of damage to the environment.”¹³

14
15 There is broad agreement across the written statements that, in keeping with the
16 jurisprudence of international courts and tribunals,¹⁴ due diligence in the context of
17 the general obligation to prevent harm to the environment requires not only the
18 adoption of appropriate rules and measures but also “a certain level of vigilance in
19 their enforcement and the exercise of administrative control.”¹⁵

20
21 Similarly, there is consensus that due diligence entails substantive requirements,
22 such as the adoption of appropriate measures to prevent harm, as well as procedural
23 requirements.¹⁶ Relevant procedural requirements include the obligations to

Written Statement, paras. 190, 223; Sierra Leone Written Statement, para. 50; Singapore Written Statement, para. 29.

⁹ See, e.g., COSIS Written Statement, para. 232; see also ILC, Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 1.

¹⁰ See, e.g., COSIS Written Statement, paras. 54, 232, 281, 284, 361, 425; see also African Union Written Statement, paras. 171, 228; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, para. 54; European Union Written Statement, para. 20; France, paras. 107, 144; International Union for Conservation of Nature Written Statement, para. 79; Korea Written Statement, para. 10; Mauritius Written Statement, para. 80; Mozambique Written Statement, para. 3.62; New Zealand Written Statement, para. 58; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 33; United Kingdom Written Statement, paras. 66, 67.

¹¹ *Area Advisory Opinion*, para. 110.

¹² *Nuclear Weapons Advisory Opinion*, para. 29.

¹³ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 (“*Gabčíkovo-Nagymaros Judgment*”), para. 140.

¹⁴ See *Pulp Mills Judgment*, para. 197; *Area Advisory Opinion*, para. 114.

¹⁵ See COSIS Written Statement, para. 278; see also African Union Written Statement, para. 174; Belize Written Statement, para. 59(c); Canada Written Statement, para. 57; Egypt Written Statement, para. 49; European Union Written Statement, para. 20; France Written Statement, para. 115; International Union for Conservation of Nature Written Statement, para. 78; Korea Written Statement, para. 10; Micronesia Written Statement, para. 41; Nauru Written Statement, para. 40; Singapore Written Statement, para. 30; United Kingdom Written Statement, para. 66; Vietnam Written Statement, para. 4.4.

¹⁶ See COSIS Written Statement, paras. 277, 302–308; see also European Union Written Statement, paras. 16–38; France Written Statement, para. 158; Indonesia Written Statement, para. 66; Micronesia Written Statement, para. 45; Rwanda, paras. 197–206, 236; United Kingdom Written Statement, para. 64; see also *Pulp Mills Judgment*, paras. 77–79; ILC, Commentaries on the Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), General Commentary, para. 1; see generally Jutta Brunnée, *Procedure and Substance in International*

1 undertake environmental impact assessments,¹⁷ and to notify and consult other
2 States.¹⁸ States must also cooperate with one another, in good faith,¹⁹ directly or
3 through relevant international organizations, in order to protect and preserve the
4 marine environment.²⁰

5
6 Another area of agreement in the written statements is that due diligence is a
7 variable and contextual standard.²¹ As such, the conduct that is required of States is
8 determined by several factors. In addition to the level of risk and the foreseeability
9 and severity of potential harm to which I have already referred, the state of
10 science,²² relevant international rules and standards,²³ and the relevant State's
11 capacities are key factors.²⁴

Environmental Law, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW Vol. 405 (2020), pp. 124–129, 140–141.

¹⁷ See COSIS Written Statement, paras. 179, 303–308, 417; see also Belize Written Statement, para. 60(c); Egypt Written Statement, para. 49; Mauritius Written Statement, paras. 78, 79; European Union Written Statement, para. 34; International Union for Conservation of Nature Written Statement, para. 151. On general international law, see *Pulp Mills Judgment*, para. 204; ILC, *Prevention*, article 7. And see UNCLOS, articles 204–206.

¹⁸ See COSIS Written Statement, paras. 308, 326(a). On general international law, see *Gabčíkovo-Nagymaros Judgment*, paras. 140–147; ILC, *Prevention of Transboundary Harm from Hazardous Activities*, UN Doc. A/56/10 (2001), articles 8, 9; UNCLOS, articles 198.

¹⁹ *SRFC Advisory Opinion*, para. 210.

²⁰ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 (“*MOX Plant Order*”), para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 92; *South China Sea Award*, paras. 984–986; see also UNCLOS, article 197; France Written Statement, paras. 120, 122, 155–156, 161; Indonesia Written Statement, para. 66.

²¹ See COSIS Written Statement, paras. 54, 281; see also African Union Written Statement, paras. 171, 228; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, para. 54; Chile Written Statement, para. 80; European Union Written Statement, para. 20; France Written Statement, paras. 106, 144; International Union for Conservation of Nature Written Statement, paras. 79, 190; Korea Written Statement, para. 10; Mauritius Written Statement, para. 80; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 32; United Kingdom Written Statement, para. 63; see also *Area Advisory Opinion*, para. 117; ILC, *Commentaries on the articles on the Prevention of Transboundary Harm from Hazardous Activities*, UN Doc. A/56/10 (2001), article 3, para. 11.

²² See African Union Written Statement, paras. 15, 127, 168, 171; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Chile Written Statement, paras. 79, 80, 96, 118(5); Egypt Written Statement, para. 41; European Union Written Statement, para. 25; International Union for Conservation of Nature Written Statement, paras. 78, 79; Mauritius Written Statement, para. 80; Micronesia Written Statement, paras. 42, 44; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 34; United Kingdom Written Statement, paras. 67, 68; see also *Area Advisory Opinion*, paras. 117, 131.

²³ See Bangladesh Written Statement, para. 51; Chile Written Statement, paras. 51, 77; Egypt Written Statement, para. 30; European Union Written Statement, paras. 14, 19, 23–24, 32; Latvia Written Statement, para. 21; Micronesia Written Statement, para. 62; Mozambique Written Statement, para. 3.85; New Zealand Written Statement, para. 70; Singapore Written Statement, para. 37; see also *South China Sea Award*, para. 941 (quoting *Nuclear Weapons Advisory Opinion*, para. 29); *Gabčíkovo-Nagymaros Judgment*, para. 140; ILC, articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 4; ILC, *Draft Guidelines on the Protection of the Atmosphere*, with Commentaries thereto, UN Doc. A/76/10 (2021), Guidelines 3, 9(1).

²⁴ See e.g., Brazil Written Statement, para. 23(iii); Canada Written Statement, para. 58; European Union Written Statement, para. 25; France Written Statement, paras. 145, 161; International Union for Conservation of Nature Written Statement, paras. 190–191, 194; United Kingdom Written Statement, para. 69; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I),

1
2 From the contextual nature of due diligence follows that the attendant obligations do
3 not have a fixed content but rather evolve over time, depending on the situation and
4 as the salient factors evolve.²⁵ For example, and crucially, due diligence
5 requirements become more stringent as risk increases or scientific understanding of
6 the severity of potential harm evolves.²⁶ This point too finds wide support in the
7 written statements.²⁷

8
9 Finally, as is implicit in the preceding point, the exercise of due diligence is a
10 continuous duty.²⁸

11
12 Mr President, it is for this Tribunal to clarify what these *generally accepted*
13 considerations entail when brought to bear on due diligence in relation to obligations
14 under UNCLOS in the context of climate change. In what follows, I submit that they
15 entail concrete requirements for the conduct of States and that States Parties to
16 UNCLOS, therefore, are subject to stringent obligations with *objective* parameters.

17
18 First of all, as I have already noted, and as many of the written statements concur,
19 the stringency of the due diligence obligations in Part XII is determined in important
20 part by the degree of risk and the foreseeability and severity of potential harm, and
21 so by objective factors.

22
23 The observations of the International Law Commission in the commentaries to the
24 2001 Draft Articles on Prevention of Transboundary Harm are on point: “The notion
25 of risk is ... to be taken objectively, as denoting an appreciation of possible harm
26 resulting from an activity which a properly informed observer had or ought to have
27 had.”²⁹

p. 43 (“*Bosnian Genocide Judgment*”), para. 430; ILC, Commentaries on the articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, paras. 12, 13, 17.

²⁵ See COSIS Written Statement, paras. 54, 340; see also Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, para. 36; Chile Written Statement, paras. 80, 118(5); Egypt Written Statement, para. 41; International Union for Conservation of Nature Written Statement, para. 79; Mauritius Written Statement, para. 80; Micronesia Written Statement, para. 42; Rwanda Written Statement, para. 192; Sierra Leone Written Statement, para. 64; United Kingdom Written Statement, para. 67; United Nations Environment Programme Written Statement, para. 12; see also *Area Advisory Opinion*, para. 117; *Gabčíkovo-Nagymaros Judgment*, para. 140; ILC, Commentaries on the articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 11.

²⁶ *Gabčíkovo-Nagymaros Judgment*, para. 140; *Area Advisory Opinion*, para. 117.

²⁷ See African Union Written Statement, paras. 171, 228; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, paras. 36, 54; Chile Written Statement, paras. 79–80, 96, 118(5); Egypt Written Statement, para. 41; European Union Written Statement, para. 20; International Union for Conservation of Nature Written Statement, para. 79; Korea Written Statement, para. 10; Mauritius Written Statement, para. 80; Mozambique Written Statement, para. 3.62; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 33; United Kingdom Written Statement, para. 67.

²⁸ See *Pulp Mills Judgment*, para. 205; *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*, I.C.J. Reports 2015, p. 665 (“*Construction of a Road Judgment*”), para. 161; see also COSIS Written Statement, para. 280.

²⁹ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 1, para. 14.

1
2 The ILC defines the relevant risk as encompassing a spectrum ranging from “a high
3 probability of significant transboundary harm” to “a low probability of disastrous
4 transboundary harm.”³⁰ As the Commission rightly points out in the commentary on
5 this definition, it is “the combined effect of ‘risk’ and ‘harm’ which sets the
6 threshold.”³¹ It is also what drives what due diligence requires of States.

7
8 The degree of risk, the foreseeability of possible harm, and the severity of that harm
9 are elucidated by scientific evidence.³² As the ILC observes, when it comes to
10 threats of serious or irreversible harm, the precautionary principle instructs that lack
11 of full scientific certainty ought not to be a reason to delay steps to protect the
12 environment.³³ In the context of activities in the Area, the Seabed Chamber
13 confirmed that “the precautionary approach is also an integral part of the general
14 obligation of due diligence.”³⁴

15
16 Distinguished members of the Tribunal, while precaution is an essential part of the
17 protection and preservation of the marine environment, it stands to reason that the
18 situation at hand is no longer one of precaution. The current state of evidence is
19 such that we know with a frightening degree of confidence that the ocean’s
20 absorption of excess heat and CO₂ due to uncontrolled greenhouse gas emissions
21 has progressed beyond the risk spectrum contemplated by the ILC. To paraphrase,
22 we face *a high probability of disastrous harm* to the marine environment, even
23 “existential threats.”³⁵

24
25 My colleague, Catherine Amirfar, will provide you with a detailed account of what the
26 scientific consensus entails in terms of actions required of States at this stage. Let
27 me simply say this: the content of States’ due diligence obligations under Part XII of
28 UNCLOS must be determined on an objective scientific basis and therefore in
29 accordance with the current scientific consensus on the high probability of disastrous
30 climate harm.

31
32 Distinguished members of the Tribunal, as I mentioned, the obligations contained in
33 articles 192 and 194(2) have been found to constitute obligations of due diligence,
34 and some States have suggested that due diligence applies more broadly.³⁶ I hope
35 to have shown that, while it may be true in general that, as the Seabed Chamber put
36 it, due to their variable content, due diligence obligations “may not easily be
37 described in precise terms”,³⁷ that does not apply in the calamitous circumstances at
38 issue in this advisory opinion request. It is *not* the case, therefore, that the content of

³⁰ *Id.*, article 2(a).

³¹ *Id.*, article 2, para. 2; see also France Written Statement, para. 108.

³² *Gabčíkovo-Nagymaros* Judgment, para. 140; *Area* Advisory Opinion, para. 117; see also COSIS Written Statement, paras. 337–340.

³³ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 10, paras. 5–7; Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I) (Annex I) [Rio Declaration], Principle 15.

³⁴ *Area* Advisory Opinion, para. 131.

³⁵ African Union Written Statement, para. 229.

³⁶ See European Union Written Statement, para. 14; Mauritius Written Statement, para. 69; Mozambique Written Statement, para. 3.56; New Zealand Written Statement, para. 57; Sierra Leone Written Statement, para. 50; United Kingdom Written Statement, para. 68.

³⁷ *Area* Advisory Opinion, para. 117; *SRFC* Advisory Opinion, para. 132.

1 the due diligence obligations at issue here is “highly general,” as some written
2 statements suggest.³⁸ Instead, it is surely right that, in the context of greenhouse gas
3 emissions and climate change, the relevant standards are objective,³⁹ specific and
4 “particularly severe”.⁴⁰

5
6 Further, regardless of how you characterize the applicability of due diligence in the
7 context of UNCLOS, the text of UNCLOS in Part XII goes beyond due diligence. In
8 particular, article 194(1) could not be clearer and stronger regarding the stringency of
9 the obligations placed upon States Parties, as Professor Thouvenin will explain
10 shortly.

11
12 So far, I have shown that due diligence obligations in Part XII are obligations with
13 objective, science-driven parameters. I also noted earlier that due diligence is
14 contextual in that it may be modulated by factors that are specific to the obligated
15 State. Contrary to what appears to be suggested in some written statements,⁴¹ this
16 does not mean that States have unbounded discretion in complying with their
17 obligations under Part XII. While contextual, the parameters of due diligence
18 obligations remain objective.

19
20 Mr President, members of the Tribunal, as I mentioned in my discussion of the
21 parameters that determine the stringency of the due diligence obligations incumbent
22 on a given State in a given situation, it is generally accepted that State’s capacities
23 are a key factor. This consideration is particularly relevant to the respective
24 obligations of developed and developing countries,⁴² which may have a relatively
25 greater or lesser capacity to combat marine pollution and protect the marine
26 environment. It is well established that “the degree of care expected of a State with a
27 well-developed economy and human and material resources ... is different from
28 States which are not so well placed.”⁴³

29
30 Furthermore, the standard of due diligence must be appropriate and proportional to
31 the degree of risk of transboundary harm that activities pose,⁴⁴ and so it is both
32 logical and just that industrialized and developed States should bear more
33 demanding obligations with respect to the prevention of harm to the marine
34 environment from greenhouse gas emissions.⁴⁵ As detailed in COSIS’s written
35 statement, industrialized and developed States play an outsized role in generating
36 greenhouse gas emissions and associated damage to the marine environment.⁴⁶ A
37 related idea has found expression in the principle of common but differentiated

³⁸ See e.g., European Union Written Statement, para. 40.

³⁹ See Belize Written Statement, para. 70.

⁴⁰ France Written Statement, para. 107.

⁴¹ See e.g., Australia Written Statement, para. 48; Canada Written Statement, para. 58; Chile Written Statement, para. 96; Indonesia Written Statement, para. 68; European Union Written Statement, para. 24; United Kingdom Written Statement, para. 69.

⁴² See European Union Written Statement, para. 73; France Written Statement, para. 113; International Union for Conservation of Nature Written Statement, paras. 190–191, 194; Singapore Written Statement, para. 58.

⁴³ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 17.

⁴⁴ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 11.

⁴⁵ See COSIS Written Statement, para. 301.

⁴⁶ *Id.*

1 responsibilities,⁴⁷ which similarly recognizes that a State’s individual circumstances
2 may affect what can reasonably be expected of it.

3
4 To repeat, the contextual nature of the due diligence standard does not render it
5 subjective. States’ particular circumstances are individual, but nonetheless objective,
6 factors. And although States do retain a certain margin of discretion as to the precise
7 measures to be adopted,⁴⁸ what measures to take “is *not* ... purely a question for the
8 subjective judgment of the party.”⁴⁹ Article 193 of UNCLOS underscores the
9 bounded nature of national discretion by stipulating that States’ sovereign rights are
10 to be exercised “*in accordance with* their duty to protect and preserve the marine
11 environment.”⁵⁰

12
13 In sum, the objective parameters of due diligence, combined with the high probability
14 of disastrous harm occasioned by climate change, limit the margin of national
15 discretion under UNCLOS.⁵¹ It stands to reason that measures must be adopted by
16 States that can actually “obtain this result”⁵² of averting calamity, determined on an
17 objective basis and allowing for States’ particular national circumstances.

18
19 And so, notwithstanding the relevance of national circumstances, the required
20 degree of care is proportional to the degree of hazard.⁵³ For States Parties to
21 UNCLOS, this central point keeps the standard of due diligence tightly connected to
22 what is objectively required to protect and preserve the marine environment and to
23 ensure the prevention of damage from climate change. As the Study Group of the
24 International Law Association observed in its report on due diligence in international
25 law, “discretion in the choice of means can be limited” because “a specific type or
26 measure is indispensable to avoid harm.”⁵⁴

27
28 Further, the fact that “the risks of harm to the marine environment resulting from
29 climate change are dependent on global concentrations of greenhouse gas
30 emissions in the atmosphere” does *not* mean, as has been suggested to the
31 Tribunal, that “it is not possible to determine the standard of conduct, or the
32 ‘necessary’ measures, required of an individual State in isolation from the collective
33 measures [that are] required.”⁵⁵ As the ICJ observed in the *Bosnian Genocide* case,
34 where action by more than one State is required to prevent a certain outcome, each

⁴⁷ See UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I) (“Rio Declaration”), Principle 7; see also Brazil Written Statement, para. 18; Egypt Written Statement, para. 92; France Written Statement, para. 161; Rwanda Written Statement, para. 220; Singapore Written Statement, para. 35.

⁴⁸ See European Union Written Statement, para. 40; see also COSIS Written Statement, para. 282.

⁴⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986 I.C.J. Reports 1986, p. 14, para. 282 (citations and internal quotation marks omitted; emphasis added).

⁵⁰ Alan Boyle & Catherine Redgwell, INTERNATIONAL LAW AND THE ENVIRONMENT (2021), p. 511 (emphasis added).

⁵¹ See also COSIS Written Statement, paras. 284, 289.

⁵² *Area Advisory Opinion*, para. 110.

⁵³ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 18.

⁵⁴ International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 7–8.

⁵⁵ New Zealand Written Statement, para. 70 (addition mine for flow).

1 individual State is nonetheless obligated to “take all measures ... which were within
2 its power.”⁵⁶

3
4 Cooperation is essential in the context of marine environmental protection, as this
5 Tribunal has reiterated on a number of occasions. But cooperation does *not* absolve
6 States, much less States with a well-developed economy and human and material
7 resources,⁵⁷ from their individual obligations to adopt rules and measures that are
8 capable of protecting the marine environment from harm due to greenhouse gas
9 emissions and the effects of climate change. Whereas it may be incumbent on
10 States to coordinate their efforts, each State remains subject to its individual
11 obligations under Part XII.

12
13 That assessment applies even more so when a cooperative arrangement is
14 premised upon national discretion regarding greenhouse gas emission reductions. In
15 fact, it is precisely the universally agreed parameters of general international law and
16 UNCLOS that I have outlined that underscore that individual States do *not* have
17 unbounded discretion to determine what measures are appropriate.⁵⁸ As Ms Amirfar
18 will explain in her speech, the current scientific consensus around the 1.5°C
19 temperature increase threshold provides an objective basis for the obligations that
20 are incumbent upon States under Part XII.

21
22 Mr President, members of the Tribunal, allow me to sum up.

23
24 The conduct required of States Parties to UNCLOS under Part XII is informed,
25 among other things, by due diligence obligations, as this Tribunal has confirmed with
26 respect to articles 192 and 194(2).⁵⁹

27
28 The focus on conduct and due diligence obligations does *not* mean that States’
29 obligations in relation to climate change under Part XII of UNCLOS are unspecified
30 or discretionary. To the contrary, as Professor Thouvenin is about to detail for
31 article 194, the clear text of the attendant obligations is quite specific and stringent
32 as to what conduct is required in the context of climate change.⁶⁰

33
34 Distinguished members of the Tribunal, because the requirements of due diligence
35 are both contextual and objective, they are especially well suited to a complex
36 challenge like climate change. Quite appropriately, indeed, crucially, the greater the
37 threat, scientific understanding of its severity and urgency, and capacity to address
38 it, the greater the demands on States.

39
40 Building on its jurisprudence on Part XII of UNCLOS, this Tribunal has a historic
41 opportunity to specify further what due diligence requires of States Parties in the face
42 of the high probability of catastrophe that we face.

43

⁵⁶ *Bosnian Genocide*, para. 430.

⁵⁷ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 17.

⁵⁸ *South China Sea Award*, paras. 941, 959; International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 8–10.

⁵⁹ See *SRFC Advisory Opinion*, paras. 125, 128–132; *Area Advisory Opinion*, paras. 116–117.

⁶⁰ See COSIS Written Statement, paras. 177, 222.

1 Mr President, honourable members of the Tribunal, this concludes my presentation
2 on behalf of COSIS. I thank you for your kind attention. And may I ask that you
3 please invite Professor Thouvenin to the podium.
4

5 **THE PRESIDENT:** Thank you, Ms Brunnée. I now give the floor to Mr Thouvenin to
6 make his statements, of course. You have the floor, sir.
7

8 **MR THOUVENIN** (*Interpretation from French*) : Thank you very much, Mr President.
9 Mr President, members of the Tribunal, it's a tremendous honour for me to address
10 your Tribunal today, and I would very much like to thank the Commission for Small
11 Island States, represented here, for having entrusted me with the task of setting out
12 certain of its arguments. I shall do so, cognizant of the responsibility that we have to
13 bear in this situation.
14

15 My task, like yours, is to determine the obligations of States Parties to deal with the
16 issue of pollution of the marine environment – this same environment that has
17 enabled life on our planet and is truly necessary for the survival of this magnificent
18 group we call humankind.
19

20 You have just heard Professor Brunnée explain what is meant by the “due diligence”
21 that is generally expected of States in meeting their obligations under Part XII of the
22 Convention.
23

24 But article 194 of the Convention, which is at the very heart of Part XII of the
25 Convention, goes much further. Its text is clear if read in good faith. It places direct
26 and immediate duties on States, which might be deemed severe, if I use the same
27 adjective that was advisedly used by France. It now lies with the Tribunal to
28 determine to what extent they pertain to greenhouse gas emissions which, as is
29 generally admitted, cause pollution of the marine environment.
30

31 As the Tribunal is aware, article 194 is made up of five paragraphs. I shall focus on
32 the first three. In doing so, I shall demonstrate, first of all, that because science
33 teaches us that GHG emissions into the atmosphere leads to pollution of the marine
34 environment, article 194, paragraph 1, obliges States to develop and adopt all
35 measures that are necessary, objectively – and when I say “necessary”, it's in the
36 meaning of indispensable – to reduce and control greenhouse gas emissions and
37 their massive presence in the atmosphere, with a view to ending that pollution. The
38 weight of that obligation varies according to the respective capabilities of States,
39 which are to be assessed objectively in the light of the level of development and
40 the resources of each of the States.
41

42 Secondly, under article 194, paragraph 2, each of the States Parties has undertaken
43 to take all measures that are objectively necessary, within the meaning of
44 “indispensable”, so that greenhouse gas emissions under their jurisdiction or control
45 do not cause significant damage by pollution to other States, including but not
46 restricted to their environment, and also to take all necessary measures, in other
47 words indispensable measures, so that these emissions do not pollute the high seas
48 beyond their exclusive economic zones.
49

1 And lastly, as far as my presentation is concerned, allow me to recall that under
2 article 194, paragraph 3, States Parties have undertaken to ensure that “all
3 measures necessary”, as referred to in the previous paragraphs of the same article,
4 deal with all sources of pollution of the marine environment, *inter alia*, in order to
5 prevent, reduce and control pollution of the marine environment, and each State
6 Party has undertaken to take measures to prevent, reduce and control pollution from
7 land-based sources, vessels and pollution from or through the atmosphere.

8
9 Mr President, I’d now like to show on the screen the text of paragraph 194(1):

10
11 States shall take, individually or jointly as appropriate, all measures
12 consistent with this Convention that are necessary to prevent, reduce and
13 control pollution of the marine environment from any source, using for this
14 purpose the best practicable means at their disposal and in accordance
15 with their capabilities, and they shall endeavour to harmonise their policies
16 in this connection.

17
18 This is a text that is extremely clear, but I shall go through it, if I may, in detail.

19
20 One can immediately see that the first paragraph is made up of two units which are
21 logically linked. The first refers to a clear and precise obligation:

22
23 States shall take, individually or jointly ... all measures ... necessary to
24 prevent, reduce and control pollution of the marine environment from any
25 source.

26
27 The second unit sets out the means that the States are bound to use in order to
28 meet their obligation:

29
30 using for this purpose the best practicable means at their disposal and in
31 accordance with their capabilities, and they shall endeavour to harmonise
32 their policies in this connection.

33
34 There are four key elements to be found here. They can be summarized as follows:

35
36 States, first of all, have a duty to “take individually or jointly”;

37
38 secondly, “all measures”;

39
40 thirdly, “necessary to prevent, reduce and control pollution of the marine
41 environment”;

42
43 and fourthly, corresponding to the “best practicable means at their disposal and in
44 accordance with their capabilities.”

45
46 If I may, Mr President, I shall now go through them in turn.

47
48 First of all, States shall “take” measures. It’s an imperative, an obligation; it is not a
49 suggestion nor a recommendation or a wish. The formulation is not “soft”. It imposes
50 on States that they adopt a certain clearly defined conduct.

1 The obligation is to take measures “individually or jointly as appropriate”, according
2 to the text. It’s a very broad formulation. “As appropriate” means, for instance, that if
3 the “joint” measures that would *a priori* seem to be the most effective cannot be
4 taken, the would be “appropriate” to take the necessary measures individually. As
5 concerns pollution of the marine environment by greenhouse gas emissions, States
6 cannot release themselves from their individual obligations to prevent, reduce and
7 control it on the pretext that it would be more appropriate to embark upon a joint
8 action or on the grounds that other States are not taking all of the necessary
9 measures.

10
11 The Supreme Court of the Netherlands has quite rightly asserted this point in
12 affirming *Urgenda* that, and I quote,

13
14 (Continued in English) each reduction of greenhouse gas emissions has a
15 positive effect on combatting dangerous climate change as every reduction
16 means that more room remains in the carbon budget. The defence that a
17 duty to reduce greenhouse gas emissions on the part of the individual
18 States does not help because other countries will continue their emissions
19 cannot be accepted for this reason either: no reduction is negligible.¹

20
21 (Continued in French) Similarly, the Constitutional Court of Germany recently ruled
22 that, and I quote,

23
24 (Continued in English) the obligation to take national climate action cannot
25 be invalidated by arguing that such action would be incapable of stopping
26 climate change. ...The state may not evade its responsibility here by
27 pointing to greenhouse gas emissions in other states.²

28
29 (Continued in French) Article 194, paragraph 1, certainly does not disagree with this.

30
31 Secondly, States shall take “all measures”. The important term here is the word “all”.
32 The term “all” has been clarified in the case concerning *Application of the*
33 *International Convention on the Suppression of the Financing of Terrorism and the*
34 *International Convention for Elimination of Racial Discrimination, Ukraine v. Russia*.
35 According to the International Court of Justice, in this case the ordinary meaning of
36 this term refers “comprehensively” to what it designates,³ and there is no reason to
37 limit its scope when the Convention in which it is used does not contain, and I quote,
38 an “exclusion of any category”.⁴

39
40 Such as they are used in paragraph 1 of article 194, the terms “all measures
41 necessary” mean, therefore, that States have not only have the duty to take certain
42 measures, a certain number of measures, “some” measures, or “the” measures they
43 deem pertinent. It is a comminatory text: States must take “all” the measures

¹ Supreme Court of the Netherlands, *Urgenda v. the Netherlands*, No. 19/00135, 20 December 2019, pt 5.7.8: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007>.

² BVerfG, Order of the First Senate, 24 March 2021, 1 BvR 2656/18, paras. 202–203: https://www.bundesverfassungsgericht.de/e/rs20210324_1bvr265618en.html.

³ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 558, para. 61.

⁴ *Id.*

1 “necessary”, without excluding any, provided that, materially or formally, they are
2 “necessary”. In other words, no necessary measure can be excluded for whatever
3 reason.

4
5 What is more, all forms and all types of measures are referred to: adoption of laws,
6 regulations, decisions of course, but also any other material, financial, scientific or
7 other action, provided that it is necessary in order to prevent, reduce and control
8 pollution of the marine environment. What is more, article 207 provides expressly for
9 the adoption of “laws and regulations to prevent, reduce and control pollution of the
10 marine environment from land-based sources”, and “other measures as may be
11 necessary.” “Other measures as may be necessary”; that includes, obviously, once
12 again, financial measures, and in order to guarantee the application of these
13 measures, there is article 213, which provides, and I quote:

14
15 “States shall enforce their laws and regulations adopted in accordance with
16 article 207.” Article 212 also imposes laws, regulations and other measures
17 necessary for pollution from or through the atmosphere, whereas article 222 imposes
18 a duty on States Parties to enforce the laws and regulations they have adopted in
19 accordance with article 212.

20
21 Mr President, members of the Tribunal, this brings me now to the question of what is
22 meant by “prevent, reduce and control pollution of the marine environment.”

23
24 It has to be acknowledged that the formulation is, at first sight, somewhat baffling.
25 Preventing pollution of the marine environment means preventing it, stopping it from
26 happening. I note, for that matter, that the award in the *Iron Rhine* referred to “the
27 duty to prevent”; that was as mentioned in the English version. It was translated into
28 French as “*obligation d'empêcher*”.⁵ What is more, on the other hand, reducing and
29 controlling pollution means limiting it, not totally preventing it. Article 194,
30 paragraph 1, provides that these actions should not be done alternatively but
31 simultaneously, as indicated by the conjunction – the word “and” – which is used in
32 preference to the term “or”, which is not used here. So the formulation is very clearly
33 different from that of the *Iron Rhine*, where mention is made of, and I quote, a “duty
34 to prevent, or at least mitigate” pollution.⁶

35
36 Article 194, paragraph 1, posits, therefore, a compound duty: that of preventing,
37 reducing and controlling pollution of the marine environment, which is perfectly
38 adapted to that pollution. While it is clear that pollution, in any circumstances, cannot
39 be immediately or totally prevented, it is equally clear that any instance of pollution of
40 the marine environment can be immediately reduced and controlled with a view
41 ultimately to preventing it. That is the duty set out by paragraph 1 of article 194, and
42 it is different from a classic or standard obligation to prevent pollution because it
43 specifies, in its very wording, the process by which effective prevention is to be
44 brought about.

45
46 In the specific context of this case, we can see that total, absolute prevention of
47 pollution of the marine environment by greenhouse gas emissions can only be a

⁵ *Iron Rhine Arbitration (Belgium/Netherlands)*, PCA Case No. 2003-02, Award, 24 May 2005, para. 59.

⁶ *Id.* See also *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Final Award, 20 December 2013, para. 112.

1 medium-term objective; thus, the immediate obligation that has to be followed in
2 order to reach that objective is to reduce and control such pollution as part of a
3 process which serves to prevent it as quickly as possible. So, it is not just a question
4 of “reducing and controlling pollution” with no concern for its “prevention”, but
5 reducing and controlling it in the context of a continuous action, with the aim of
6 gradually preventing it. The Tribunal will perhaps at this stage imagine that we are
7 seeing a sort of mirror effect with the same gradual reduction – albeit in a tighter time
8 frame due to climate urgency – as that of greenhouse gas emissions adopted under
9 the Paris Agreement.⁷

10
11 But, Mr President, allow me now to turn to the context of this obligation. As I’ve
12 already said, it’s not just an obligation of prevention without any further detail; it is an
13 obligation to “take all measures necessary” in order to “prevent, reduce and control
14 pollution of the marine environment”.

15
16 The International Court of Justice has had the opportunity to clarify that the
17 obligation to take, and I quote, “all necessary measures”, end of quote, for a result to
18 be reached requires direct and immediate action when such a result is not, and
19 I quote, “materially impossible ... or [where] it would [not] involve a burden out of all
20 proportion to the benefit deriving from it.”⁸

21
22 In the case of the *Jurisdictional Immunities of the State*, Germany asked the Court to
23 adjudge and declare that Italy had an obligation, and I quote, “by means of its own
24 choosing, [to] take any and all steps” to ensure that all decisions of its courts
25 infringing Germany’s sovereign immunity become unenforceable.⁹ The Court granted
26 this request and ruled that, given that it was not materially impossible nor would
27 involve a burden out of all proportion to the benefit deriving from it, Italy was under
28 an obligation to achieve this result by enacting appropriate legislation or by resorting
29 to other “methods of its choosing” having the same effect.¹⁰ Obviously we will see
30 that when the Court indicated that Italy could “choose a method” or use a “method of
31 its choosing” to meet its duty, it did not allow for any discretion as to the content of
32 the obligation to be respected, which obviously had to remain the same.¹¹

33
34 You will also note that, in the case of interpretation of the *Avena* judgment, the
35 International Court of Justice adopted a provisional measure ordering that the United
36 States take all necessary measures to ensure that persons would not be executed
37 before certain legal remedies had been exhausted.¹² Subsequently, it judged that

⁷ See Article 4 of the Paris Agreement.

⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, para. 137.

⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, paras. 15-17.

¹⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, para. 137.

¹¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, para. 139, point (4).

¹² *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Order – Request for the Indication of Provisional Measures, 16 July 2008, para. 80.

1 there had been infringement of that duty because one of the individuals had been
2 executed without the procedures indicated by the Court being followed.¹³

3
4 Thus, Mr President, members of the Tribunal, we can probably consider that the duty
5 under article 194, paragraph 1, is a direct and immediate duty, which is to reach a
6 precise result that is neither materially impossible nor out of proportion; in other
7 words, taking – i.e., developing and implementing – all measures necessary to
8 prevent, reduce and control pollution of the marine environment.

9
10 This being said, Mr President, is it correct to say, as some would have it – some of
11 the States and other parties participating in these proceedings – that determining all
12 measures necessary to prevent, reduce and control pollution of the marine
13 environment is left to the discretion of States?¹⁴ That is not the case and there are at
14 least two reasons for this.

15
16 First of all, the term “necessary” means “indispensable”. This is what has been noted
17 by the World Trade Organization’s appellate body for which, and I quote:

18
19 “The word ‘necessary’ normally denotes something ‘that cannot be dispensed with or
20 done without, requisite, essential, needful’.”¹⁵

21
22 Of course, what is “indispensable” cannot be decided according to discretion; it has
23 to be done objectively.

24
25 And then, because the International Court of Justice has already interpreted the
26 concept of “necessary” by ruling that, and I quote:

27
28 “whether a given measure is ‘necessary’ is ‘not purely a question for the subjective
29 judgment of the party’ [...], and may thus be assessed by the Court.”¹⁶

30
31 It is, thus, an objective evaluation that determines what all the measures necessary
32 to be adopted by States are in order to prevent, reduce and control pollution of the
33 marine environment. Ms Amirfar will develop this point shortly. What should be noted
34 at this stage is that when measures are objectively necessary, they must be taken.

35
36 Let us now move to the fourth part of the text, which requires States to use the “best
37 practicable means at their disposal in accordance with their capabilities”. The means
38 to be used refer to the material content of the measures to be adopted by States in

¹³ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Judgment - 19 January 2009, para. 52. See P. D’Argent, « Les obligations internationales », Recueil des Cours de l’Académie de droit international de La Haye, Vol. 417, 2021, para. 222, p. 157.*

¹⁴ See, in particular, the written statement of the European Union, paras. 40, 66 and 76. See also the written statement of Singapore, para. 32. See also, *contra*, the written statement of Portugal, paras. 78–79, the written statement of the Democratic Republic of the Congo, paras. 252–253, and the written statement submitted by Opportunity Green, para. 55, point b., and para. 68.

¹⁵ WT/DS161/AB/R – WT/DS169/AB/R, 11 December 2000, *Korea – Measure Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body report, para. 160.

¹⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment - Merits, 6 November 2003, para. 43; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, 30 March 2023, para. 106.

1 order to fulfill their obligations. Moreover, the term “best practicable means” generally
2 refers to techniques, technologies or scientific or financial means.¹⁷

3
4 In this instance, there’s no need to be a great scholar to understand that one of the
5 “best” practicable means to prevent, reduce and control pollution of the marine
6 environment caused by greenhouse gas emissions is to reduce them as quickly as
7 possible, with a view to preventing them as soon as possible. I note that it is also
8 currently the “best practicable means” in the view of all, to reduce the progression of
9 global warming.

10
11 As to the reference to the fact that States must act “in accordance with their
12 capabilities”, this Tribunal has already interpreted this in the *Area Advisory Opinion*
13 in relation to the precautionary principles set out by the first sentence of principle 15
14 of the Rio Declaration, according to the which, you will recall:

15
16 “In order to protect the environment, the precautionary approach shall be widely
17 applied by States according to their capabilities.”

18
19 Your Tribunal was of the opinion, I quote you here, that this “introduces the
20 possibility of differences in application of the precautionary approach in light of the
21 different capabilities of each State.”¹⁸

22
23 Finally, your opinion made clear that these differences can be objectively assessed,
24 *inter alia*, according to each State’s level of development and resources.¹⁹

25
26 So, there are nuances in the obligation to adopt “all measures necessary to prevent,
27 reduce and control pollution”. Depending on their capabilities, some States have to
28 make greater efforts than others to prevent, reduce and control pollution of the
29 marine environment. This mirrors a concept you can find in the Paris Agreement
30 under, *inter alia*, article 2, paragraph 2, which recognizes the principle of common but
31 differentiated responsibilities and the respective capabilities of each State.

32
33 Mr President, distinguished members of the Tribunal, to conclude on this particular
34 point, article 194, paragraph 1, obliges States to adopt all measures objectively
35 necessary – meaning indispensable – to reduce and control greenhouse gas
36 emissions under their jurisdiction, with a view to putting a swift end to their discharge
37 into the atmosphere, which leads – as the science tells us – to pollution of the marine
38 environment. This obligation varies in stringency according to States’ capabilities –
39 capabilities which are to be objectively assessed, *inter alia*, in the light of each
40 State’s level of development and available resources.

41
42 Mr President, now I turn towards paragraph 2 of article 194, which rewrites, as a
43 treaty obligation, an obligation which is already well and solidly anchored in general

¹⁷ See, for example, Art. 2, para. 11, of Council Directive 96/61/CE of 24 September 1996 concerning integrated pollution prevention and control.

¹⁸ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory opinion, 1 February 2011, *ITLOS Reports 2011*, para. 129.

¹⁹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory opinion, 1 February 2011, *ITLOS Reports 2011*, paras. 151–163.

1 international law, as we recalled in our written statement which you will have read.²⁰
2 You can see the text here on screen:

3
4 States shall take all measures necessary to ensure that activities under
5 their jurisdiction or control are so conducted as not to cause damage by
6 pollution to other States and their environment, and that pollution arising
7 from incidents or activities under their jurisdiction or control does not spread
8 beyond the areas where they exercise sovereign rights in accordance with
9 this Convention.

10
11 In its ordinary meaning and taken as a whole, this provision contains the obligation
12 on States to adopt all measures necessary to prevent everything conducted under
13 their jurisdiction or control from affecting third parties or the high seas beyond the
14 EEZ.

15
16 I will address this in three stages: first, by briefly mapping out the nature of the
17 obligation; then, by getting into the details of the obligation to not cause damage to
18 third parties; and, finally, by looking at the meaning and scope of the obligation to not
19 pollute the high seas.

20
21 Mr President, as my colleague Professor Brunnée described, article 194,
22 paragraph 2, has been considered by your Tribunal as containing an obligation of
23 due diligence. The reasoning leading to this conclusion is founded, above all, on the
24 verb “to ensure”, which appears in the English version of article 194, paragraph 2,
25 and it is a verb that appears once again in article 139, paragraph 1, of the
26 Convention.

27
28 But the wording of these two articles is actually rather different. Article 139,
29 paragraph 1, provides that “States Parties shall have the responsibility to ensure”
30 that the activities over which they have jurisdiction are conducted consistently with
31 the requirements of the Convention. It is this “responsibility to ensure” which is key
32 here. By contrast, article 194, paragraph 2, doesn’t use have that wording but
33 instead:

34
35 “States shall take all measures necessary to ensure” that activities under their
36 jurisdiction do not cause damage.

37
38 This difference in wording is also found in the French version: article 139,
39 paragraph 1, reads as follows, and I’ll read it in French: “*Il incombe aux États Parties*
40 *de veiller à*”, whereas the text of article 194, paragraph 2, reads “*Les États prennent*
41 *toutes les mesures nécessaires pour*”. Same distinction, same difference.

42
43 Thus, as Professor Brunnée has just set out, due diligence is included in article 194,
44 paragraph 2. The wording of this provision is even more rigorous than what flows
45 from due diligence insofar as this is possible. Why? Well, it requires States to “take
46 all measures necessary” to ensure that those sort of events which must be avoided

²⁰ See COSIS Written Statement, paras. 206–207.

1 do not occur. To quote the terms of your Tribunal in your Area Opinion,
2 paragraph 122, this is a “direct obligation.”²¹

3
4 This obligation is, on the one hand, to not cause damage by pollution to other States
5 and their environment.

6
7 “Pollution”, referred to here, is broader in scope than mere pollution of the marine
8 environment as defined in article 114 of the Convention. Why? Because the term
9 “marine environment” is omitted, and when article 194 means to refer to “pollution of
10 the marine environment”, it says so expressly. Here, the text speaks to “pollution
11 caused to States and to their environment”, without further specification. So you
12 could think that “pollution”, within the meaning of article 194, paragraph 2, is defined
13 more broadly than “pollution of the marine environment”, all the while, of course,
14 remaining within the scope of the Convention. The ILC considered that beach
15 pollution falls within that scope. According to the ILC, to quote one of its reports
16 2001:

17
18 a case of pollution of the high seas in breach of article 194 of the [UN]
19 Convention on the Law of the Sea may particularly impact on one or several
20 States whose beaches may be polluted by toxic residues or whose coastal
21 fisheries may be closed. In that case, independently of any general interest
22 of the States Parties to the Convention in the preservation of the marine
23 environment, those coastal States Parties should be considered as injured
24 by the breach.²²

25
26 So the pollution in issue here can include pollution generated by shipping waste
27 (Marpol Convention, Annex V) or atmospheric pollution by shipping (also Marpol
28 Convention, Annex VI). Those are only a few examples.

29
30 Looking now at harm. Harm isn’t characterized by the text; however, in most
31 conventions on environmental protection, it is understood to be harm of a certain
32 significance.²³ The ICJ, in the *Pulp Mills* case, stated that, under general
33 international law, I quote the ICJ:

34
35 A State is thus obliged to use all the means at its disposal in order to avoid
36 activities which take place in its territory, or any area under its jurisdiction,
37 causing significant damage to the environment of another State.²⁴

38
39 As for the International Law Commission, in its draft articles on the prevention of
40 transboundary harm from hazardous activities, it included the concept of “significant
41 transboundary harm”, specifying that, and I will quote the ILC here:

42
43 “It is to be understood that ‘significant’ is something more than ‘detectable’ but need
44 not be at the level of ‘serious’ or ‘substantial’. The harm must lead to a real
45 detrimental effect on matters such as, for example, human health, industry, property,

²¹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, para. 121.*

²² *Report of the International Law Commission on the work of its fifty-third session, A/56/10, YILC, 2001, vol. II, part 2, p. 127, 12.*

²³ See the instruments mentioned in the COSIS Written Statement, para. 231.

²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, para. 101.

1 environment or agriculture in other States. Such detrimental effects must be
2 susceptible of being measured by factual and objective standards.”²⁵

3
4 Mr President, distinguished members of the Tribunal, the Commission of Small
5 Island States is in agreement with other States having submitted written statements
6 in the framework of the instant proceedings and considers that this definition of
7 “harm” corresponds to that which should be applied in the interpretation of
8 article 194, paragraph 2.

9
10 Activities falling under the jurisdiction or control of States Parties must not “cause
11 damage by pollution to other States and their environment”. This means that it is not
12 only harm to the environment of other States, but also any sort of pollutant damage
13 caused to States by other States which must be prevented. For example, to the
14 degree that sea-level rise causes catastrophic harm which isn’t uniquely, solely
15 environmental in nature, it is the totality of this prejudice that States have the
16 obligation to prevent by adopting “all measures necessary”.

17
18 Mr President, distinguished members of the Tribunal, article 194, paragraph 2, seeks
19 not only to protect third States from all significant harm occasioned by the pollution of
20 others, as I’ve just pointed out. It also requires States to take all measures necessary
21 so that pollution resulting from incidents or activities under their jurisdiction or control
22 does not spread to the high seas beyond the EEZ. Now, I’ll leave “incidents” to one
23 side because I don’t think it’s terribly relevant here, and I shall focus on “activities”.

24
25 As it is drafted, this provision says nothing about States which might allow activities
26 on their territory to continue which generate marine pollution localized in areas over
27 which they exercise sovereign rights. The provision says nothing about this. But if
28 States do engage in this type of activity, this provision – and that’s its object –
29 requires them to take all measures necessary so that this pollution does not spread
30 beyond their areas – meaning, of course, it should not spread to the high seas or
31 beyond the EEZ.

32
33 A typical case in issue here would be plastic pollution. You can see that all measures
34 necessary to stop this plastic pollution aren’t being taken. Plastic pollution starts
35 onshore and then flows out to sea, which is tragic. A new treaty is being discussed to
36 confront this plague, but it is plain that UNCLOS already has a provision which is
37 extremely clear and which allows States’ obligations in this respect to be determined.

38
39 The same applies to pollution caused by global warming due to atmospheric
40 greenhouse gas emissions and which spreads over all the oceans. We can see from
41 article 194, paragraph 2, that States should take “all measures necessary”, meaning
42 objectively indispensable, to prevent this from occurring.

43
44 Mr President, as I have already underscored, paragraph 1 of article 194 obliges
45 States to take all measures necessary – meaning “indispensable” – to prevent,
46 reduce and control pollution of the marine environment, and paragraph 3 of this
47 article confirms that no source of pollution escapes this obligation.

²⁵ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, *Yearbook of the International Law Commission, 2001*, vol. II(2), Commentary on draft article 2, p. 417, para. 4.

1
2 The written statements received within the framework of the instant proceedings
3 suggest that the sources of pollution, the most relevant in this case, are those which
4 are land-based, namely “pollution” from “point and diffuse sources on land from
5 which substances or energy reach the maritime area by water, through the air, or
6 directly from the coast.”²⁶ Here I am citing the definition of land-based pollution from
7 the Convention for the Protection of the Marine Environment of the North-East
8 Atlantic, the OSPAR Convention, paragraph 1(e). Pollution, more broadly from and
9 through the atmosphere is also relevant.

10
11 These sources are specifically targeted by article 194, paragraph 3,
12 subparagraph (a). Pollution from vessels, referred to in subparagraph (b), also
13 cannot be neglected, but I don’t think there is any sort of disagreement about that.

14
15 To restrict myself to land-based pollution by vessels and from or through the
16 atmosphere, articles 207, 211 and 212 of the Convention respectively set out a
17 series of obligations which directly concern them, such as States’ obligations to
18 adopt laws and regulations taking account of internationally agreed rules, standards,
19 practices and procedures, to take all other measures necessary, and to harmonize
20 their policies at the regional level, in order to prevent, reduce and control pollution of
21 the marine environment. States also have the obligation, when acting through
22 competent international organizations, or diplomatic conferences, to adopt rules and
23 standards, practices and procedures seeking the same objective.

24
25 As a complement, and in order to ensure practical effect is given to the obligations of
26 Part XII of the Convention, articles 213 and 222 oblige States to implement the rules
27 and regulations adopted under articles 207 and 212.

28
29 Mr President, distinguished members of the Tribunal, this brings me to the end of my
30 presentation. I do hope I have demonstrated that the three conclusions which I set
31 out at the introduction of my presentation have been clearly demonstrated and
32 confirmed. I would like to thank you now for your very kind attention and ask that you
33 give the floor to Ms Catherine Amirfar.

34
35 **THE PRESIDENT:** Thank you, Mr Thouvenin. I think that at this stage the Tribunal
36 will withdraw for a break of 30 minutes. We will continue this hearing at 11.55. Thank
37 you.

38
39 *(Short break)*

40
41 **THE PRESIDENT:** I now give the floor to Ms Amirfar to make her statement. You
42 have the floor, Madam.

43
44 **MS AMIRFAR:** Mr President, honourable members of the Tribunal, good afternoon.
45 It is a privilege to appear before you and on behalf of the Commission of Small
46 Island States on this important occasion.

47

²⁶ Article 1(e) of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).

1 My task today is to present the Commission’s position on the first question before the
2 Tribunal and in particular, to identify the specific obligations that States Parties have
3 under the Law of the Sea Convention in respect of pollution of the marine
4 environment by greenhouse gas emissions.
5

6 We submit that the answer to the first question flows from the clear text of the
7 Convention, as well as from the unequivocal record of scientific evidence. The focus
8 of my intervention today is the role of climate science in informing the content of
9 States Parties’ obligations under Part XII with respect to greenhouse gas emissions.
10

11 The role of science under the Convention is multifaceted. As relevant to the
12 UNCLOS framework, the best available science demonstrates that greenhouse
13 gases constitute pollution of the marine environment under article 1(1)(4). The best
14 available science demonstrates the actual and likely deleterious effects from
15 greenhouse gas emissions under that definition and quantifies the risk and harms of
16 such effects. The best available science provides thresholds and targets that must
17 be reached to avoid such effects on the marine environment and can offer a menu of
18 possible actions to States Parties to achieve that end. And while ultimately the
19 science cannot select among these actions, this is where the legal framework of the
20 Law of the Sea Convention steps in: it makes clear the requirements placed on
21 States Parties as a matter of specific legal obligations, rather than as an exercise of
22 political discretion.
23

24 Members of the Tribunal, to elucidate these points, I will proceed in three parts. First,
25 I will address the obligations under article 194 as informed by the science. Second, I
26 will explain how the science informs other obligations under Part XII of the
27 Convention. And third, I will conclude with the Commission’s position on the States
28 Parties’ specific obligations under the Convention in relation to the first question.
29

30 In short, the international consensus around the best available science demonstrates
31 that avoiding the worst consequences of climate change on the marine environment
32 requires limiting average global temperature rise to no more than 1.5°C above pre-
33 industrial levels. The Law of the Sea Convention thus requires States Parties to take
34 all measures necessary to do so, and to do so urgently.
35

36 Turning to my first point, I start with a basic premise: that the best available science
37 stands as the objective and determinative metric that delineates the specific
38 obligations of article 194. Article 194(1) requires, in strong terms, States Parties to
39 “take . . . all measures . . . necessary” to prevent, reduce, and control marine
40 pollution in the form of greenhouse gas emissions, “using the best practical means at
41 their disposal and in accordance with their capabilities.” And as Professor Thouvenin
42 just went through, what is “necessary” by virtue of the clear text is what is
43 indispensable, and what is indispensable must be determined objectively. That
44 objective basis is supplied by the best available science.
45

46 Article 194(2) requires – also in strong terms – that States Parties “shall take all
47 measures necessary” to “ensure” that activities under their jurisdiction or control do
48 not cause damage by greenhouse gases to other States and their environment.
49 Professor Brunnée explained how the due diligence obligations contained in
50 articles 192 and 194(2) require that States Parties exercise diligence depending on

1 the level of risk and foreseeable harm, as measured on an objective basis. And as
2 Professor Thouvenin explained, the wording of article 194(2) is even more
3 demanding. Here again, it is the best available science that informs the objective
4 measures under article 194(2) necessary to “ensure” that activities do not cause
5 transboundary damage. The measures considered sufficiently diligent, in the words
6 of the Seabed Disputes Chamber’s *Area Advisory Opinion*, may change over time in
7 line with “new scientific or technological knowledge”.¹

8
9 You heard yesterday the presentations of Dr Cooley and Dr Maharaj describing in
10 plain language the devastating impacts of anthropogenic greenhouse gas emissions
11 on the marine environment. It bears reminding that when it comes to climate change
12 and the ocean, we are not dealing with a high risk of small harm; or a low risk of
13 grave harm. We are dealing with a high risk of very significant harm as a matter of
14 “high confidence”. And these impacts are current and only intensifying. Importantly,
15 as scientific knowledge develops, those developments inform the obligations under
16 the Convention to do what is “necessary” to prevent, reduce and control pollution
17 under article 194(1) and to “ensure” activities do not cause damage by pollution
18 under article 194(2). This is an aspect of the central and rigorous role played by
19 developments in scientific and technical information in the interpretation of
20 obligations under the Convention more generally, as demonstrated yesterday by
21 Professor Okowa.

22
23 For purposes of my first point, I will start by addressing what the science has to say
24 as to how pollution of the marine environment by greenhouse gas emissions links to
25 global temperature rise, as well as the time scale associated with such pollution. I
26 will then turn to the international standard based on that science and its implications
27 for the specific obligations of States Parties under the Convention.

28
29 Turning to the link between marine pollution and global temperature rise, the
30 international consensus around the best available science is manifest in the work of
31 the Intergovernmental Panel on Climate Change, or the IPCC. The overwhelming
32 majority of States’ written submissions addressing the merits of the questions before
33 the Tribunal relied on the IPCC’s findings, for good reason. Its assessments reflect
34 the consensus of hundreds of the world’s leading scientists. In granting the Nobel
35 Peace Prize to the IPCC, the Nobel committee memorably acknowledged the critical
36 importance of the IPCC’s work to, in the committee’s words, “build up and
37 disseminate greater knowledge about man-made climate change, and to lay the
38 foundations for the measures that are *needed* to counteract such change.”²

39
40 The reason for this acknowledgement has as much to do with the IPCC’s process
41 and procedures, as with the rigor of its conclusions. The IPCC reviews thousands of
42 scientific papers each year to distil “what is known about the drivers of climate
43 change, its impacts and future risks, and how adaptation and mitigation can reduce
44 those risks.”³ The IPCC makes the first and final drafts of its assessment reports
45 available to the governments of each Member State to review and comment. The

¹ *Area Advisory Opinion*, para. 117.

² *Intergovernmental Panel on Climate Change*, The Nobel Prize, <https://www.nobelprize.org/prizes/peace/2007/ipcc/facts/> (emphasis added).

³ *About the IPCC*, IPCC, <https://www.ipcc.ch/about/>.

1 IPCC's findings are thus the consensus not only of the global scientific community,
2 but also incorporate the views of the 195 participating States.⁴

3
4 Earlier this year, the IPCC concluded its Sixth Assessment Cycle, which began in
5 2018 and was concluded this year. In coming to its conclusions, the IPCC speaks in
6 terms of “very high”, “high”, “medium”, “low”, or “very low” confidence. As you heard
7 from Drs Cooley and Maharaj yesterday, careful attention to evaluating uncertainty in
8 the IPCC's stated scientific conclusions underscores that its reports reflect the
9 highest standards of scientific rigor.

10
11 When it comes to the negative impact of greenhouse gas emissions as marine
12 pollution, the underlying problem is continuous, not binary. The IPCC concluded *with*
13 *high confidence* that “[e]very increment of global warming will intensify multiple and
14 concurrent hazards.”⁵ With respect to the ocean and marine cryosphere in particular,
15 the IPCC has “high confidence” that limiting global warming to 1.5 degrees as
16 opposed to 2 degrees will: reduce increases in ocean temperature as well as
17 associated . . . decreases in ocean oxygen levels. . . . Consequently, limiting global
18 warming to 1.5°C is projected to reduce risks to marine biodiversity, fisheries, and
19 ecosystems, and their functions and services to humans, as illustrated by recent
20 changes to Arctic sea ice and warm-water coral reef ecosystems (high confidence).⁶

21
22 The IPCC also concluded with “high confidence” that the risks to small islands and
23 low-lying coastal areas associated with sea-level rise – including saltwater intrusion,
24 flooding, and damage to infrastructure – “are higher at 2°C compared to 1.5°C”.⁷

25
26 With respect to ocean acidification, the IPCC has “high confidence” that the level of
27 ocean acidification due to increasing CO₂ concentrations associated with global
28 warming of 1.5°C is projected to amplify the adverse effects of warming, and even
29 further at 2°C, impacting the growth, development, calcification, survival, and thus
30 abundance of a broad range of species, for example, from algae to fish.⁸

31
32 This chart from the IPCC's Sixth Assessment Report shows the consequences
33 associated with five areas that the IPCC has identified as “Reasons for Concern”,
34 which include the gamut of impacts and risks to ocean ecosystems, including as
35 Dr Cooley detailed yesterday, widespread ecosystem death and biodiversity loss.
36 Generally speaking, as you can see here, for each Reason for Concern, temperature
37 rise above 1.5°C represents a dramatic increase in the risk, moving from moderate
38 to high. For example, with regard to some “unique and threatened systems” such as
39 coral reefs, the IPCC identified, and I quote, “increasing numbers of systems at
40 potential risk of severe consequences at global warming of 1.5°C above pre-
41 industrial levels.”⁹

42

⁴ https://www.ipcc.ch/site/assets/uploads/2019/02/ipcc_members.pdf.

⁵ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 12.

⁶ IPCC, *Summary for Policymakers*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 8.

⁷ *Id.*, p. 8.

⁸ IPCC, *Summary for Policymakers*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 9.

⁹ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 253.

1 In fact, what we know is that in a world above 1.5°C, 70 to 90 per cent of tropical
2 corals would disappear as a result of mass bleaching and mortality.¹⁰ This will have
3 devastating effects on marine biodiversity, given that these coral reefs provide
4 habitats for over one million species.¹¹ Framework organisms – that is, those that
5 provide habitats for a large number of marine species – such as kelp forests,
6 seagrass meadows, corals and mangroves will be at high risk of dying off due to
7 increasingly frequent and severe marine heatwaves.¹² There would likely be ice free
8 summers in the Arctic by 2050, risking habitat loss for many species including seals,
9 whales, polar bears and seabirds.¹³ These are but a few examples drawn from the
10 expert evidence of Dr Cooley and Dr Maharaj.¹⁴

11
12 I turn now to the timetable for action to mitigate the effects of climate change on the
13 marine environment. The best available science tells us that we are dangerously
14 close to exceeding the 1.5° limit.

15
16 The IPCC has calculated a “remaining carbon” budget, which estimates the total net
17 amount of carbon dioxide that human activities can still release into the atmosphere
18 while keeping global temperatures to a specified limit above pre-industrial levels.¹⁵

19
20 The chart on the screen reflects the IPCC’s assessment of the remaining carbon
21 budget as of 2022. The IPCC found that attaining even a 50 per cent chance of
22 limiting global warming to 1.5°C would require limiting the remaining carbon budget
23 to a cumulative total of 500 billion tonnes of CO₂ in the years from 1 January 2020
24 onward, which you can see in the lower right hand of the chart.¹⁶ Currently, human
25 activities are emitting around 40 billion tonnes of CO₂ into the atmosphere in a single
26 year.¹⁷ The IPCC’s conclusions thus show that, without dramatic and urgent
27 reductions in greenhouse gas emissions, the world will soon exceed our estimated
28 remaining carbon budget with devastating consequences.¹⁸ That point is shockingly
29 close: it will be reached within this decade.¹⁹

30
31 The IPCC has shown, and the vast majority of written statements submitted in this
32 case concur,²⁰ that the only way to do avoid such devastating consequences is by

¹⁰ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), pp. 179, 229–230 (Box 3.4).

¹¹ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), pp. 229–230 (Box 3.4).

¹² *Id.*, pp. 225–226.

¹³ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), pp. 205–206; IPCC, Working Group II, *Chapter 3: Ocean and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 395, 432, Table 3.14.

¹⁴ See generally COSIS Written Statement, Annexes 4, 5.

¹⁵ IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 777.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 20–21.

¹⁹ *Id.*

²⁰ See, e.g., African Union Written Statement, paras. 202, 206; Australia Written Submission, paras. 6, 9, 35; Bangladesh Written Submission, paras. 35, 45; Belize Written Statement, paras. 25, 26; Egypt Written Statement, paras. 73–74; European Union Written Submission, paras. 55; International Union for Conservation of Nature Written Statement, paras. 36–37; Mauritius Written Submission, para. 31; Micronesia Written Submission, paras. 50-51; Mozambique Written Submission, para. 3.67; Portugal

1 swiftly and sharply decreasing greenhouse gas emissions.²¹ The IPCC assesses
2 that, to achieve at least a 50 per cent chance of limiting warming to 1.5°C, States
3 must reduce greenhouse gas emissions, as measured against 2019 levels, by at
4 least 43 per cent by 2030, 60 per cent by 2035, 69 per cent by 2040 and 84 per cent
5 by 2050.²² And as Dr Cooley explained yesterday, it may be impossible to recover
6 from exceeding the 1.5-degree limit even if the world develops significant carbon-
7 capture technology, which at present does not exist. Indeed, the best available
8 science tells us there is currently no sign that these targeted reductions will be
9 achieved, making the rapid and dramatic action to limit global temperature rise to
10 1.5°C all the more urgent.

11
12 In considering this science, it bears keeping in mind that a notable consequence of
13 the IPCC's lengthy review process is that its conclusions are based on data that are
14 sometimes several years old. Climate projections have only gotten worse since the
15 findings of the Sixth Assessment Cycle.²³ This fact, combined with the IPCC's strict
16 criteria for evaluating evidence, means that its findings about the nature or likelihood
17 of climate impacts are often conservative. We have seen this play out, for instance,
18 with respect to the Arctic and Antarctic ice sheets, which have experienced warming
19 and loss at a much higher rate than previously predicted. This is one of the strongest
20 warming trends on Earth, which destroys polar habitats, contributes to sea-level rise,
21 distorts global ocean currents, and reduces the ice albedo effect by reflecting less
22 heat back out of the atmosphere.²⁴

23
24 As a general matter, then, the IPCC has concluded with high confidence that
25 keeping the average global temperature rise to within 1.5 degrees will reduce the
26 risks of harm associated with even greater negative impact on the ocean and marine
27 cryosphere. This is a critical point: in other words, an average global temperature
28 rise of 1.5°C would not be "ok" with respect to pollution of the marine environment;
29 on the contrary, even that increment of warming will likely give rise to serious
30 deleterious effects to humans, fauna and flora. But the risks and magnitude of global,
31 catastrophic harm grow significantly if the world exceeds a 1.5-degree temperature
32 increase.

33
34 Although meeting the 1.5-degree threshold would be no panacea, neither is it
35 arbitrary; rather, it is an evidence-based threshold that represents the international
36 standard based upon the best available science around harm mitigation.

37
38 Much has been said in the written statements before the Tribunal on the import and
39 relevance of the climate regime and the Paris Agreement. As Professor Mbengue
40 explained yesterday, the question is not one of conflict or competition, or a hierarchy
41 of obligations. Rather, the global climate regime in general, and the Paris Agreement
42 in particular, evince the global consensus around the scientific understanding of

Written Submission, para. 44, Rwanda Written Submission, paras. 108, 150; Sierra Leone Written Submission, para. 63; United Kingdom, paras. 69, 89(c) fn 234; United Nations Environment Programme Written Statement, paras. 47, 49(a); see also Paris Agreement, articles 2(1)(a), 4(1).

²¹ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 21–22.

²² *Id.*, pp. 12, 21–22.

²³ See International Union for Conservation of Nature Written Statement, paras. 81, 158.

²⁴ International Union for Conservation of Nature Written Statement, para. 141 (citing International Cryosphere Climate Initiative, *State of the Cryosphere 2022: Growing Losses, Global Impacts: We cannot negotiate with the melting point of ice* (2022)).

1 climate change. Article 2(1)(a) of the Paris Agreement sets forth that States Parties
2 should “pursue efforts to limit the temperature increase to 1.5°C”, “recognizing that
3 this would significantly reduce the risks and impacts of climate change.”²⁵ Article 4(1)
4 recognizes that in order to reach this temperature goal, States Parties should “aim to
5 reach global peaking of greenhouse gas emissions as soon as possible” and “to
6 undertake rapid reductions thereafter in accordance with best available science”.²⁶
7 Since the Paris Agreement was adopted, the States Parties to the UNFCCC – which
8 include all States Parties to UNCLOS – have continually reaffirmed the critical
9 importance of keeping to within 1.5°C in their annual Conference of the Parties,
10 including in COP27.²⁷

11
12 The Paris Agreement and decisions of the Conference of the Parties to the UNFCCC
13 confirm that the 1.5-degree limit reflects an international, science-backed threshold,
14 and, as such, constitutes an internationally agreed rule, standard and recommended
15 practice and procedure relevant to the interpretation of States Parties’ obligations
16 under the Convention. This is in accordance with article 207(1), which deals with
17 pollution from land-based sources, article 211(1) for pollution from vessels, and
18 articles 212(1) and 212(3) for pollution from or through the atmosphere.

19
20 Before leaving this point, a word on the obligation for States Parties to the Paris
21 Agreement to publish nationally determined contributions, or NDCs. A State’s NDC
22 stands as a statement of intention to achieve the 1.5-degree temperature target,
23 reflecting each State’s relative greenhouse gas emissions on a forward-looking
24 basis. Some States, in their written statements before the Tribunal, come close to
25 suggesting that their obligations under Part XII will be satisfied by publishing
26 progressively ambitious NDCs.²⁸ But simply publishing an NDC, on its own, cannot
27 satisfy the obligations under the Convention.²⁹

28
29 Indeed, currently NDCs are falling short. The IPCC graphic shown here depicts the
30 existing and significant gap between the sum of current NDCs and the 1.5-degree
31 temperature limit. The right-hand chart shows that to be on track to stay within 1.5°C,
32 States must reduce annual emissions by 43 per cent from 2019 levels before 2030.
33 Published NDCs will only get us to a 4 per cent reduction, and the trend from
34 *implemented* NDCs shows that emissions are on track to actually *increase* by
35 5 per cent.³⁰ Indeed, just this past Friday, the UNFCCC Secretariat issued its first
36 global stocktake on Paris Agreement commitments, which stated, “the window to
37 keep limiting warming to 1.5°C is closing rapidly, and progress is still inadequate
38 based on the best available science.”³¹ Publishing and implementing NDCs that are

²⁵ Paris Agreement, Art. 2(1)(a) (emphasis added).

²⁶ Paris Agreement, Art. 4(1) (emphasis added).

²⁷ COP27, Decision 21/CP.27, UN Doc. FCCC/CP/2022/10/Add.2 (2023), para. 7; UNFCCC-COP27, Decision 2/CP.27 (2022).

²⁸ Australia Written Statement, paras. 36–41, 46, 51; Canada Written Statement, paras. 42, 62; European Union Written Statement, paras. 28, 67–69, 92–94; United Kingdom Written Statement, para. 68–69; Singapore Written Statement, paras. 38–41.

²⁹ COSIS Written Statement, para. 364.

³⁰ See UNEP, EMISSIONS GAP REPORT (2022); *CAT Emissions Gap*, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/global/cat-emissions-gaps/>; IPCC, *Longer Report*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 25, Figure 2.5.

³¹ UNFCCC Secretariat, Technical dialogue of the first global stocktake: Synthesis report by the co-facilitators on the technical dialogue, FCCC/SB/2023/9 (8 Sep 2023), para. 80.

1 plainly insufficient to limit global average temperature to within 1.5°C cannot possibly
2 satisfy the obligation under the Convention to take *all necessary measures* to
3 prevent, reduce, and control pollution of the marine environment by greenhouse gas
4 emissions, or to do the utmost in exercising due diligence consistent with the best
5 available science.

6
7 In addition, the reality is that some pathways to an average increase limited to no
8 more than 1.5 degrees around the end of the century still involve significant
9 temporary increases above 1.5 degrees with devastating effects on the marine
10 environment – in IPCC terms these are referred to as temperature “overshoot”
11 scenarios.³² NDCs, considered individually and jointly, may thus be compliant with
12 the Paris Agreement, but nevertheless would be inconsistent with obligations under
13 the Convention. For example, even current levels of warming have caused
14 widespread coral bleaching the world over.³³

15
16 Now, that is not to say that NDCs are irrelevant to the Law of the Sea Convention in
17 this context: they are an internationally recognized means by which a State could set
18 forth the measures it is taking relevant to mitigating the deleterious effects of climate
19 change, and in so doing potentially meet its obligations under the Convention. They
20 also cast light on what States deem are needed and practicable measures to be
21 taken. But they are neither a ceiling nor a floor for Part XII obligations, and their mere
22 publication cannot suffice, cannot suffice to meet those obligations.

23
24 To sum up on this point, it is the best available science that determines what
25 measures are “necessary” with respect to the obligations under Part XII relating to
26 pollution of the marine environment emanating from greenhouse gas emissions.
27 Currently, to fulfil their obligation under the Convention under article 194(1) to take
28 all measures necessary to prevent, reduce and control marine pollution, States
29 Parties must do at least all that is necessary to limit average global temperature rise
30 to no more than 1.5°C, using the “best practical means at their disposal and in
31 accordance with their capabilities.”

32
33 Now to be clear, the 1.5°C threshold is set by virtue of a global assessment of
34 aggregate harm that is continuously developing; greenhouse gas emissions
35 constitute “pollution of the marine environment” under article 1(1)(4) because
36 “deleterious effects” result or are likely to result even at thresholds far below the
37 1.5°C standard. At the same time, what is “necessary” as a general matter cannot
38 entail preventing absolutely every last speck of pollution; but in fact, the 1.5-degree
39 threshold and the associated mitigation timetables are premised upon significantly
40 reducing the risk and impacts of greenhouse gas emissions on the marine
41 environment and preventing catastrophic harm in the higher emissions scenarios.³⁴

³² See, e.g., IPCC, Working Group III, *Chapter 3: Mitigation Pathways Compatible With Long-Term Goals*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), pp. 298–299; IPCC, Working Group II, *Annex I: Glossary*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), p. 1810.

³³ IPCC, Working Group II, *Chapter 3: Ocean and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 412.

³⁴ See, e.g., Paris Agreement, articles 2(1)(a); IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), pp. 24–25.

1 For purposes of the Advisory Opinion, the Commission respectfully submits that the
2 specific obligations of States Parties under the Convention must be interpreted
3 consistent with and as informed by the international standard set by the best
4 available science, and currently that means doing all that is necessary to stay at
5 least within the 1.5°C limit. This is even while acknowledging the variable nature of
6 that standard due to, for example, advances in scientific understanding of the
7 impacts of climate change on the marine environment or particular circumstances of
8 “deleterious effects” due to, for example, regional variations.

9
10 Likewise, to fulfil their obligation under article 194(2) of the Convention to take all
11 measures necessary to ensure that activities do not cause damage by
12 transboundary pollution and under article 194(5) to protect rare or fragile marine
13 ecosystems and habitats, States Parties must be at least as diligent as necessary to
14 limit average global temperature rise to no more than 1.5°C.

15
16 Further, the science also informs what constitutes necessary action by States Parties
17 to meet that global standard, whether such Parties are acting individually or jointly.³⁵
18 In other words, the measures objectively necessary for an individual State Party to
19 meet that standard under article 194(1) will differ based on the scientific evidence
20 particular to that State, including as to its best practical means and capabilities. In
21 that respect, both the mathematics of climate emissions and differing capabilities
22 show that, to achieve the 1.5-degree temperature limit, high-emitting, high-resource
23 States will have to make more progress in reducing and capturing greenhouse gas
24 emissions than low-emitting, low-resource States.³⁶

25
26 Mr President, members of the Tribunal, turning to my second point, article 194 is one
27 of some 30 articles regulating pollution of the marine environment. COSIS set these
28 out in detail in Chapter 7 of its written statement. States Parties’ written statements
29 reveal little controversy about them, and for good reason: these obligations flow
30 directly from express, specific provisions of the Convention.

31
32 I will not repeat what is in the written statement³⁷ or what is clearly set out in the
33 Convention. There is simply one core point I wish to emphasize: just as with
34 article 194, the best available science is also key to the interpretation and
35 implementation of States Parties’ other obligations under Part XII to prevent, reduce
36 and control pollution of the marine environment.

37
38 To illustrate this, I address four categories of specific obligations.

39
40 First, States Parties must follow the best available science in fulfilling their
41 obligations to “adopt laws and regulations to prevent, reduce and control” marine
42 pollution from land-based sources, from or through the atmosphere, and by vessels.
43 Articles 207(1) and 212(1) explicitly require that such laws and regulations with
44 respect to land-based and atmospheric sources of pollution must “take into account
45 internationally agreed rules, standards and/or recommended practices and
46 procedures”. Article 213 further requires States Parties both to “enforce” such laws

³⁵ See, e.g., UNCLOS, article 194(1).

³⁶ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 11, 31; UNEP, EMISSIONS GAP REPORT (2022), pp. 7–9.

³⁷ COSIS Written Statement, Ch. 7, § II.

1 and regulations and to “adopt” those “necessary to implement applicable
2 international rules and standards ... to prevent, reduce and control” marine pollution
3 from land-based sources. Likewise, under article 211(2) with respect to pollution
4 from vessels, such laws and regulations must “at least have the same effect as that
5 of generally accepted international rules and standards.” Accordingly, internationally
6 agreed scientific standards as set out by the IPCC for example, must supply the
7 content of those laws and regulations in achieving the 1.5-degree temperature limit.
8 States Parties should also draw from the IPCC’s concrete recommendations for
9 reducing GHG emissions through legislation and policy governing energy generation,
10 industry, transportation, agriculture, land use, and other areas.³⁸

11
12 Second, States Parties are required to undertake monitoring and environmental
13 assessments on the risks or effects of greenhouse gases on the marine environment
14 in accordance with “recognized scientific methods” under article 204.³⁹ When States
15 Parties have reasonable grounds to believe that planned activities – both at sea and
16 on land – under their jurisdiction or control may cause substantial marine pollution
17 through greenhouse gas emissions, article 206 requires them to assess the potential
18 effects of those activities on the marine environment. To be accurate and effective,
19 that assessment must account for the best available science.

20
21 Third, States Parties must also be guided by the science in fulfilling their obligations
22 to provide scientific and technical assistance, as well as funds, to developing States
23 to prevent, reduce, and control marine pollution in the form of greenhouse gases,
24 primarily under article 202.⁴⁰ This includes technical assistance in terms of
25 addressing the comparatively less-developed data on climate change risks and
26 impacts that are already harming small islands.⁴¹ This paucity is due principally to a
27 lack of financial and technical resources for developing States, which implicate both
28 article 202 and the preferential treatment terms of article 203. States Parties must
29 also provide appropriate assistance to developing States in the “preparation of
30 environmental assessments”⁴² and “minimization of the effects of major incidents”
31 arising out of “serious pollution of the marine environment”,⁴³ such as measures for
32 adapting to severe weather events exacerbated by ocean heating.

33
34 Finally, States Parties should strive to generate and rely on the science relevant to
35 climate change when fulfilling their obligations to cooperate directly or through
36 international organizations to prevent, reduce and control marine pollution in
37 accordance with articles 197, 198, 199, 200 and 201. Article 200 in particular refers
38 to undertaking relevant “scientific research” and encouraging the exchange of
39 “information and data”.⁴⁴ Article 201 requires States Parties to cooperate to establish
40 “scientific criteria for the formulation and elaboration of rules, standards and
41 recommended practices and procedures” to prevent, reduce, and control marine
42 pollution.⁴⁵ Many of the relevant international bodies have scientific mandates

³⁸ See IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 27–30.

³⁹ See *also* UNCLOS, article 205.

⁴⁰ See UNCLOS, article 202.

⁴¹ COSIS Written Statement, Annex 5, Maharaj Report, § II.

⁴² UNCLOS, article 202(c).

⁴³ UNCLOS, article 202(b).

⁴⁴ UNCLOS, article 200.

⁴⁵ UNCLOS, article 201 (emphasis added).

1 bearing upon the science of climate change, including the IPCC, the UN
2 Environmental Programme, the International Maritime Organization, the UNESCO
3 Intergovernmental Oceanographic Commission, and the Conferences of the Parties
4 of the UNFCCC and the Convention on Biological Diversity, all of which produce
5 rigorous scientific data relevant to the obligations of States Parties in this important
6 respect. When participating in these international fora, States Parties must make
7 every effort to implement the necessary measures to mitigate climate change
8 impacts on the ocean and marine environment, consistent with the best available
9 science.

10
11 Mr President, members of the Tribunal, I turn now to my final point, the
12 Commission's submission on the answer to the first question before the Tribunal.
13 The Commission requests that the Tribunal declare the following specific obligations
14 of States Parties under the Law of the Sea Convention in relation to marine pollution
15 due to greenhouse gas emissions.

16
17 States Parties must, as a matter of urgency:

18
19 Individually or jointly as appropriate, take all measures necessary to prevent, reduce
20 and control pollution of the marine environment from greenhouse gas emissions,⁴⁶
21 including from land-based sources,⁴⁷ from vessels,⁴⁸ from or through the
22 atmosphere,⁴⁹ and all measures necessary to protect and preserve rare or fragile
23 ecosystems and habitats of depleted, threatened, or endangered species and other
24 forms of marine life,⁵⁰ using for this purpose the best practicable means at their
25 disposal and in accordance with their capabilities. States Parties must do so on the
26 basis of the best available scientific and international standards, which require, at a
27 minimum, taking all measures objectively necessary to:

28
29 (a) limit average global temperature rise to no more than 1.5°C above pre-industrial
30 levels, without overshoot, and taking account any current emission gaps; and
31 reach global peaking of greenhouse gas emissions as soon as possible and
32 undertake rapid reductions thereafter in accordance with the best available
33 science.⁵¹

34
35 (b) Take all measures necessary to ensure that greenhouse gas emissions from
36 activities under their jurisdiction or control do not cause damage by pollution to other
37 States and their environment, and do not spread beyond the areas where they
38 exercise sovereign rights under the Convention, as informed by the duty of due
39 diligence and best available scientific and international standards, consistent with the
40 specific temperature goal and timetable noted in (a) above.⁵²

41

⁴⁶ UNCLOS, article 194(1).

⁴⁷ UNCLOS, article 207(2).

⁴⁸ UNCLOS, article 211.

⁴⁹ UNCLOS, article 212(2).

⁵⁰ UNCLOS, article 194(5).

⁵¹ Paris Agreement, article 4(1); IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 21–22.

⁵² UNCLOS, article 194(2).

1 (c) Adopt and enforce laws and regulations to prevent, reduce, and control pollution
2 of the marine environment from greenhouse gas emissions, including from land-
3 based sources,⁵³ from vessels,⁵⁴ from or through the atmosphere,⁵⁵ and from
4 activities in the area,⁵⁶ taking account of best available scientific and international
5 standards, consistent with the specific temperature goal and timetable noted in (a)
6 above. In so doing, States Parties should draw from the IPCC's concrete
7 recommendations for reducing greenhouse gas emissions through legislation and
8 policy governing energy generation, industry, transportation, agriculture, land use,
9 and other areas.

10
11 (d) Cooperate directly or through international organizations to prevent, reduce and
12 control pollution of the marine environment from greenhouse gas emissions and
13 protect and preserve the marine environment from climate change as informed by
14 best available scientific and international standards, including by: undertaking
15 programmes of scientific research; encouraging the exchange of information and
16 data; publishing reports on the risks and effects of greenhouse gas emissions on the
17 marine environment; formulating and elaborating international rules and standards to
18 mitigate the drivers and impacts of climate change; and addressing any gaps in such
19 studies and reports, consistent with the specific temperature goal and timetable
20 noted in (a) above.⁵⁷

21
22 (e) Provide technical, financial, and other appropriate assistance to developing
23 States, directly or through international organizations, to assess the impacts of
24 greenhouse gas emissions and take all measures to prevent, reduce, and control
25 pollution of the marine environment from greenhouse gas emissions as informed by
26 best available and international standards, consistent with the specific temperature
27 goal and timetable noted in (a) above.⁵⁸

28
29 And (f) Undertake monitoring and assessment of planned activities under their
30 jurisdiction or control, including through environmental impact assessments and
31 contingency plans, to determine whether such activities may cause substantial
32 pollution of the marine environment, as informed by the duty of due diligence and
33 best available scientific and international standards, consistent with the specific
34 temperature goal and timetable noted in (a) above, and publish any such reports.⁵⁹

35
36 Simply put, the Convention requires that States Parties at least take these measures
37 because they are what the best available science tells us is necessary to avoid
38 global catastrophe with respect to the world's marine environment.

39
40 Mr President, distinguished members of the Tribunal, this concludes my
41 observations before you today. Thank you for your kind attention. May I ask that you
42 please invite Professor Philippa Webb to address you?
43

⁵³ UNCLOS, articles 207(1), 207(5), 213.

⁵⁴ UNCLOS, articles 211(2), 217–220.

⁵⁵ UNCLOS, articles 212(1), 222.

⁵⁶ UNCLOS, articles 209, 215.

⁵⁷ UNCLOS, articles 197–201, 204(1), 205.

⁵⁸ UNCLOS, articles 202–203.

⁵⁹ UNCLOS, articles 198, 204(2), 205–206.

1 **THE PRESIDENT:** Thank you Ms Amirfar. I now give the floor to Ms Webb to make
2 her statement. You have the floor, Madam. Ms Webb, I understand that you would
3 wish to complete your statement before we break for lunch; so even if we go beyond
4 1:00, I will allow you the time.

5
6 **THE PRESIDENT:** Thank you very much.

7
8 **MS WEBB:** Thank you, Mr President, it will be no more than a couple of minutes.

9
10 Mr President, distinguished members of the Tribunal, it is an honour to appear
11 before you and to represent the Commission of small island States in these
12 proceedings.

13
14 I – together with Professor Oral – will address the second question before the
15 Tribunal: What are the specific obligations of State Parties to the United Nations
16 Convention on the Law of the Sea ... including under Part XII: ... to protect and
17 preserve the marine environment in relation to climate change impacts, including
18 ocean warming and sea level rise, and ocean acidification?

19
20 This question concerns the meaning and scope of article 192, which provides that
21 “States have the obligation to protect and preserve the marine environment.” This
22 provision is an independent basis for imposing specific obligations on States, and it
23 has a broader scope than article 194.

24
25 I will make four points. First, there is a very high degree of consensus on the content
26 of article 192 in the written statements of States Parties and organizations. Second,
27 there is some divergence of views of the relationship between the article 192
28 obligations and commitments that States have made under UNFCCC and the Paris
29 Agreement. COSIS’s firm position, as set out by Professor Mbengue, Professor
30 Brunnée, Professor Thouvenin and Ms Amirfar, is that compliance is to be assessed
31 by reference to the meaning of UNCLOS and the best available science, taking into
32 account the global climate regime.

33
34 Third, the obligations to “protect and preserve” go beyond, and add to, the obligation
35 to “prevent, reduce and control.” Fourth, the duty of due diligence to protect and
36 preserve the marine environment gives rise to three types of specific obligations.
37 There is the forward-looking obligation to protect, to act to prevent damage, in the
38 light of the fact that the marine environment is the world’s largest heat and carbon
39 sink; there is the obligation to mitigate the risk of harm, to work to reduce the current
40 and future harmful effects of climate change. Professor Oral will address the third
41 type – the obligation to undertake adaptation measures – recognizing that climate
42 change is here, the damage is being done and we have to build the marine
43 environment’s resilience to climate change, now and into the future.

44
45 Turning to my first point: there is almost complete agreement in the written
46 statements on article 192 being both a general obligation and a framework provision
47 with independent legal force. States and organizations agree that it creates a broad
48 substantive obligation to protect and preserve the marine environment, which reflects

1 customary international law.¹ The drafters of UNCLOS decided to emphasize the
2 obligation in article 192 by “codifying it in a single article.”² This broad obligation
3 gains colour when read in the context of the other provisions of Part XII as well as
4 other international rules and standards. They agree that the obligation requires
5 States both to take positive action to protect and preserve the marine environment
6 and to refrain from degrading the marine environment.³

7
8 Crucially, there is agreement that article 192 goes beyond article 194, and that the
9 second question before you therefore covers a different domain from the first.
10 Article 192 is not limited to marine pollution. It applies to all harm caused to the
11 marine environment – any destruction or alteration or threats from any source.⁴ This
12 includes harm to the living resources and marine life.⁵ As Professor Alan Boyle has
13 stated, it is clear that Part XII of UNCLOS, which article 192 opens, “encompasses
14 protection of ecosystems, conservation of depleted and endangered species of
15 marine life and control of alien species.”⁶ You will recall Dr Cooley’s and Dr
16 Maharaj’s compelling evidence of the catastrophic harm that climate change has
17 caused and risks causing to marine ecosystems, especially those that rely on coral
18 reefs and seagrasses.

19
20 Article 192 also has no spatial restriction. It applies to the marine ecosystem, the
21 water column, the seabed, the entire ocean, and the marine cryosphere.⁷ There is no
22 distinction between spaces under and beyond national jurisdiction: internal waters,
23 territorial seas, exclusive economic zones, high seas.⁸ The South China Sea
24 Tribunal noted that “ocean currents and the life cycles of marine species create a
25 high degree of connectivity between the different ecosystems,” meaning that the
26 obligation to protect and preserve the marine environment includes areas that may
27 be indirectly affected by harmful activities.⁹

¹ See Australia Written Statement, paras. 42–44; Bangladesh, paras. 50–51; Belize, paras. 55–61; Brazil, para. 21; Canada, paras. 64–65; Chile, paras. 43, 48; European Union, paras. 16–27; Micronesia, paras. 33, 60; Mozambique, paras. 4.3–4.10; Nauru, paras. 52–55; Netherlands, paras. 4.1–4.4, 6.2; New Zealand, paras. 32, 79–83; Portugal, paras. 21, 60–64; Republic of Korea, paras. 6–15; Rwanda, paras. 157–208; Sierra Leone, paras. 74–79; Singapore, paras. 62–65; United Kingdom, paras. 44–52; Vietnam, paras. 4.3–4.4; African Union, paras. 247–259; IUCN, paras. 125–129; ACOPS, paras. 5, 23; CIEL/Greenpeace, paras. 28–29; Our Children’s Trust/Oxfam, p. 29; Observatory for Marine and Coastal Governance, p. 15–16; Opportunity Green, paras. 24–27 WWF, paras. 107–114.

² Detlef Czybulka, *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Pröhl, 2017), p. 1284.

³ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 941.

⁴ See *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-0, Award (18 March 2015), paras. 320, 538.

⁵ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-0, Award (18 March 2015), paras. 320, 538.

⁶ Alan Boyle, *The Environmental Jurisprudence of the International Tribunal for the Law of the Sea*, 22 INT’L J. MARINE & COASTAL L. 369 (2007), 373.

⁷ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 408, 945.

⁸ Detlef Czybulka, *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Pröhl, 2017), p. 1280.

⁹ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 825; Rwanda Written Statement, para. 165.

1 States and international organizations agree that article 192 reflects an obligation to
2 act with due diligence.¹⁰ As Professor Brunnée has explained, the requirements of
3 due diligence increase with the degree of risk and severity of harm. The relevant
4 standards are objective, specific and particularly severe. States are subject to a
5 stringent obligation “to deploy adequate means, to exercise best possible efforts, to
6 do the utmost.”¹¹ In the context of the marine environment, that means undertaking
7 specific obligations to protect, mitigate and adapt – a point to which I will return.
8

9 Mr President, members of the Tribunal, my second point is on the relationship
10 between article 192 and the global climate regime. Certain of the written statements
11 argue that compliance with these instruments establishes compliance with
12 article 192 obligations;¹² that the Paris Agreement “lowers the threshold and the level
13 of discretion that States Parties have under Part XII of UNCLOS”;¹³ that the Paris
14 Agreement is “one of the most important standards” in assessing the obligation of
15 due diligence under article 192;¹⁴ that implementing Paris is “an important indicator”
16 of the extent to which States are meeting their article 192 obligations.¹⁵
17

18 Other States and international organizations, like COSIS, emphasize that what
19 should be taken from the Paris Agreement is not the standard for assessing
20 UNCLOS obligations, but rather the temperature goal of pursuing efforts to limit the
21 global average increase to 1.5°C above pre-industrial levels.¹⁶ As Professor
22 Mbengue and Ms Amirfar have stated, there is no hierarchy of obligations. The
23 global climate change regime is important for expressing consensus around the best
24 available science and an international standard relevant to the interpretation of
25 States Parties’ obligations under UNCLOS. In interpreting article 192, we must
26 therefore also take into account the objective of increasing the ability of States to
27 adapt to the adverse impacts of climate change and to foster resilience. And the
28 obligations in article 192 inform how States should comply with their climate change
29 obligations.
30

31 UNCLOS, the “constitution for the oceans”, is the instrument that governs
32 compliance with the obligations to protect and preserve the marine environment.
33 Issuing a Nationally Determined Contribution does not tick the box of compliance
34 with article 192. Ms Amirfar explained that issuing NDCs is neither a floor nor a
35 ceiling for States Parties’ obligations under articles 194; so, too, for article 192.
36 Implementing an NDC may also be insufficient or irrelevant to fulfilling article 192.

¹⁰ See *above* note 1.

¹¹ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10 (1 February), para. 110.

¹² European Union Written Statement, para. 28; Australia Written Statement, paras. 39–40; Singapore Written Statement, para. 38 (referring to article 194 UNCLOS); Chile Written Statement, paras. 56–60 (referring to article 194 UNCLOS); Egypt Written Statement, paras. 72–73; Portugal Written Statement, para. 93.

¹³ Portugal Written Statement, para. 93.

¹⁴ Republic of Korea Written Statement (in the context of both articles 192 and 194), para. 16. See also New Zealand Written Statement, para. 94(f); United Kingdom Written Statement, para. 69 (in the context of article 194).

¹⁵ Canada Written Statement, paras. 62(viii).

¹⁶ COSIS Written Submission, paras. 357–365; Rwanda Written Statement, paras. 239–240; Nauru Written Statement, paras. 47–50; Federated States of Micronesia Written Statement, para. 50; Bangladesh Written Statement, para. 42; African Union Written Statement, para. 202 (referring to article 194(1)); CIEL/Greenpeace Written Statement, para. 82.

1 Protection and preservation of the marine environment is not a required part of the
2 NDC process, which is focused on emission reduction targets and mitigation
3 efforts.¹⁷
4

5 My third point is that the obligations to protect and preserve the marine environment
6 go beyond preventing, reducing and controlling marine pollution – and, again, in this
7 way, the second question is broader than the first one.
8

9 The duty to “protect” requires States to prevent future damage to the marine
10 environment. It requires them not only to take action to prevent harm to the marine
11 environment caused by their agents but also individuals within their control. As the
12 South China Sea Tribunal explained, quoting the International Court of Justice in the
13 Nuclear Weapons Advisory Opinion:¹⁸ “The corpus” of international law relating to
14 the environment, which informs the content of the general obligation in article 192,
15 requires that States “ensure that activities within their jurisdiction and control respect
16 the environment of other States or of areas ‘beyond national control’.”
17

18 The South China Sea Tribunal found on the facts of that case that article 192
19 includes a due diligence obligation “to prevent the harvesting of species that are
20 recognized internationally as being at risk of extinction and requiring international
21 protection.”¹⁹ The Tribunal said that “article 192 imposes a due diligence obligation
22 to take those measures ‘necessary to protect and preserve rare or fragile
23 ecosystems as well as the habitat of depleted, threatened or endangered species
24 and other forms of marine life’.” The scope of article 192 therefore covered the direct
25 harvesting of species at risk of extinction as well as “the prevention of harms that
26 would affect depleted, threatened, or endangered species indirectly through the
27 destruction of their habitat.”²⁰
28

29 The duty to “preserve” under article 192 means maintaining or improving the present
30 condition of the marine environment. It goes beyond protection²¹ and includes the
31 duty to restore.²² The plain meaning of “preserve” is to “keep in its original or existing
32 state” and “to make lasting”.²³ The obligation is to restore degraded marine
33 environments and ecosystems. It is “the logical measure” to ensure improvement of
34 the present condition of the marine environment.²⁴ It is closely related to the notion
35 of sustainability – maintaining the marine environment so we can address existing
36 harm as well as future activities.
37

¹⁷ Paris Agreement, Arts. 3, 4.4.

¹⁸ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 941 (citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, para. 29).

¹⁹ *Id.*, at para. 956.

²⁰ *Id.*, at para. 959.

²¹ Yoshifumi Tanaka, *Article 1: Use of Terms and Scope*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Pröhl, 2017), pp. 23–24.

²² COSIS Written Statement, paras. 389–392, 422; Mozambique Written Statement, paras. 4.17–4.18; Sierra Leone Written Statement, paras. 76–79; WWF Written Statement, paras. 110–111.

²³ *Oxford English Dictionary*, “preserve”.

²⁴ Yoshifumi Tanaka, *Articles 1: Use of Terms and Scope*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Pröhl, 2017), p. 24.

1 The duty to restore did not arise as such in the *travaux préparatoires* of UNCLOS,
2 but it has become an important norm in international environmental law. It is linked
3 with the objective of enhancing ecosystem resilience, which, as Dr Cooley has
4 pointed out, is crucial to addressing the impacts of climate change. In a similar vein,
5 Principle 7 of the Rio Declaration provides that “States shall cooperate in a spirit of
6 global partnership to conserve, protect and restore the health and integrity of the
7 Earth’s ecosystem.”²⁵ And the 1995 Global Programme of Action speaks of
8 “facilitating the realization of States to preserve and protect the marine environment”
9 by assisting them to take measures to “recover” the marine environment “from the
10 impacts of land-based activities.”²⁶

11
12 The 1992 Convention on Biological Diversity, with 196 Contracting Parties, requires
13 States to “[r]ehabilitate and restore degraded ecosystems and promote the recovery
14 of threatened species.”²⁷ According to the Contracting Parties, ecological restoration
15 “refers to the process of managing or assisting the recovery of an ecosystem that
16 has been degraded, damaged or destroyed as a means of sustaining ecosystem
17 resilience and conserving biodiversity”.²⁸

18
19 Maintaining and improving ecosystem resilience is also one of the general principles
20 and approaches stipulated in the BBNJ Treaty.²⁹

21
22 So the duty to preserve includes reversing degradation and increasing resilience,
23 and it applies to the entire marine environment. This accords with UNCLOS as a
24 “living instrument”, as Professor Okowa has explained yesterday.

25
26 Mr President, members of the Tribunal, my last point is that the specific obligations
27 of States to protect and preserve the marine environment in relation to climate
28 change impacts include the obligation to protect marine ecosystems to increase their
29 resilience and enable them to continue to minimize the extent of climate change and
30 the extent to which the effects of climate change are felt in the atmosphere; and the
31 obligation to mitigate emissions. Professor Oral will address adaptation.

32
33 As Dr Cooley explained, and many States and organizations have recognized: the
34 ocean is currently the world’s primary carbon and heat sink, absorbing 26 per cent of
35 all carbon dioxide emissions and over 90 per cent of the excess heat generated by
36 these emissions.³⁰ It is not just the ocean water, but also the seagrass meadows,

²⁵ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I), Principle 7 (emphasis added).

²⁶ United Nations Environment Programme, *Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities*, UN Doc. UNEP(OCA)/LBA/IG.2/7 (5 December 1995), para. 3 (emphasis added).

²⁷ Convention on Biological Diversity (5 June 1992), Art. 8(f).

²⁸ CBD Conference of the Parties, Decision XIII/5 on Ecosystem Restoration: Short-Term Action Plan, CBD/COP/DEC/XIII/5 (10 December 2016) (Annex), para. 4.

²⁹ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023), Arts. 7(g)–(h), 17(c).

³⁰ Pierre Friedlingstein et al., *Global Carbon Budget 2022*, 14 EARTH SYSTEM SCIENCE DATA 4811 (2022), pp. 4814, 4834; Mauritius Written Statement, paras. 20, 65; Republic of Korea Written Statement, para. 23; Rwanda Written Statement, paras. 275, 278–279; Singapore Written Statement, para. 62.

1 tidal marshes and mangroves that form “blue carbon” ecosystems capable of
2 sequestering significant amounts of carbon dioxide.³¹

3
4 If these sinks are degraded by the effects of climate change,³² it will greatly reduce
5 the ocean’s ability to act as a heat and carbon sink. As Dr Cooley explained, this will
6 cause significant harm to the marine environment and magnify the effects of climate
7 change.

8
9 Article 192 therefore requires States to protect the marine environment to enable it to
10 continue to serve its function as a sink and in this way prevent further harm to the
11 marine environment, such as through ocean acidification. Measures include building
12 resilience in marine ecosystems, such as actively protecting tidal marshes,
13 mangroves and sea grasses. COSIS endorses the suggestions of other participants
14 in these proceedings to: protect coral reefs by reducing the effects of coastal runoff,
15 pollution, overfishing, and the presence of invasive species³³ and to address
16 microplastic pollution that inhibits the ability of global phytoplankton populations to
17 absorb carbon in the ocean.³⁴

18
19 To this end, States may be required to implement marine protected areas to protect
20 vulnerable ecosystems and species. The Chagos Marine Protected Area Tribunal
21 determined that the protection and preservation of the marine environment is not
22 limited to measures related to pollution control, and extends to the declaration of
23 marine protected areas.³⁵ As States and organizations have recommended in these
24 proceedings: the best available science indicates that States should establish marine
25 protected areas to help prevent sea-level rise and loss of biodiversity;³⁶ marine
26 protected areas may help fulfil the duty of due diligence, in particular for fragile
27 ecosystems.³⁷

28
29 The obligation to restore the marine environment entails engaging in sustainable
30 management and active restoration measures of degraded ecosystems, to conserve
31 and enhance the ocean’s carbon cycling services that underpin its role in the global
32 climate system. States should in particular enhance or restore habitats and improve
33 the conservation of species, such as whales, that help sequester large amounts of
34 carbon. States should rebuild overexploited or depleted fisheries.³⁸ These steps
35 would also enhance the ability of those ecosystems to withstand the effects of
36 climate change by enhancing their resilience.

³¹ UNESCO, UNESCO MARINE WORLD HERITAGE: CUSTODIANS OF THE GLOBE’S BLUE CARBON ASSETS (2021), p. 3, <https://unesdoc.unesco.org/ark:/48223/pf0000375565>.

³² IPCC, Working Group I, Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), pp. 743–46.

³³ Rwanda Written Statement, para. 280.

³⁴ Rwanda Written Statement, para. 281.

³⁵ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-0, Award (18 March 2015), paras. 320, 538.

³⁶ Chile Written Statement, paras. 97–101; Micronesia Written Statement, para. 62.

³⁷ European Union Written Statement, para. 21; Chile Written Statement, paras. 97–101, 120; Rwanda Written Statement, para. 272(b); Micronesia Written Statement, para. 62; IUCN Written Statement, paras. 128, 148.

³⁸ Mozambique Written Statement, paras. 4.17–4.18.

1 Importantly, this obligation must not be implemented in a manner that exacerbates
2 ocean acidification, such as, through ocean fertilization.³⁹

3
4 The obligation to mitigate concerns the impact of greenhouse gas emissions. The
5 IPCC's concrete recommendations for reducing emissions should be given effect in
6 the light of, and in a manner that will fulfil, the obligation to take all measures
7 necessary to protect and preserve marine biodiversity. This includes specific
8 measures to mitigate the intake of carbon dioxide by the ocean resulting in
9 acidification.

10
11 Dr Cooley and Ms Amirfar took you to the IPCC's findings regarding mitigation
12 measures that States must adopt to keep global warming within 1.5°C of pre-
13 industrial levels and avoid some of the most devastating consequences of climate
14 change, consequences that will in some instances be felt first and irreversibly by
15 vulnerable and fragile marine ecosystems such as warm-water coral reefs. I will
16 highlight a further concrete step that States should take towards mitigation:
17 substantive, transparent and comprehensive environmental impact assessments.

18
19 As Ms Amirfar stated regarding articles 194, if States have reasonable grounds to
20 believe that a development may cause substantial marine pollution, necessary
21 measures include the obligation of a State to conduct an environmental impact
22 assessment under articles 206, including the duty to monitor the effects of such
23 activities under articles 204. It is also an obligation of customary international law, as
24 recognized in the *Area Advisory Opinion*.⁴⁰ In the context of article 192,
25 environmental impact assessments should not be limited to the impact of pollution,
26 but extend to direct and indirect harm to the marine environment.⁴¹ COSIS endorses
27 the suggestion made in the written statements that environmental impact
28 assessments should "become a form of reflex for planned activities" and shared
29 consistently with articles 205 to ensure the public are fully informed;⁴² they should
30 "include the cumulative effects of climate change, ocean acidification, deoxygenation
31 and other related harms [The assessments] need to include socio-economic
32 impacts as well as ecological and physical dimensions."⁴³

33
34 In relation to their article 192 obligations, States are necessarily required to take
35 internal measures, such as the passing of legislation, the making of regulations, and
36 the taking of executive action, to ensure that these obligations are implemented.

37
38 In sum, the obligations to protect and preserve the marine environment are broad
39 and substantive. Under article 192, States are under specific substantive and
40 procedural obligations, including a duty of due diligence, to protect and preserve the
41 marine environment from the deleterious effects of climate change, in areas both

³⁹ IPCC, Working Group III, *Summary for Policymakers*, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE (2022), p. 36.

⁴⁰ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 145.

⁴¹ Belize Written Statement, para. 77.

⁴² Belize Written Statement, para. 81.

⁴³ IUCN Written Statement, para. 163. See also New Zealand Written Statement, para. 91; Belize Written Statement, para. 77; Mauritius Written Statement, paras. 83–84; Portugal Written Statement, para. 64; Rwanda Written Statement, para. 197.

1 within and beyond national jurisdiction, and regardless of the vector through which
2 those effects occur.

3

4 Mr President, members of the Tribunal, thank you for your kind attention. I ask that
5 you call Professor Oral to the podium to continue the submissions on the second
6 question before the Tribunal.

7

8 **THE PRESIDENT:** Thank you, Ms Webb. This brings us to the end of this morning's
9 sitting. The hearing will be resumed at 3.00 pm. The sitting is now closed.

10

11

(Lunch break)