

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Tuesday, 12 September 2023, at 3 p.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

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

List of delegations:

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

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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

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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

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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 afternoon. 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.

4
5 I now give the floor to Ms Oral to make a statement.

6
7 You have the floor, Madam.

8
9 **MS ORAL:** Mr President, distinguished members of the Tribunal, it is a distinct
10 honour to appear before you today on a matter of global importance and to do so on
11 behalf of COSIS.

12
13 On 4 August 2023, the media headlines read “Ocean heat record broken, with grim
14 implications for the planet.”¹ The latest information from Copernicus, the EU’s
15 climate change service, is that the ocean has hit its hottest ever recorded global
16 average of over 20°C.

17
18 There is no doubt that the health of the ocean is facing historic, if not unprecedented,
19 risks of harm due to the activities of humans. The only positive aspect to this grim
20 reality is that the very humans responsible can also take the necessary measures to
21 protect and preserve the ocean from the potentially catastrophic impacts of climate
22 change. In his message on World Ocean’s Day, Sir David Attenborough said, “The
23 ocean’s power of regeneration is remarkable – if we just offer it a chance.”

24
25 That is why we stand before this Tribunal seeking guidance on the legal obligations
26 under UNCLOS and international law for States to protect and preserve the ocean.

27
28 My learned colleague Professor Webb has just spoken on the scope and nature of
29 the article 192 obligation and the specific obligations to protect and mitigate. I will
30 now present on why States have an obligation to take adaptation measures in
31 response to the adverse consequences of climate change on the marine
32 environment.

33
34 In my presentation, I will first briefly lay out the scientific basis as to why States have
35 such obligation. Second, I will detail the specific obligations of States to implement
36 adaptation and resilience-strengthening measures under article 192 and international
37 law, including some key principles, as informed by other sources of international law.
38 Third, I will present my concluding remarks.

39
40 As we have heard from Dr Cooley and Dr Maharaj, as well as from Ms Amirfar, the
41 science is clear that climate change is having significant adverse impacts on the
42 marine environment. The science is also clear that the marine environment will
43 continue to suffer in both the high and low greenhouse gas emissions scenarios set
44 out in the IPCC assessment projections. It is now a question of the degree of harm
45 that will result which depends on our future emission pathway.² Unfortunately, our
46 current emission trajectory, if continued, shows a pathway to reach 2.8°C above pre-

¹ *Ocean Heat Record Broken, with Grim Implications for the Planet*, BBC NEWS (4 August 2023), <https://www.bbc.com/news/science-environment-66387537>

² UNEP, EMISSIONS GAP REPORT: THE CLOSING WINDOW (2022), p. XVI.

1 industrial levels, and not the target, 1.5°C, or even the higher threshold target of “well
2 below 2.0°C” under article 2 of the Paris Agreement.

3
4 In truth, even in the best-case scenario, that is the low-emission pathway, climate
5 change will continue to have adverse impacts on the ocean and the marine
6 environment. In projecting the future state of the ocean, the 2019 IPCC Special
7 Report on the Ocean and Cryosphere in a Changing Climate, included the following:

8
9 First, over the 21st century, it is virtually certain that the ocean will transition to
10 unprecedented conditions with increased temperatures.³

11
12 Second, continued carbon uptake by the ocean by 2100 is virtually certain to
13 exacerbate ocean acidification.⁴

14
15 Third, with very high confidence, marine heatwaves are projected to further
16 increase.⁵

17
18 Fourth, with high confidence, sea-level rise will continue at an increasing rate. By
19 2050, extreme sea level events that are historically rare – once per century – are
20 projected to occur at least once per year – in low and high emission scenarios,
21 especially in tropical regions.⁶

22
23 Fifth, with medium confidence, over the 21st century, there will be a decrease in
24 global biomass of marine animal communities, their production and fisheries catch
25 potential, and a shift in species composition under all emission scenarios. And with
26 high confidence, the rate and magnitude of decline are projected to be highest in the
27 tropics.⁷

28
29 And lastly, with high confidence, almost all warm-water coral reefs are projected to
30 suffer significant losses of area and local extinctions, even if global warming is
31 limited to 1.5°C.⁸

32
33 While the forecast for the marine environment appears to be one of certain decline, it
34 is critical to recognize that measures can be taken to reduce the negative impacts on
35 the marine environment. Indeed, the IPCC, in addition to presenting the ominous
36 picture of climate change and the ocean, also presents a path forward, observing
37 with high confidence that:

38
39 “The far-reaching services and options provided by ocean and cryosphere-related
40 ecosystems can be supported by protection, restoration, precautionary ecosystem-
41 based management of renewable resource use, and the reduction of pollution and
42 other stressors.”⁹

³ *Id.*, p. 18.

⁴ *Id.*, p. 19.

⁵ *Id.*

⁶ *Id.*, p. 20.

⁷ *Id.*, p. 22.

⁸ *Id.*, p. 25 (emphasis added).

⁹ *Id.*, p. 30 (emphasis added).

1 As Dr Cooley and Dr Maharaj explained yesterday, States must pursue adaptation at
2 the same time as mitigation to have any chance of protecting and preserving life in
3 Earth's most vulnerable marine ecosystems.

4
5 Mr President and distinguished members of the Tribunal, having presented the
6 scientific reality of what the future of climate change holds for the ocean and the
7 marine environment, I will now present why article 192 includes the obligation for
8 States to take adaptation and resilience-strengthening measures against the harmful
9 consequences of climate change on the ocean and marine environment.

10
11 While the term "adaptation" is not expressly referred to in UNCLOS, the Tribunal
12 may look to other sources for interpreting the Convention, as the tribunal did in the
13 *South China Sea* case in referring to the Convention on Biological Diversity for
14 defining "ecosystem".¹⁰ In this context and in relation to adaptation, I respectfully
15 draw the Tribunal's attention to the IPCC Sixth Assessment Working Group II Report
16 on "Impacts, Adaptation and Vulnerability", which represents one of the most
17 authoritative scientific sources for setting the international standards for taking
18 measures to address climate change.¹¹

19
20 The IPCC defines "adaption" as a "response to current climate change in *reducing*
21 *climate risks and vulnerability*".¹² Working Group II's contribution to the Sixth
22 Assessment Report stresses the importance of adaptation in playing a key role in
23 reducing climate-related risks along with the mitigation and sustainable development
24 and "in reducing exposure and vulnerability to climate change."¹³ By adopting
25 adaptation measures which strengthen the resilience to the adverse impacts of
26 climate change, we reduce the risks and vulnerability of the marine environment.

27
28 Both the IPCC Special Report on the Ocean and Cryosphere and the Sixth
29 Assessment Working Group II report underscore that "[c]onservation, protection and
30 restoration of terrestrial, freshwater, *coastal and ocean ecosystems*, together with
31 targeted management to adapt to unavoidable impacts of climate change, *reduces*
32 *the vulnerability of biodiversity to climate change*."¹⁴

33
34 As my colleague Professor Webb has just explained, article 192 creates a broad
35 substantive obligation to protect and preserve the marine environment that reflects
36 customary international law, which also includes protection against present harm and
37 preservation against future harm. In addition, the Tribunal has recognized that the

¹⁰ *South China Sea* (Philippines v. China), PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 945.

¹¹ IPCC, Working Group II, *Summary for Policymakers*, Sixth Assessment Report: Impacts, Adaptation and Vulnerability (2022), p. 20.

¹² IPCC, Working Group I, Annex VII: Glossary, Sixth Assessment Report: The Physical Science Basis (2021), p. 2216.

¹³ *Id.*, p. 5.

¹⁴ *Id.*, p. 24 (emphasis added). See IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 30.

1 duty to protect and preserve the marine environment is one of an *erga omnes* nature
2 in the high seas and the Area,¹⁵ and applies in all maritime areas.¹⁶

3
4 In view of the reality that the impacts of climate change are already harming the
5 marine environment and will continue to, we submit that States have a duty, under
6 article 192 of the Convention, as informed by other rules of international law, to
7 implement adaptation and resilience strengthening measures. That is, that the
8 positive obligation of States to take active measures, as pronounced by the Tribunal
9 in the *South China Sea* case, entails adaptation measures which are necessary to
10 build resilience against present and future harm from climate change. Moreover,
11 recalling that this Tribunal has held “the conservation of the living resources of the
12 sea is an element in the protection and preservation of the marine environment”,¹⁷
13 such obligation also applies to the conservation and management of living resources
14 in face of climate change.

15
16 Adaptation and increasing resilience to climate change are also core to the global
17 climate regime under the UNFCCC and the Paris Agreement. As my colleague
18 Professor Mbengue explained yesterday, UNCLOS and the climate change regime
19 should not be framed in exclusionary terms. The ultimate goal of stabilizing
20 greenhouse gas concentrations in the atmosphere under article 2 of the UNFCCC is
21 expressly linked to allowing natural ecosystems time to adapt to climate change.
22 However, science strongly indicates that we are at a point that, without human
23 intervention, such adaptation will not be possible.

24
25 Under the Paris Agreement, adaptation obligations were strengthened to be on par
26 with mitigation obligations. Article 7 establishes the global goal on adaptation of
27 enhancing adaptive capacity, strengthening resilience and reducing vulnerability to
28 climate change.

29
30 The Paris Agreement also recognizes the need to support developing countries in
31 meeting their adaptation needs. The adaptation needs for the Member States of
32 COSIS are, and – as the adverse impacts of climate change progress – will be
33 beyond their capacity to undertake. Meeting the needs of developing States in
34 relation to adaptation is also consistent with UNCLOS. The preamble of UNCLOS
35 links the “special interests and needs of developing countries” to the achievement of
36 a “just and equitable international order.” Similarly, in Part XIV of UNCLOS on the
37 development and transfer of marine technology, the needs of developing States are
38 underscored, which are also relevant to providing the means and tools for
39 adaptation.¹⁸

40
41 In recent years, the ocean has garnered greater attention under the UNFCCC. In
42 relation to adaptation, this was highlighted in the UNFCCC Nairobi Work Programme

¹⁵ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 180.

¹⁶ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS Rep. (2 April), para. 120 (affirmed in *South China Sea* (Philippines v. China), PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 940).

¹⁷ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Case Nos. 3 & 4), Order (Provisional Measures), 1999 ITLOS REP. 280 (27 August), para 70; *SRFC Advisory Opinion*, paras. 120, 216.

¹⁸ See, e.g., UNCLOS, articles 266, 269, 272.

1 on impacts, vulnerability and adaptation to climate change, which, while established
2 in 2005, only in 2018 included the ocean. Its 2020 report declared that “[u]rgent
3 actions are needed to *scale up adaptation* to climate change in the ocean and
4 coastal zones, and *build resilience* for the ocean, coastal areas and ecosystems.”¹⁹
5

6 Professor Mbengue has most eloquently presented the important developments in
7 strengthening the ocean-climate agenda under the UNFCCC. This includes the
8 launching by the COP27 Presidency of the Sharm-el-Sheikh Adaptation Agenda,²⁰
9 which provides insights into the adaptation measures to be taken. In relation to
10 coastal and ocean systems, the outcome included a financial target of investing
11 some US\$ 4 billion for 15 million hectares of mangroves globally to halt mangrove
12 loss that includes restoring half of recent losses. It also includes the goals of halting
13 loss, protecting and restoring coral reefs to support people in tropical communities,
14 and halting loss, protecting and restoring seagrass, marshes and kelp forests to
15 support people in temperate communities.²¹
16

17 The Tribunal may also look to the Convention on Biological Diversity, which has
18 near-universal membership of States, as another source to take into account in
19 assessing the obligation for States to take adaptation measures.²² Article 8,
20 paragraph (d), of the Convention provides for the obligation of States Parties to
21 promote the protection of ecosystems, natural habitats and the maintenance of
22 viable population of species in natural surroundings. This applies equally to the
23 marine environment, as the Convention applies to land and sea.
24

25 In addition, and more specifically, article 8, paragraph (f), of the Convention requires
26 States to: “Rehabilitate and restore degraded ecosystems and promote the recovery
27 of threatened species, inter alia, through the development and implementation of
28 plans or other management strategies” as far as possible and as appropriate. Again,
29 this applies equally to the marine environment.
30

31 In 2010, the parties to the Convention on Biological Diversity adopted
32 DECISION X/29 specifically addressing coastal and marine biodiversity.²³ These
33 decisions are important as they are adopted by consensus by the Parties and can be
34 read as part of the implementation and interpretation of the Convention.²⁴ The
35 Decision expressed its concern on “the adverse impact of climate change on marine
36 and coastal biodiversity” – listing as examples “sea level rise, ocean acidification,

¹⁹ UNFCCC – Nairobi Work Programme, Policy Brief on the Ocean (2020), p.1 (emphasis added).

²⁰ COP27, SHARM-EL-SHEIKH ADAPTATION AGENDA (November 2022), p. 8,
https://climatechampions.unfccc.int/wp-content/uploads/2022/11/SeS-Adaptation-Agenda_Complete-Report-COP27_FINAL-1.pdf.

²¹ *Id.*

²² The Convention on Biological Diversity, *opened for signature* 5 June 1992, 1760 UNTS 79 (*entered into force* 29 December 1993).

²³ CBD, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, UNEP/CBD/COP/DEC/X/29 (29 October 2010).

²⁴ See ILC, Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, UN Doc. A/CN.4/L/907 (2018), Conclusion 11.

1 and coral bleaching”.²⁵ The decision further stressed the importance of marine and
2 coastal biodiversity for the mitigation of and adaptation to climate change.²⁶

3
4 The same decision makes some 20 references to UNCLOS, underscoring the
5 synergistic relationship between the Convention on Biological Diversity and
6 UNCLOS. The decision specifically names UNCLOS as part of the applicable
7 international law “to achieve long-term conservation, management and sustainable
8 use of marine resources and coastal habitats,” including adaptation to climate
9 change.²⁷ This is an example of the harmonization and systematic integration
10 reflected in article 31, paragraph 3, subparagraph (c), of the Vienna Convention on
11 the Law of Treaties that promotes a single set of compatible obligations.²⁸ In this
12 case, the compatibility is without question.

13
14 More recently, States Parties adopted by consensus the Post-2020 Biodiversity
15 Framework under the Convention on Biological Diversity which aims to promote
16 urgent and transformative action by governments and other actors to halt and
17 reverse the loss of biodiversity, which necessarily applies to marine biodiversity.
18 According to Target 8, States Parties are to “[m]inimize the impact of climate change
19 and ocean acidification on biodiversity and increase its resilience through mitigation,
20 adaptation, and disaster risk reduction actions, including through nature-based
21 solutions and/or ecosystem-based approaches, while minimizing negative and
22 fostering positive impacts of climate [change] on biodiversity.”²⁹

23
24 The recently adopted BBNJ Agreement,³⁰ which is the first legally binding instrument
25 adopted under UNCLOS to make express reference to climate change, includes
26 among its objectives to “[p]rotect, preserve, restore and maintain biological diversity
27 and ecosystems, including with a view to enhancing their productivity and health,
28 and strengthen resilience to stressors, including those related to climate change,
29 ocean acidification and marine pollution.”³¹ The Agreement was adopted by
30 consensus, reflecting the shared understanding by States of the need to take active
31 measures against climate change for the protection and preservation of the marine
32 environment.

33
34 It is also important to take into account the Sustainable Development Goals which
35 were adopted by consensus by the General Assembly in 2015.³² The SDG 14 on the
36 ocean underscores the need and obligation for States to undertake adaptation,
37 resilience and restoration measures for the protection and preservation of the marine
38 environment.

39
40 Specifically, SDG 14.2 highlights the preventive function of adaptation and sets a
41 target for States to “sustainably manage and protect marine and coastal ecosystems

²⁵ CBD, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, UNEP/CBD/COP/DEC/X/29 (29 October 2010), para. 7.

²⁶ *Id.*, para. 8.

²⁷ *Id.*, para. 15.

²⁸ COSIS Written Statement, para. 352.

²⁹ *Ibid.*

³⁰ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023).

³¹ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023), article 17.

³² UNGA, Transforming Our World: the 200 Agenda for Sustainable Development, A/RES/70/1 (25 September 2015).

1 to avoid significant adverse impacts, including by strengthening their resilience, and
2 to take action for their restoration in order to achieve healthy and productive oceans”
3 by 2020.

4
5 SDG 14.3 further identifies the target to “[m]inimize and address the impacts of
6 ocean acidification, including through enhanced scientific cooperation at all levels.”
7

8 Admittedly, adaptation to climate change is a broad concept that involves various
9 types of responses to climate change ranging from physical measures to biological
10 responses. Many examples of biological adaptation measures especially relevant for
11 the marine environment were listed in the 2019 IPCC Special Report on the Ocean
12 and Cryosphere, such as:

13
14 The establishment of networks of protected areas;

15
16 Terrestrial and marine habitat restoration, and use of an ecosystem management
17 tool;

18
19 Strengthening precautionary approaches, such as rebuilding overexploited or
20 depleted fisheries;

21
22 and restoration of vegetated coastal ecosystems, such as mangroves, tidal marshes
23 and seagrass meadows.³³
24

25 Adaptation also includes the application of certain principles that have wide
26 recognition in the international community. These have been referred to in the
27 instruments I have mentioned and others. These principles include the adoption of
28 the precautionary approach and the ecosystem approach. The precautionary
29 approach has been recognized by the Tribunal, dating back to the 1999 *Southern*
30 *Bluefin Tuna* provisional order. The Seabed Chamber observed in the 2011 *Activities*
31 *in the Area* Advisory Opinion “that the precautionary approach has been
32 incorporated into a growing number of international treaties and other instruments,
33 many of which reflect the formulation of Principle 15 of the Rio Declaration. In the
34 view of the Chamber, this has initiated a trend towards making this approach part of
35 customary international law.”³⁴
36

37 In relation to the ecosystem approach, as observed by Churchill, Lowe and Sanders,
38 while not expressly referred to in UNCLOS, it is reflected in article 61, paragraph 4,
39 wherein coastal States, in taking measures to maintain or restore species, are
40 required to take into account effects on associated or dependent species.³⁵ The
41 need to protect ecosystems was later expressly recognized by States under
42 Principle 7 of the 1992 Rio Declaration. The ecosystem approach was subsequently
43 adopted in article 5 of the 1995 Fish Stocks Agreement.³⁶

³³ IPCC, *Summary for Policymakers*, Special Report on the Ocean and Cryosphere in a Changing Climate (2019), p. 30.

³⁴ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 135.

³⁵ R. CHURCHILL, V. Lowe, & A. SANDER, *THE LAW OF THE SEA* (4th ed. April 2022), pp. 537, 617–618.

³⁶ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I), Principle 7; United Nations Conference on

1 Most recently, the ecosystem approach was adopted in article 7 of the BBNJ
2 Agreement as one of the applicable principles. Moreover, article 5(g) expressly
3 provides for “[a]n approach that builds ecosystems’ resilience, including to the
4 adverse effects of climate change and ocean acidification, and also maintains and
5 restores ecosystem integrity, including the carbon-cycling services that underpin the
6 role of the ocean in [the] climate.”³⁷

7
8 The IPCC Special Report on the Ocean and Cryosphere further recognized the
9 importance of nature-based or ecosystem-based adaptation and “[t]he use of
10 biodiversity and ecosystem services as part of an overall adaptation strategy to help
11 people to adapt to the adverse effects of climate change.”³⁸

12
13 Mr President, and distinguished members of the Tribunal, in conclusion, while we still
14 have the window of opportunity, and in the light of the overwhelming scientific
15 evidence, we submit that adaptation is a necessary measure together with mitigation
16 for responding to the harmful impacts of climate change on the marine environment
17 and is included in the independent obligations reflected in article 192.

18
19 In response to the second question before the Tribunal, and fully incorporating the
20 specific obligations set out by Ms Amirfar and the presentation by Dr Cooley and
21 Dr Maharaj, in answer to the first question, States Parties must, at a minimum and as
22 a matter of urgency:

23
24 Take measures necessary to protect the marine environment, including but not
25 limited to, taking action to enable the ocean to continue to serve its function as a
26 carbon sink, and to build resilience through establishing marine protected areas;

27
28 To this end, take measures necessary to mitigate the risk of harm to the marine
29 environment, including but not limited to, mitigating greenhouse gas emissions in line
30 with current and best available scientific and international standards. This includes
31 undertaking substantive, transparent and comprehensive environmental impact
32 assessments;

33
34 Take measures necessary to preserve the marine environment, including but not
35 limited to, restoring degraded ecosystems and conserving species that help
36 sequester carbon;

37
38 In light of the obligations to protect and preserve the marine environment, take
39 measures necessary to adapt to the adverse effects of climate change, including but
40 not limited to, adopting nature-based or ecosystem-based approaches and
41 protecting and restoring coral reefs, seagrass, marshes and kelp forests; and

42
43 Assist developing States in meeting their adaptation needs in the face of the adverse
44 impacts of sea-level rise on the marine environment and marine living resources.

Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) *A/RES/48/194* (adopted 4 August 1995).

³⁷ BBNJ Treaty, articles 7(f), 7(h).

³⁸ IPCC, *Chapter 5: Changing Ocean, Marine Ecosystems, and Dependent Communities*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 525.

1 Mr President, distinguished members of the Tribunal, that concludes my submissions
2 to you today. May I now ask you to please invite Dr Conway Blake to address you.

3
4 **THE PRESIDENT:** Thank you, Ms Oral. I now give the floor to Mr Blake to make his
5 statement. You have the floor, Sir.

6
7 **MR BLAKE:** Mr President, honourable members of the Tribunal, good afternoon. It
8 truly a privilege to appear before you today on behalf of COSIS.

9
10 Now, the Tribunal has already heard detailed and compelling submissions on States'
11 substantive obligations under articles 194 and 192 of UNCLOS. I will be addressing
12 a fundamental overarching obligation that runs throughout UNCLOS Part XII: the
13 duty of international cooperation.

14
15 The stark reality is that no single State acting alone can fix the climate crisis or
16 protect the ocean from the devastation wrought by greenhouse gas emissions. To be
17 sure, the primary duty rests on each State to ensure that it takes all possible
18 measures within its jurisdiction, within its control and within its economic means to
19 address marine pollution from climate change. However, climate change is a
20 quintessentially global problem and therefore it also demands a collective response.
21 International cooperation is therefore necessary if States are to effectively address
22 climate-induced damage to the marine environment.

23
24 Now, the duty of States to cooperate in this context is not dependent on the whims of
25 charity or the dictates of political expediency. As I will come on to explain,
26 international cooperation under UNCLOS Part XII is grounded in hard-edged and
27 binding treaty obligations, which mandate that States engage in concrete collective
28 and equitable actions to address the adverse impacts of climate change.

29
30 The remainder of my remarks will be dedicated to examining the scope and content
31 of these cooperation obligations.

32
33 The duty of international cooperation is a normative pillar of UNCLOS Part XII. The
34 duty is enshrined in, among other provisions, articles 192, 194, 202 and 203 of
35 UNCLOS. And to be more specific, there are over 26 separate references to
36 obligations of cooperation in Part XII. These are all binding obligations. To adopt the
37 terminology used in the *Area Advisory Opinion* – the cooperation obligations under
38 Part XII are “direct obligations” incumbent on all States Parties.¹

39
40 At their core, the cooperation obligations under Part XII require that States engage in
41 genuine and meaningful actions on the international level, oriented towards the
42 protection of the marine environment. Like all other international obligations – the
43 duty of cooperation must be carried out in good faith.² Accordingly, UNCLOS
44 requires that States engage with each other with a real intent to protect and preserve
45 the marine environment. It is not sufficient simply to engage in rhetorical or symbolic
46 acts.

¹ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 121.

² See e.g., Australia Written Statement, para. 58; France Written Statement, para. 158; United Kingdom Written Statement, para. 84.

1 Broadly speaking, UNCLOS imposes three categories of cooperation obligations on
2 States Parties: obligations to harmonize laws, policies and procedures; obligations to
3 take cooperative action through international organizations; and finally, obligations to
4 grant assistance to developing States. And I will address each of these in turn.

5
6 First, Part XII of UNCLOS mandates that States coordinate and harmonize their
7 policies and laws regarding pollution of the marine environment, including in the
8 context of climate change. Now, this general obligation is found in articles 194 and is
9 further elaborated in articles 207 and 208. Article 194(1) sets down the general
10 obligation of States Parties to “individually or jointly” take all measures necessary to
11 prevent, reduce, and control pollution of the marine environment, and work “to
12 harmonize their policies in this connection.”

13
14 This obligation to harmonize requires States to collectively formulate and direct
15 policies to address marine pollution from all possible sources. Thus: article 194(3)
16 makes clear that States Parties must harmonize policies in connection with pollution
17 “through the atmosphere”; article 207(3) requires States Parties to harmonize
18 policies relating to pollution from land-based sources; and article 208(4) requires the
19 same, but in respect of pollution from seabed activities and artificial islands, and
20 installations and structures in the ocean.

21
22 The obligation to harmonize policies is crucial for full compliance with UNCLOS
23 Part XII. If States adopt divergent or conflicting standards and regulatory
24 approaches, the international community will fail, will fail to effectively address the
25 problem of climate-induced harm to the marine environment.

26
27 Further, as my colleague, Ms Amirfar, explained, UNCLOS dictates that the
28 formulation and harmonization of global policy responses to climate change must be
29 informed by the best available scientific knowledge. Only then can we be assured of
30 the effectiveness of States’ joint efforts to prevent, reduce and control marine
31 pollution.

32
33 I want to turn next to the second category of obligations: the obligation to take
34 cooperative action through international organizations.

35
36 Now, international organizations are perhaps the most obvious and typical vehicles
37 for inter-State cooperation, and the management of global problems. Against this
38 background, Part XII of UNCLOS requires States to take concrete cooperative steps
39 through competent international organizations to prevent, reduce and control
40 pollution of the marine environment, and minimize its effects.

41
42 States are required, for example, to work through international organizations to set
43 environmental norms and standards. Under articles 197, States Parties must
44 cooperate either “directly or through competent international organizations, in
45 formulating and elaborating international rules, standards and recommended
46 practices and procedures . . . for the protection and preservation of the marine
47 environment”.

48
49 The obligation to engage in norm and standard setting in international organizations
50 is reflected in other UNCLOS provisions dealing with marine pollution. Article 207(4),

1 for example, provides that, in confronting land-based sources of marine pollution,
2 States Parties must “through competent international organizations or diplomatic
3 conferences, . . . endeavour to establish” rules and practices “taking into account...
4 the economic capacity of developing States . . . [.]”
5

6 COSIS itself is a manifestation of this form of cooperation. It was formed to promote
7 and develop international law norms concerning climate change.
8

9 In addition to norm and standard setting, UNCLOS also requires that States take
10 specific steps through international organizations to prevent, reduce and control
11 pollution of the marine environment, and minimize its impacts.³ Those obligations are
12 elaborated at paragraph 326 of COSIS’s written statement. I do not propose to
13 traverse those submissions today, except to emphasize the point that States are
14 required to deploy necessary means and do their utmost in the context of the various
15 organs and activities within international organizations to achieve the aim of
16 minimizing harm to the marine environment.
17

18 I turn now to the third and final set of cooperation obligations: the duty to cooperate
19 with and assist developing States.
20

21 In agreeing to the terms of Part XII, the States Parties acknowledged that tackling
22 global environmental problems requires international solidarity, and the need for
23 common but differentiated responsibilities among States.
24

25 Common but differentiated responsibilities are particularly important in the context of
26 climate change, where the evidence shows (i) that advanced economies have
27 historically contributed more to the production of GHG than less advanced
28 economies,⁴ and (ii) that developing States have fewer resources and less technical
29 capacity to contribute to combating the climate crisis.⁵
30

31 Consistent with that approach, articles 202 and 203 of UNCLOS impose binding
32 obligations on States Parties to assist developing States in their efforts to protect and
33 preserve the marine environment. For example, article 202(a) mandates that States
34 Parties must “promote programmes of scientific, educational, technical and other
35 resources to developing States for the . . . prevention, reduction and control of
36 marine pollution.” It also specifies that the assistance must include, for example,
37 “training of their scientific and technical personnel”, “supplying them with necessary
38 equipment and facilities” and “enhancing their capacity to manufacture such
39 equipment”. The duties of scientific and technological assistance are further
40 reinforced in articles 266, 276 and 277 of UNCLOS. For example, articles 276 and
41 277 require States to “promote ... the establishment of regional marine scientific and
42 technological research centres, particularly in developing States,” including to
43 promote “study programmes related to the protection and preservation of the marine
44 environment and the prevention, reduction and control of pollution.”
45

³ See COSIS Written Statement, para. 326.

⁴ IPCC, Working Group III, Chapter 2: Emissions Trends and Drivers, Sixth Assessment Report: Mitigation of Climate Change (2022), pp. 218–219.

⁵ IPCC, Working Group II, Chapter 15: Small Islands, Sixth Assessment Report: Impacts, Adaptation and Vulnerability (2022), pp. 2047, 2073, 2088–2089.

1 These obligations of scientific and technological assistance are particularly important
2 for small island developing States. For example, Dr Maharaj explained in her expert
3 report that significant gaps in available data severely limit the ability of scientists and
4 policymakers to evaluate, plan for, and adapt to the significant impact of climate
5 change on small islands and their marine environment.⁶
6

7 This is only one example of the many areas in which developing States must be
8 assisted, if our collective response to climate change is to be effective.
9

10 In addition to technical and scientific assistance, States Parties are also required
11 under Part XII to provide financial assistance to developing States in relation to the
12 preservation and protection of the marine environment.
13

14 The provision of financial assistance to developing States is one of the many
15 measures envisaged under article 194(1). It is certainly a measure that is necessary
16 for the achievement of the environmental aims specified in UNCLOS Part XII.
17

18 The provision of financial assistance is also expressly contemplated in Part XII. For
19 example, article 203 expressly grants developing States “preference” in “the
20 allocation of appropriate funds.”
21

22 Article 202 also clearly envisages financial assistance when requiring States to
23 provide “other assistance” and “appropriate assistance” to developing States, which
24 is separate and distinct from scientific, educational and technical assistance.
25

26 The importance of financial assistance to developing States cannot be exaggerated.
27 Such funding can help to fill the debilitating data gaps that I have just mentioned. Dr
28 Maharaj has also explained that developing States need funding to replenish capital
29 resources that are being eroded by, for example, the high costs of rebuilding from
30 extreme weather events.⁷
31

32 The economies of small island developing States are characterized by their
33 miniscule size and vulnerability to myriad external shocks. Despite those
34 vulnerabilities, these island States often cannot access certain concessionary
35 finance because of their GNI per capita ranking.⁸ This ranking results in many small
36 island developing States being ineligible to receive support other than in the form of
37 loans from financial institutions or other developing countries.⁹
38

39 This results in a cycle where many small island States are subject to destructive
40 events of the changing climate, and are then required to take punitive loans or rely
41 on the goodwill of other nations to rebuild from the damage.¹⁰ That is not a fair or
42 equitable outcome, particularly given that small islands make only negligible

⁶ Annex 5, Maharaj Report, paras. 10–12.

⁷ *Id.* at paras. 92–95.

⁸ UN Off. High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Finance for Development of Small Island Developing States* (2022), p. 42.

⁹ *Ibid.*

¹⁰ See *id.*; IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 2073.

1 contributions to greenhouse gas emissions and climate change, and are heavily
2 reliant on large ocean spaces.

3
4 The obligation to assist must therefore mean that existing methods of climate finance
5 fall to be re-evaluated. As Dr Maharaj explained, large amounts of financial
6 assistance have been provided through high-interest loans, which severely limit the
7 access to finance for recovery and adaptation from climate-related impacts.¹¹ It is far
8 from clear that these financial obligations and arrangements comply with obligations
9 under UNCLOS Part XII.

10
11 It is important to note that UNCLOS does not impose a hierarchy of different forms of
12 assistance. States Parties are required – working jointly – to adopt all measures
13 necessary to address the issue of harm to the marine environment. This will require
14 different forms of international assistance, financial and non-financial, as is
15 appropriate in each case.

16
17 Now, before drawing to a close, I must briefly address a few written statements
18 which seek to cast some doubt on the robustness of the cooperation obligations
19 under Part XII.

20
21 It has been suggested, for example, that the duty to cooperate may dilute the
22 individual obligations of States.¹² That view is, with respect, misconceived. As
23 Professor Brunnée noted, in addition to the duties of cooperation under Part XII,
24 each State remains subject to their individual UNCLOS obligations to adopt rules
25 and measures to protect the marine environment from harm due to greenhouse gas
26 emissions. The duty of cooperation is complementary to the other obligations.
27 Compliance with the duty to cooperate does not and cannot absolve States from
28 their independent, individual duties to adopt measures to prevent, reduce and limit
29 the adverse effects of climate change. And it is a fallacy to put cooperation in
30 opposition to States' binding individual obligations.

31
32 It has also been a suggestion, in a small number of written statements, that the duty
33 to cooperate is fulfilled simply through compliance with the UNFCCC or the Paris
34 Agreement.¹³ However, as my colleagues have already explained, while climate
35 change treaties may be relevant to States' obligations under UNCLOS, those
36 instruments cannot displace the Convention's specific obligations for the protection
37 and preservation of the marine environment. Part XII enshrines specific and
38 autonomous obligations with respect to international cooperation, which pertain
39 specially to the marine environment and which go considerably farther than existing
40 climate regimes.

41
42 In summary, UNCLOS imposes clear obligations on States Parties to cooperate as
43 to achieve the environmental objectives set out in Part XII.

44
45 These duties of cooperation are not based on charity or political expediency; they
46 are binding international obligations.

¹¹ Annex 5, Maharaj Report, para. 95.

¹² New Zealand Written Statement, para. 69.

¹³ See, e.g., Australia Written Statement, para. 61; France Written Statement, para. 125; European Union Written Statement, paras. 81–82.

1 These obligations require, among other things, genuine coordinated legal, scientific
2 and institutional responses from States. They also require appropriate assistance to
3 developing States in their efforts to battle the adverse impacts of climate change.
4

5 Cooperation obligations do not operate to dilute the general obligations under Part
6 XII, but instead to complement States' individual duties with respect to climate
7 change. Robust individual and collective action is required to effectively tackle the
8 problem of climate change.
9

10 In the *MOX Plant* decision, this Tribunal affirmed that "the duty to cooperate is a
11 fundamental principle in the prevention of pollution of the marine environment under
12 Part XII of the Convention. . . [.]"¹⁴ We urge the Tribunal to similarly recognize and
13 affirm the importance of international cooperation within the scheme of UNCLOS
14 relating to climate change.
15

16 Mr President, distinguished members of the Tribunal, this concludes my
17 observations. Thank you for your kind attention. I now yield the floor to Ambassador
18 Charles.
19

20 **THE PRESIDENT:** Thank you, Mr Blake. I now give the floor to Mr Charles to make
21 his statement. You have the floor, Sir.
22

23 **MR CHARLES:** Mr President, members of the Tribunal, good afternoon. I am
24 honoured to address you on matters related to the interpretation of the provisions of
25 the 1982 United Nations Convention on the Law of the Sea, also known as the
26 Montego Bay Convention, on behalf of the Commission of Small Island States on
27 Climate Change and International Law.
28

29 My task today is to explain how the present request for an advisory opinion
30 complements ongoing diplomatic efforts to tackle the climate crisis.
31

32 I will do so as a lecturer in law at the University of the West Indies and as a former
33 diplomat and international law expert with over 25 years of experience in bilateral
34 and multilateral negotiations, public international law, environmental law and the law
35 of the sea. In particular, and among other functions, I currently serve as the Special
36 Representative of the Secretary-General of the International Seabed Authority for the
37 Enterprise. I am a former Ambassador Extraordinary and Plenipotentiary of Trinidad
38 and Tobago to the United Nations. I was elected Chairman of the Sixth Committee of
39 the United Nations General Assembly for its 70th session. I was appointed by the
40 President of the United Nations General Assembly as the first Chairman of the
41 Preparatory Committee for the conclusion of an international legally binding
42 agreement under the Convention on the conservation and sustainable use of marine
43 biological diversity beyond areas of national jurisdiction. And, as well, I was the
44 Coordinator of the annual omnibus resolution on Ocean Affairs and the Law of the
45 Sea for four years.
46

47 My speech will proceed in three parts.

¹⁴ *MOX Plant Case (Ireland v. United Kingdom)*, Order, 3 December 2001, para. 82 (hereinafter "*MOX Plant*").

1
2 *First*, I will explain that COSIS is situated within a broader international tradition of
3 multilateral cooperation to resolve global issues, of which climate change is currently
4 the most pressing.

5
6 *Second*, I will demonstrate that advisory opinions have a proven history of advancing
7 diplomatic negotiations.

8
9 *Third*, I will illustrate how an advisory opinion in these proceedings will complement
10 the broader diplomatic efforts on the climate crisis.

11
12 Mr President, members of the Tribunal, you have a crucial role to play by providing
13 much needed clarification and guidance on the existing requirements that
14 international law imposes on States with regard to climate change. A precise,
15 concrete and definitive statement of those existing legal requirements from this
16 Tribunal will be of invaluable assistance to the ongoing diplomatic negotiations
17 around the climate crisis.

18
19 Since the founding of the United Nations, States have come together on the basis of
20 regional, economic, political and other interests to form groupings to advance their
21 interests within the wider framework of the UN.

22
23 More specifically, we have often witnessed over the years Member States working
24 together to negotiate recommendations and devise solutions, which are then brought
25 to the wider table of the UN General Assembly for adoption. This has been
26 observed, for example, in order to bring about global multilateral measures to
27 address multilateral problems, including in the negotiation and adoption of treaties.

28
29 There are countless examples of such groupings that I could point to, many of them
30 very large. The Group of 77 and China in particular comes to mind: it consists of over
31 130 States, which come together within the confines of the UN and other bodies to
32 negotiate and safeguard their interests without prejudice to bringing about
33 agreement on issues within wider diplomatic entities to which they belong.¹

34
35 UNCLOS itself is a framework agreement composed of carefully balanced rights and
36 obligations related to the rule of law and ocean governance. An example of the
37 negotiating history of UNCLOS will show that it was the Group of Latin American and
38 Caribbean States which proposed the creation of the Enterprise as a unique
39 international commercial entity established under the regime of Part XI of UNCLOS,
40 as amended by the 1994 Agreement on its Implementation.²

41
42 COSIS is operating within this well-established diplomatic tradition and, with respect
43 to its request for an advisory opinion from this Tribunal, under the auspices of an
44 international agreement that is well-suited to multilateral cooperation.

45
46 COSIS, while new, is a fit-for-purpose vehicle to assist Small Island Developing
47 States (SIDS) in seeking multilateral solutions to tackle issues related to the clear

¹ *The Group of 77 at the United Nations, G77*, <https://www.g77.org/>

² U.N. GAOR, 77th Sess., 48th plen. mtg. at 14-15, U.N. Doc. A/77/PV.48.

1 and present danger that climate change poses to their sustainable development, and
2 in some cases, their very existence as members of the international community.³

3
4 COSIS membership is broad, not narrow. It is open to all members of the Alliance of
5 Small Island States (AOSIS).⁴ So, it builds on existing diplomatic ties. AOSIS, which
6 has a membership of 39 SIDS, is a recognized intergovernmental organization which
7 was established in 1990 during the Second World Climate Conference in Geneva.⁵
8 AOSIS plays an integral role in carrying out advocacy for small island States and
9 influencing international environmental policy. It has participated in and continues to
10 shape multilateral negotiations on climate change.⁶

11
12 COSIS intends to advance the successes of AOSIS,⁷ including by facilitating the
13 urgently-needed clarification on States' international obligations as they relate to
14 climate change and the marine environment through its request for this advisory
15 opinion.

16
17 Indeed, and this takes me to my second point, such opinions have proven invaluable
18 in the past.

19
20 Mr President, members of the Tribunal, I can say that I have seen firsthand how a
21 clear and well-reasoned advisory opinion can assist in diplomatic negotiations.
22 I recall that in 2010, members of the Council of the International Seabed Authority,
23 while negotiating aspects of the mining code for deep seabed mining, requested an
24 advisory opinion from the Seabed Disputes Chamber relating to responsibilities and
25 obligations of States sponsoring persons and entities with respect to activities in the
26 Area.⁸

27
28 The well-written advisory opinion that resulted from this request proved to be very
29 timely and useful, as it provided much needed guidance to members of the Council
30 of the ISA, who relied on its contents concerning the responsibilities and obligations
31 of States in drafting the exploitation code for minerals in the Area.⁹ The opinion also
32 aided States in drafting national legislation on deep seabed mining.¹⁰

33
34 Similar approaches have been adopted by other intergovernmental bodies related to
35 obligations under UNCLOS.

36
37 In this regard, members of the Tribunal, you will recall further that request for an
38 advisory opinion of the Conference of Ministers of the Sub-Regional Fisheries

³ COSIS Agreement, Preamble.

⁴ COSIS Agreement, articles 3(1).

⁵ *Bureau of the AOSIS*, UNITED NATIONS, <https://www.un.org/ohrlls/content/bureau-aosis>.

⁶ *Issues: Climate Change*, ALLIANCE OF SMALL ISLANDS STATES, <https://www.aosis.org/issues/>.

⁷ COSIS Agreement, Preamble.

⁸ *See generally Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February).

⁹ *See generally International Seabed Authority, Commentary on Draft Regulations on Exploitation of Minerals in the Area*, U.N. Doc. ISBA/25/C/WP.1 (22 March 2019).

¹⁰ Donald K. Anton, Robert A. Makgill, & Cymie R. Payne, *Seabed Mining Advisory Opinion on Responsibility and Liability*, 41 ENVIRONMENTAL POLICY AND LAW 60 (2011), p. 65.

1 Commission (SRFC).¹¹ This was done in keeping with article 33 of the Convention
2 on the Determination of the Minimal Conditions for Access and Exploitation of Marine
3 Resources within the Maritime Areas under Jurisdiction of the Member States of the
4 SRFC. It should be noted further that the questions put to the Tribunal concerned
5 obligations of States flowing from an international, legally binding instrument without
6 prejudice to diplomatic work being conducted.

7
8 As it has proven to be the case in the past, an advisory opinion issued by this
9 Tribunal has the power to assist diplomatic efforts to combat climate change by
10 providing the concrete guidance that is so desperately needed.

11
12 Therefore, the suggestion, made in some written statements that COSIS's advisory
13 request risks disturbing a hypothetical equilibrium reached in State negotiations and
14 may impede further diplomatic progress, is profoundly mistaken.¹² In fact, it is
15 precisely the contrary that is the case.

16
17 The international need for guidance on climate-related issues could not be clearer. In
18 March of this year, the UN General Assembly adopted its resolution requesting an
19 advisory opinion from the ICJ on the obligations of States with respect to climate
20 change. This resolution had been supported by 105 co-sponsors.¹³

21
22 This advisory request is part and parcel of this international consensus that clear
23 answers are required on the legal framework within which diplomatic efforts
24 concerning climate change must move forward.

25
26 Many will be guided by this Tribunal's advisory opinion. States, whether States
27 Parties to the Convention or those which have accepted its provisions as rules of
28 customary international law, are required to discharge their obligations under Part XII
29 of the Convention related to the protection of the marine environment.

30
31 UNCLOS itself requires States to cooperate, including through international
32 organizations, to, for example, protect and preserve the marine environment.

33
34 The duty of cooperation means that an advisory opinion will complement diplomatic
35 relations because the very terms of UNCLOS require such cooperation.¹⁴ Already,
36 members of COSIS, AOSIS, as well as other States Parties to UNCLOS, treat these
37 issues within the rubric of the annual Meetings of States Parties to UNCLOS which
38 take place at UN Headquarters.¹⁵

¹¹ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS Rep. (2 April).

¹² See e.g., France Written Statement, para. 27; Japan Written Statement, p. 3; United Kingdom Written Statement, para. 7.

¹³ UN General Assembly, Resolution 77/276, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, A/RES/77/276 (29 March 2023).

¹⁴ COSIS Written Statement, Volume I, paras. 316–336.

¹⁵ UNCLOS, *Report of the Thirty-third Meeting of States Parties*, UN Doc. SPLOS/33/15 (2023). See also *Thirty-Third Meeting of States Parties to United Nations Convention on Law of Sea to Be Held at Headquarters, 12-16 June*, UN Press (9 June 2023), <https://press.un.org/en/2023/sea2179.doc.htm>.

1 The advisory opinion, and its request for clarification on the obligations under
2 Part XII of UNCLOS, will expand rather than restrict international discussion around
3 climate change.

4
5 And, in fact, States Parties have consistently made statements at the UN General
6 Assembly in support of measures aimed at addressing matters related to but not
7 exclusive to obligations flowing from Part XII of UNCLOS.

8
9 For example, the resolution on Ocean Affairs and the Law of the Sea, negotiated and
10 adopted annually by members of the United Nations General Assembly, afforded
11 States the opportunity to address issues on the protection and preservation of the
12 marine environment.¹⁶ During the general debate in support of this omnibus
13 resolution, States individually, and also as groupings representing, the Caribbean
14 Community, AOSIS, the G77 and China, and others, made interventions in support
15 of this soft law instrument, which were not viewed as contradictory or in opposition to
16 the diplomatic efforts they pursue during the annual Meetings of States Parties to the
17 Convention.¹⁷

18
19 Also, very recently the international community witnessed the adoption by the UN
20 General Assembly of an instrument called the BBNJ Agreement that only addressed
21 an aspect of State obligations under UNCLOS.¹⁸ This, Mr President, is a historic
22 agreement on the conservation and sustainable use of marine biological diversity
23 beyond areas of national jurisdiction. It was borne out of diplomatic efforts to ensure
24 that marine biological resources are conserved and sustainably used for the benefit
25 of all humankind.

26
27 The fact that the BBNJ Agreement was adopted by consensus demonstrates the
28 robust ability of multilateral diplomacy to resolve matters confronting the international
29 community, including matters related to the rule of law governing those resources
30 which are not within the national jurisdiction of any State. The negotiation of the
31 Agreement was seen as complementary to and reinforcing of, as well as elaborating
32 on, general provisions of the Convention on matters related to BBNJ.

33
34 It is in this context, Mr President and members of the Tribunal, that the COSIS
35 request for an advisory opinion must be viewed.

36
37 Here, Mr President, I wish to pause and emphasize an important point. Everyone
38 can read the plain text of Part XII of UNCLOS. We know that Part XII requires States
39 to protect and preserve the marine environment, as stated in article 192. We can all
40 read the language of article 194 and the language of other articles in Part XII.

41
42 What is much needed, what is urgently needed from you, is concrete and specific
43 guidance. We need this Tribunal to go beyond the obvious text of UNCLOS and tell

¹⁶ See, e.g., UN General Assembly, Resolution adopted by the General Assembly on 30 December 2022, UN Doc. A/RES/77/248 (9 January 2023).

¹⁷ *General Assembly Lauds Success of Law of Sea Convention, But Deplores Sea-Level Rise, Lack of Support for Small Island Nations, Increased Maritime Risks*, UN PRESS (8 December 2022), <https://press.un.org/en/2022/ga12479.doc.htm>.

¹⁸ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023).

1 us, concretely, specifically, what this all-important text means and how it is to be
2 applied when it comes to climate change.

3
4 Such an advisory opinion will guide the conduct of States in complying with their
5 obligations which flow from the Convention and assist them in continuing to
6 negotiate a more ambitious global climate regime, allowing them to make more
7 progress towards meeting international standards. This is not only beneficial to Small
8 Island Developing States, but also to other members of the international community.

9
10 Ultimately, therefore, COSIS's request for an advisory opinion is a complementary
11 part of diplomatic efforts to protect and preserve the marine environment. I look
12 forward to reading your opinion in these proceedings.

13
14 I wish to thank you, Mr President and member of the Tribunal. I now have the
15 pleasure of handing the floor over to Mr Zachary Phillips. Thank you.

16
17 **THE PRESIDENT:** Thank you, Mr Charles. At this stage the Tribunal will withdraw
18 for 30 minutes and we will continue the hearing at 4:40, that is 20 minutes to 5:00.
19 Thank you.

20
21 *(Short break)*
22

23 **THE PRESIDENT:** I now give the floor to Mr Phillips to make his statement.

24
25 You have the floor, Sir.

26
27 **MR PHILLIPS:** Mr President, distinguished members of the Tribunal, it is an honour
28 to appear before you today on behalf of COSIS.

29
30 I am not only here representing COSIS, but as a national of Antigua and Barbuda.
31 I am a native of a small island developing State, a State that was devastated by
32 Hurricane Irma six years ago. I experienced a storm displacing an entire island of
33 people in a single day. 95 per cent of infrastructure on Barbuda was destroyed,
34 including the hospitals and the schools. The marine ecosystems have also been
35 permanently affected by the damage caused by Hurricane Irma. It is with this lived
36 experience and with the knowledge that I am a youth who will inherit an ocean vastly
37 different from the ocean of my forefathers, as a result of the actions or inactions of
38 States, that I will address the Tribunal on the obligation of States to educate current
39 and future generations to create an informed and active citizenry.¹

40
41 I will proceed by briefly contextualizing the current discussion on obligations under
42 UNCLOS in terms of the need to promote educational programmes with respect to
43 the protection and preservation of the marine environment and the prevention,
44 reduction and control of marine pollution. Then I shall highlight the considerations of
45 equity underpinning such education.

46
47 As COSIS has already demonstrated during these hearings, Part XII of UNCLOS
48 provides for a number of obligations that States must respect and implement in

¹ COSIS Written Statement, para. 497.

1 relation to the climate change crisis, and this Tribunal is called upon to specify these
2 obligations for the purposes of this advisory opinion.

3
4 COSIS further submits that ultimately, the full realization of these obligations must
5 involve the “education of current and future generations about environmental
6 matters” as “essential to broaden the basis for an enlightened opinion and
7 responsible conduct by individuals, enterprises and communities in protecting and
8 improving the environment in its full human dimension.”²

9
10 Earlier today, Ms Amirfar demonstrated why UNCLOS requires that States Parties
11 follow the best available science in fulfilling their obligations to prevent, reduce and
12 control pollution, and to protect and preserve the marine environment. A key aspect
13 of these obligations is the requirement to invest in education around the necessary
14 mitigation and adaptation measures that comply with international standards. Indeed,
15 the IPCC concluded with high confidence in its most recent assessment report that
16 “[i]ncreasing education including capacity building, climate literacy, and information
17 provided through climate services and community approaches can facilitate
18 heightened risk perception and accelerate behavioural changes and planning.”³

19
20 UNCLOS reflects a commitment to education as a crucial element in fulfilling the
21 objectives of Part XII. Article 202(a) provides that States shall, directly or through
22 competent international organizations . . . promote programmes of scientific,
23 *educational*, technical and other assistance to developing States for the protection
24 and preservation of the marine environment and the prevention, reduction and
25 control of marine pollution.”⁴ Similarly, the UNFCCC provides that States Parties
26 shall “[p]romote and cooperate in *education*, training and public awareness related to
27 climate change and encourage the widest participation in this process”⁵ – a
28 commitment also reflected in the Paris Agreement and COP decisions.⁶

29
30 What must we educate the citizenry about? Mr President, I will not repeat that
31 science matters, or what science says. It has been already addressed during these
32 hearings. I must add here the crucial point that science is not the only driver of the
33 necessity to take climate action. Equity is a further one. I will concentrate on equity.

34
35 As Ms Fifita explained yesterday, a global movement driven by youth has
36 spontaneously emerged. A key principle that is colouring this movement is precisely
37 equity. Both intergenerational equity and equity amongst States. They convey the
38 strong idea that the “responsible conduct by individuals, enterprises and
39 communities in protecting and improving the environments...”⁷ cannot be based on a
40 myopic perspective, but rather it must be based on a global perspective
41 incorporating the most responsible and equitable actions for all States and for future
42 generations based on the best available science.

43

² COSIS Written Statement, para. 424.

³ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 30.

⁴ UNCLOS, article 202(a) (emphasis added).

⁵ UNFCCC, article 4(1)(i) (emphasis added).

⁶ See, e.g., Paris Agreement, article 12; COP27, Decision -/CMA.3.

⁷ COSIS Written Statement, para. 424.

1 Therefore, education on both what science says about climate change, but also on
2 what equity conveys, is key not only for the citizenry to grasp the obligations that
3 their States are required to meet but also to understand the motivations behind the
4 measures being taken.

5
6 In the current era – and this is fortunate – democracy and the rule of law are at the
7 root of good and efficient governance. It follows that States are ultimately the
8 representation of communities of thousands or millions of individuals and companies,
9 and that the actions States endeavour to carry out shall ultimately be either
10 buttressed or thwarted by the compliance of the individuals and their companies
11 within those States.

12
13 The obvious requirement for States to align with their UNCLOS obligation is the
14 necessity for them to keep abreast of the most relevant and accurate science to
15 inform the measures they must take to fulfil their UNCLOS obligations, but also to
16 ensure that all persons and companies under their jurisdiction and control fully
17 understand the reasons, motivations, necessity and accuracy of those measures,
18 and accept the burden they might create.

19
20 Many understand the concept of equity or fairness innately. However, in this context
21 the inequity is twofold: firstly, there is an inequity between States; and, secondly, an
22 inequity between current and future generations. I will address each in turn.

23
24 As early as 2001, experts stated very clearly that “the countries with the fewest
25 resources are likely to bear the greatest burden of climate change in terms of loss of
26 life and relative effect on investment and economy.”⁸

27
28 That prediction has come true. For example, some nations are facing a
29 disproportionate amount of extreme weather events and/or slow-onset events. This
30 is particularly true for small island developing States where, despite only contributing
31 to less than 1 per cent of GHG emissions, we are on the front lines of the climate’s
32 wrath, which results in the increase in frequency and severity of extreme weather
33 events such as hurricanes, typhoons, floods and heatwaves, just to name a few.

34
35 Those are just the extreme weather events. But as my colleagues have
36 demonstrated, small island States are also facing more pernicious but equally
37 destructive slow-onset events that are threatening economies and, in some
38 instances, the very existence of communities and nations.

39
40 Now, Mr President, to complete this dire picture which island nations are
41 experiencing, not only are small island States dealing with the destruction associated
42 with the adverse effects of climate change on their marine environment, but the
43 burden of rebuilding after such catastrophic events rests on these small island
44 developing economies.

45
46 This is the reality that I am living in. This is the reality that Antiguan, Barbudans and
47 every SIDS native is grappling with from year to year. We are literally sitting and

⁸ POVERTY AND CLIMATE CHANGE: REDUCING VULNERABILITY OF THE POOR THROUGH ADAPTATION, AFRICAN DEVELOPMENT BANK (2003), p. 10.

1 waiting for the storm to pass hoping that everything will be okay when it is over.
2 However, if you have never sat in your home anxiously listening to the storm as it
3 howls outside, you cannot truly comprehend this concept. This is why education is
4 key. Unfortunately, while this is a reality for us, the global citizenry does not fully
5 grasp what we are facing. With a more complete understanding of the severe
6 ramifications of the adverse effects of climate change, the hope is that the global
7 citizenry will be in a better position to take the drastic steps needed to save our
8 ocean.

9
10 Mr President, we have only referenced the immediate damage to highlight this
11 disparity, but indirect effects can be equally as devastating. Using ocean acidification
12 and ocean warming as examples, some migratory species are now changing their
13 migration patterns, which is extremely concerning for States, such as mine, that rely
14 heavily on the fishing industry. Similarly, rising sea levels are causing coastline
15 erosion and, in some cases, the submergence of entire islands that many call home.

16
17 There is currently little discussion about viable solutions to these kinds of existential
18 threats and, unfortunately, most island States cannot simply “rebuild inland”. States
19 such as Kiribati, Solomon Islands and Tuvalu are currently dealing with islands within
20 their State completely disappearing. Completely disappearing, I might add, as a
21 result of a phenomenon that these islands have negligibly contributed to.

22
23 This segues into the second point; climate change is an inherently intergenerational
24 problem with extremely serious implications for equity between ourselves and future
25 generations and among communities in the present and the future.⁹

26
27 Noting the devastating effects on the environment and specifically the ocean, the
28 question then becomes what will our future generations, what will our children,
29 inherit?

30
31 On the current trajectory, the children of the small island States will inherit oceans
32 that are too warm and/or too acidic to sustain vibrant coral reefs and fish species.
33 The children will inherit economies that are locked into a cycle of natural disasters
34 that cause damage exceeding their annual GDP. A world of constant rebuilding and
35 constant concern. They may also quite possibly inherit a world where the islands of
36 today do not exist, a world where their culture and people are displaced and have
37 lost their home.

38
39 Mr President, reflected in the Rio Declaration is the idea that the special situation
40 and needs of developing countries, particularly the least developed and most
41 environmentally vulnerable, shall be given special priority. International actions in the
42 field of the environment and development must also address the interests and needs
43 of all countries.¹⁰ Unfortunately, the interests and needs of the small island States
44 regardless of their income, are not being given priority.

45

⁹ Edith Brown Weiss, *Climate Change, Intergenerational Equity and International Law*, 9 VERMONT JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW 615 (2008), p. 615.

¹⁰ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I), Principle 6.

1 The question must then be asked, is that equity? But this is not just a question for
2 this distinguished Tribunal. This is a question for the world to answer. Without
3 educating citizens, this possibility will not become a reality. But the fact is many are
4 not aware that this is a reality that several island nations are facing, and it is an
5 outcome that will affect future generations with greater intensity. The actions that can
6 stop it must be actions of today and so, citizens worldwide must be on the same
7 page.

8
9 It is clear that both intragenerational and intergenerational equity are concepts that
10 are central to addressing the climate problem. Those concepts are also integral to
11 the combined efforts of States to manage, protect and preserve our one shared
12 ocean. That is why education of the entire global citizenry is so important.

13
14 To echo the points of Naima Fifita made yesterday, the current generations, and
15 particularly the youth, stand in a position where they are both attuned to the severe
16 gravity of the situation, and yet also are capable of reimagining what climate action
17 looks like so that a sustainable future can be secured. We are seeing great
18 examples of this in the youth of island nations, especially the islands of the Pacific.

19
20 But the actions of the citizens of the islands will not be enough to meaningfully
21 address this climate crisis. In fact, without any meaningful cooperation from the
22 citizenry around the world, many small island States will cease to exist in the coming
23 years. This is what education must convey.

24
25 The science and the law point to the need for action by all to prevent, reduce and
26 control the pollution of the marine environment and to protect and preserve the
27 marine environment not just for our sustainable use, but for the sustainable use of
28 future generations.

29
30 Mr President, distinguished members of the Tribunal, in the words of the
31 International Court of Justice, “the environment is not an abstraction but represents
32 the living space, the quality of life and the very health of human beings, including
33 generations unborn.”¹¹ Fulfilling the obligation to protect and preserve the
34 environment requires the education of the citizenry.

35
36 Climate action is not a high-level theoretical exercise that only involves the leaders,
37 experts and scientists of the world. It is a very real exercise of trying to protect living
38 space, quality of life and the very health of human beings. We are at a stage where
39 the living spaces of some people, my people, are being threatened. And due to the
40 irreversible character of damage to the environment, vigilance and prevention are
41 required¹² on the part of all States.

42
43 The island nations have been doing what we can to keep our heads above water and
44 we will never stop that fight. But we acknowledge and accept that the more persons
45 worldwide who are aware of this fight, the more persons will be able to assist.
46 Education is the tool that will spread the message to far corners of the globe.
47 Sharing these truths that I have just shared with you, Mr President, and distinguished

¹¹ *Nuclear Weapons Advisory Opinion*, para. 29.

¹² *Gabčikovo-Nagymaros Judgment*, para. 140.

1 members of the Tribunal, painting this picture of the reality we are facing for the
2 world to see is an obligation of all States so that their citizens can make informed
3 decisions and ultimately secure the compliance of their States in fulfilling these
4 obligations to prevent, reduce and control the pollution of the marine environment
5 and to protect and preserve the marine environment.
6

7 Mr President, distinguished members of the Tribunal, I now conclude my
8 presentation, and sincerely thank you for your time and attention. If I can be of no
9 further assistance, I ask the Tribunal to invite Mr Vaughan Lowe KC.

10
11 **THE PRESIDENT:** Thank you, Mr Phillips, for your statement. I now give the floor to
12 Mr Lowe to make his statement.

13
14 You have the floor, Sir.

15
16 **MR LOWE:** Thank you, Sir. Mr President, members of the Tribunal, it is a privilege to
17 appear before you and an honour to have been entrusted with the task of bringing
18 the COSIS submission to a close.

19
20 The importance of this subject is obvious, and you have heard much about it.
21 Climate change, ocean warming, sea-level rise and ocean acidification are specific
22 aspects of the climate change crisis that the world is now facing. The seas are the
23 ultimate destination of much of the pollution released into the atmosphere and into
24 rivers and coastal waters. Ocean warming deoxygenates the waters and bleaches
25 coral reefs and disrupts marine ecosystems.¹ Heat melts ice and makes water
26 expand, causing sea levels to rise.²
27

28 The seas are also a crucial factor in strategies to mitigate the problem. The ocean is
29 the major sink for the heat trapped in the Earth's atmosphere by greenhouse gases:
30 the top few metres of the ocean store as much heat as the Earth's entire
31 atmosphere.³ But warm seas can store less heat, and less CO₂, than cold water. As
32 Dr Cooley and Dr Maharaj have explained, continuing emissions of greenhouse
33 gases not only exacerbate the problem of global warming and climate change; they
34 simultaneously undermine the limited capacity of the seas to contribute to mitigation
35 measures.
36

37 These are serious problems for all States, but they are particularly serious for small
38 island States, whose interests are "specially affected", to use the language of the

¹ *Greenhouse Gases are Depriving our Oceans of Oxygen*, UNITED NATIONS ENVIRONMENT PROGRAMME (10 April 2019), <https://www.unep.org/news-and-stories/story/greenhouse-gases-are-depriving-our-oceans-oxygen> .

² *Ocean Warming*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET—NASA (December 2022), <https://climate.nasa.gov/vital-signs/ocean-warming/> ; *Understanding Sea Level: Thermal Expansion*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET—NASA, <https://sealevel.nasa.gov/understanding-sea-level/global-sea-level/thermal-expansion> .

³ *Ocean Warming*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET—NASA (December 2022), <https://climate.nasa.gov/vital-signs/ocean-warming/> ; *Ocean and climate change*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/ocean/topics/climate-change-ocean/> .

1 *North Sea Continental Shelf* cases⁴ and the Vienna Convention on the Law of
2 Treaties,⁵ and they are so for three reasons:

3
4 *First*, their geography: they are the States whose territory is mostly coastal, and
5 whose populations live and work closest to the sea, and are most dependent on it;

6
7 *Second*, their topography: they are the States which have the greatest proportion of
8 their territory and populations located closest to sea level and at the most imminent
9 risk from sea-level rise; and

10
11 *Third*, their existence: they are the States that are at this moment facing a literally
12 existential crisis. Some of the island States that currently exist will literally disappear
13 from the face of the Earth as a result of sea-level rise.

14
15 Yesterday, the Co-Chairs of COSIS – the Prime Ministers of Antigua and Barbuda
16 and of Tuvalu – told you of the catastrophic impacts of climate change on their
17 nations. Many countries will face such impacts unless States change their behaviour.
18 The Co-Chairs emphasize two points: the extreme gravity of the situation and the
19 urgency of the situation. That is why this advisory opinion has a real historical
20 importance and why it will be studied throughout the next few, critical years for which
21 the window of opportunity to limit global warming to 1.5°C remains open, as the
22 UNFCCC pointed out last week.⁶

23
24 There will be many questions that arise from what is now generally accepted to be
25 the inevitable rise in global sea levels. For example, what happens when base points
26 for the determination of baselines disappear below high-water level? What happens
27 to entitlements to maritime zones? For what acts or omissions that exacerbate or
28 accelerate ocean warming, sea-level rise and ocean acidification is injunctive relief
29 or compensation available?

30
31 These are questions of immense importance, but they are not the questions in front
32 of you today. The questions before you are every bit as important, but they are even
33 more urgent. The States specially affected are having to prepare *now* for the
34 consequences of marine pollution due to greenhouse gas emissions. COSIS has
35 therefore focused in this request on the more immediate task of clarifying what
36 UNCLOS States Parties are committed to do *now* to mitigate the inevitable harm
37 resulting from climate change, *before* those problems demand solutions in particular
38 instances.

39
40 The request has two aims: *first*, to establish once and for all that climate change, and
41 the deleterious effects for the ocean that result – or are likely to result from it –
42 caused by anthropogenic greenhouse gas emissions into the atmosphere, amount to
43 marine pollution and falls squarely within Part XII of UNCLOS; *second*, to establish
44 and fill out the principle that the duties of UNCLOS States Parties are, in short, to
45 follow the science, to protect and preserve the marine environment, and to take

⁴ *North Sea Continental Shelf*, Judgment, 1969 ICJ Rep. 4 (20 February), para. 73.

⁵ Vienna Convention on the Law of Treaties (23 May 1969), article 60(2). Cf., ILC, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/49 (2001), article 42.

⁶ UNFCCC, *Technical Dialogue of the First Global Stocktake*, UN Doc. FCCC/SB/2023/9, 8 September 2023, para. 80.

1 whatever steps are necessary to prevent, reduce and control marine pollution from
2 any source.

3
4 Those are the headline points from articles 192 and 194 of UNCLOS, and they are,
5 of course, supported by the other provisions of UNCLOS Part XII, which my
6 colleagues have taken you to yesterday and today.

7
8 These points are largely uncontentious. The scientific evidence is clear:
9 anthropogenic emissions of greenhouse gases introduce substances and energy into
10 the marine environment, which result or are likely to result in deleterious effects. That
11 falls within the definition of marine pollution in UNCLOS article 1(4) and it engages
12 UNCLOS Part XII on the protection and preservation of the marine environment.

13
14 Part XII is explicit. Starting with article 192, headed “General obligation”, and
15 article 194, Part XII sets out obligations to keep under surveillance and report on
16 marine pollution, and to protect and preserve the marine environment, and to
17 prevent, reduce and control its pollution. The words of UNCLOS articles 192 and 194
18 are clear and cannot be denied or ignored; and the same is true of other provisions
19 of UNCLOS Part XII that impose additional duties.

20
21 I should say at this point that behind the language of particular UNCLOS provisions
22 there are often specific duties, some of which are necessarily implied by those
23 express provisions. For example, the obligation to prevent pollution of the marine
24 environment implies that States must maintain some sort of mechanism for
25 monitoring polluting activities and watching developments in marine science, and in
26 the availability of marine technology, and in maintaining a degree of readiness to use
27 or to augment national resources to control pollution when the need arises.

28
29 The very purpose of the COSIS request is to have the Tribunal assist in unpacking
30 the language of UNCLOS and identifying the specific components and implications
31 of such UNCLOS provisions. Whether a particular component of an UNCLOS duty,
32 such as the duty to take necessary measures using the best practicable means at
33 the disposal of the State, is classified as an obligation of conduct or an obligation of
34 result or some other category of obligation and may be open to debate.

35
36 And of course it may be both – a duty to keep under surveillance activities under a
37 State’s control and to be aware of new technologies such as improved booms for
38 containing offshore spillages, and then a duty to use that technology to reduce and
39 control pollution when an appropriate case emerges.

40
41 Are those elements obligations of conduct or of result? Well, what is clear is that the
42 obligation explicitly set out in UNCLOS has various implications and that those duties
43 or components of those duties cannot simply be put into one or other box, article by
44 article, as conduct or result. That is why COSIS will prepare a written response to
45 questions from the Bench yesterday, to explain its position without oversimplifying it.

46
47 Many of these obligations are tied to duties to take into account internationally
48 agreed rules, standards and recommended practices and procedures. You will find
49 examples in articles 207, 211, 212, 213 and 222 of UNCLOS.

1 Such generally accepted international rules and so on already exist, for example
2 under the 1992 Framework Convention on Climate Change and the Paris Agreement
3 adopted pursuant to it in 2015.

4
5 Though I shall generally refer simply to the Paris Agreement as one of the most
6 relevant and archetypal instruments in the present context, it is important to
7 remember that there are many other international instruments that bear on the
8 implementation of UNCLOS obligations in a similar way. For instance, the
9 conventions on marine pollution adopted under the auspices of the IMO⁷ and the
10 Espoo Convention on Environmental Impact Assessment.⁸

11
12 All of these internationally agreed rules, standards and procedures inform the
13 interpretation and application of the UNCLOS provisions that address marine
14 pollution, and thus help to define the precise content of UNCLOS obligations.

15
16 Well, there is nothing particularly remarkable in any of this, and it's clear from the
17 written submissions in this case that these points are generally accepted. They are
18 the straightforward consequences of the express provisions of UNCLOS and of the
19 provisions on treaty interpretation reflected in the Vienna Convention on the Law of
20 Treaties.

21
22 The written submissions also show wide support for the principle that the UNCLOS
23 obligations on the one hand, and the internationally agreed rules, standards and
24 procedures on the other, should, as far as possible, be interpreted and applied so as
25 to give rise to a coherent set of compatible obligations.

26
27 But beyond these points, there are areas where it is less clear that there is a
28 consensus.

29
30 And one particularly important point concerns the relationship between UNCLOS and
31 other international instruments, and in particular, in this context, the Paris
32 Agreement.

33
34 Some of the written submissions suggest that in the context of climate change,
35 compliance with the UNCLOS provisions can require no more than compliance with
36 the Framework Convention and the Paris Agreement – that compliance with the
37 Paris Agreement *ipso facto* establishes compliance with UNCLOS.

38
39 That is, with respect, not what UNCLOS says and it is not what the Paris Agreement
40 says. UNCLOS was concluded more than 30 years before the Paris Agreement and
41 obviously could not refer to it or take it into account. But nor does the Paris
42 Agreement make any reference to UNCLOS or, indeed, specifically to marine
43 pollution.

44
45 The Paris provisions are not expressly and literally incorporated into UNCLOS. Nor
46 are they incorporated by reference. There is broad agreement in the written

⁷ *List of IMO Conventions*, INTERNATIONAL MARITIME ORGANIZATION,
<https://www.imo.org/en/about/Conventions/Pages/ListOfConventions.aspx>

⁸ Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”) (10 September 1997).

1 submissions that the 1982 UNCLOS does not simply incorporate the Framework
2 Convention and Paris Agreement obligations, so that when questions of compliance
3 and breach of UNCLOS obligations arise, there is a kind of *renvoi*, and the question
4 becomes, was there a breach of the Framework Convention or of the Paris
5 Agreement?
6

7 Of course, those two instruments, and others that bear upon the protection of the
8 marine environment, are of great importance in the interpretation of the obligations of
9 States Parties under UNCLOS. They cast light on some of the points that the
10 international community regards as most urgently requiring action for the protection
11 of the environment, and on some of the actions that States regard as immediately
12 necessary steps towards that end. UNCLOS cannot be interpreted in isolation from
13 the corpus of international environmental law.
14

15 But as a matter of law, the fact remains that UNCLOS on the one hand, and the
16 Framework Convention and Paris Agreement on the other, are separate,
17 independent instruments. They impose separate, independent obligations. They
18 have separate, independent dispute settlement procedures, in articles 14 of the
19 Framework Convention and article 24 of the Paris Agreement, and in UNCLOS
20 Part XV. Obligations under UNCLOS are not extinguished or superseded or limited
21 by the provisions of the Framework Convention or the Paris Agreement.
22

23 No doubt there will be instances where steps taken pursuant to the Paris Agreement
24 are completely sufficient to satisfy the obligations under UNCLOS. But there may
25 also be instances where such steps do not completely fulfil all UNCLOS obligations.
26

27 For example, UNCLOS articles 204-206 contain provisions that require the
28 monitoring of activities in order to determine whether they are likely to pollute
29 specifically the *marine* environment and require States to report periodically on the
30 results. The Paris Agreement contains no such obligation specifically related to the
31 marine environment: only general stocktaking.⁹
32

33 On substantive steps, the Paris Agreement is framed primarily in terms of the aims
34 and ambitions of the Parties and things that they “should” (rather than “shall”) do. For
35 instance, Paris article 4 provides that “Parties aim to reach global peaking of
36 greenhouse gas emissions as soon as possible ... and to undertake rapid reductions
37 thereafter.” That is an agreed policy, not an obligation. In contrast, UNCLOS States
38 expressly agreed to unequivocal, legal obligations.
39

40 So, UNCLOS Parties agreed in article 194(1) to an explicit obligation to “take ... all
41 measures ... that are necessary to prevent, reduce and control pollution of the
42 marine environment from any source, using for this purpose the best practicable
43 means at their disposal and in accordance with their capabilities.” And they agreed in
44 article 194(3) that these measures must include “those designed to minimize to the
45 fullest possible extent” the release of toxic, harmful or noxious substances from land-
46 based sources and pollution from vessels or installations and devices at sea.
47

⁹ Paris Agreement, article 14.

1 There are no such binding commitments in the Framework Convention or the Paris
2 Agreement.

3
4 Of course all these agreements are intended to work towards the same end – the
5 protection of the environment – as, indeed, are other international agreements,
6 global and regional. But that does not mean that the Framework Convention and the
7 Paris Agreement rewrite the UNCLOS Part XII text, substituting their own obligations
8 for those agreed in 1982 and ratified by all UNCLOS States Parties. Nor does it
9 mean that the Parties to the Paris Agreement decided to “undertake to implement
10 UNCLOS Part XII in accordance with this Agreement,” to borrow the words of
11 article 1 of the 1994 Agreement Relating to the Implementation of Part XI of
12 UNCLOS.¹⁰

13
14 States know well how to tailor the implementation of UNCLOS provisions to new
15 developments if they so wish. They had done so in the 1994 Implementation
16 Agreement only two years after the Framework Convention was concluded,¹¹ but
17 they have made no such arrangement in respect of the UNFCCC and Paris
18 Agreement and UNCLOS Part XII.

19
20 The UNCLOS obligation is simple and unequivocal: “States shall take ... all
21 measures ... that are necessary to prevent, reduce and control pollution of the
22 marine environment from any source”¹² That is not mere aspiration: UNCLOS
23 Parties did not simply “aim” to take all measures that are necessary, or commit
24 themselves to make “ambitious efforts” to that end, to borrow phrases used in the
25 Paris Agreement.¹³ There is a commitment in UNCLOS, an obligation, to take all
26 measures that are “necessary” to prevent, reduce and control pollution; and the Paris
27 Agreement and Framework Convention and the 1.5 °C limit show what is
28 internationally understood to be ‘necessary’ to that end.

29
30 And how is that necessity to be determined in any particular case? Well, the first
31 thing to say is that, as the International Court of Justice put it earlier this year,
32 “whether the measures taken were ‘necessary’ is not purely a question for the
33 subjective judgment of the party.”¹⁴ As my colleagues have already explained,
34 “necessity” is an objective concept, and in the present context it is to be determined
35 on the basis of generally accepted scientific data and analyses.

36
37 The science is there. You heard from Ms Amirfar about the work of the IPCC and the
38 breadth of its consultations and its confidence in its conclusions. And the Paris
39 Agreement and Framework Convention and the 1.5 °C limit are clear evidence of
40 what is internationally understood to be “necessary” to that end.

41
42 This is not a matter of digging out the small print in the contract that no one read
43 properly before they signed it. UNCLOS was signed in 1982 after more than

¹⁰ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (28 July 1994), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/332/98/PDF/N9433298.pdf?OpenElement>

¹¹ *Id.*

¹² UNCLOS article 194(1).

¹³ Paris Agreement, articles 3, 4(1).

¹⁴ *Certain Iranian Assets (Iran v. United States)*, Judgment, slip opinion (30 March 2023), para. 106.

1 10 years of work. Every line was drafted and studied and debated and often
2 amended before it was finally adopted. States then took the text away to consider
3 whether or not to ratify it. It was 12 years later that it eventually entered into force in
4 1994; and since then, another 100 States have decided to ratify it. States knew what
5 they were taking on, what commitments they were making.

6
7 They knew that they were making an explicit and unequivocal commitment to take
8 the measures necessary to prevent, reduce and control marine pollution.

9
10 So what is the role of this Tribunal in this emergency? Climate change is a moving
11 target. Predictions need to be updated to take account of new data. Who, 30 years
12 ago, would have predicted the current rate of loss of sea ice? Similarly, the scientific
13 understanding of the adverse impacts of climate change, and the technologies and
14 adaptive mechanisms that might address the problem, develop over time.

15
16 This Tribunal cannot arrest those developments. It cannot say today that it is
17 necessary that this or that technology, or this or that limit on emissions of specific
18 greenhouse gases or other pollutants, must henceforth be applied by all States.
19 When States commit to take “all measures ... necessary” using “the best practicable
20 means at their disposal” and “in accordance with their capabilities,” the reference is
21 not to “measures that were considered necessary 40 years ago,” when UNCLOS
22 was adopted, or even 20 or 10 years ago. It is not to the “best practicable means
23 available” in 1982, or to the capabilities of the State at that time.

24
25 The content of particular obligations in any particular case will depend upon what the
26 need for action is at the time and in the place concerned; and it will be decided in
27 future on a case-by-case basis.

28
29 But what the Tribunal can do now is spell out the duty under UNCLOS to take the
30 *necessary* measures, whatever they might be, and say that *necessity* is an objective
31 concept to be determined on the basis of generally accepted scientific evidence; and
32 it can point to the sources of that scientific evidence.

33
34 States negotiated hard over the Paris Agreement and the limits on climate change
35 necessary to avert the looming catastrophe. But the duties under UNCLOS are not
36 now matters for negotiation. The question is not what commitments States would
37 now be willing to agree to make: that question was settled in 1982 when the text of
38 UNCLOS was adopted. The question now is: What commitments have UNCLOS
39 States Parties already made? What does UNCLOS say and what does it mean, and
40 what they are legally bound to do *now*?

41
42 Earlier today, Ms Amirfar and Dr Oral set out in some detail the specific steps that
43 UNCLOS States Parties are committed to, at a minimum and as a matter of urgency.
44 And they did so in order to address the problem that States are sometimes ready to
45 subscribe to general statements calling for responsible actions in relation to
46 environmental matters, but very reluctant actually to take concrete steps to do
47 anything meaningful about it. COSIS asks you to identify and declare in your
48 advisory opinion the steps identified by Ms Amirfar and Dr Oral as the minimum
49 current obligations of UNCLOS States Parties, to be implemented as a matter of

1 urgency. I will not read out those steps again, but I respectfully invite the Tribunal to
2 refer to those submissions when considering how to frame its opinion.

3
4 Life is complicated, and involves difficult choices. We are all familiar with the
5 propensity of governments to explain that their past promises cannot be fulfilled
6 because of unforeseen developments or the need to balance competing demands or
7 to pursue more urgent or important objectives. That is the nature of politics. But we
8 are not politicians.

9
10 The duty of the lawyer is to say, honestly and plainly, what the law is. The lawyer,
11 the court, cannot physically compel people actually to do things in accordance with
12 their legal obligations, but they can and must say what those legal obligations are.
13 That is the service to the community that we are all engaged in in these proceedings.

14
15 If every State is free to abandon or rewrite its clear and formally made commitments,
16 international cooperation – not only over climate change but over any matter –
17 becomes virtually impossible. If every State is free to decide what its promises
18 actually mean and entail, no matter how far from the ordinary meaning of their words
19 it might take them, the trust and predictability on which international law depends will
20 disappear.

21
22 Equally, it is not for courts and tribunals to rewrite the terms of agreements that
23 States have made, or to rebalance the rights and duties of parties. If UNCLOS
24 States Parties see a need for revision, they can amend the Convention, or withdraw
25 from it, or make a new agreement. That is a matter for them, not for courts and
26 tribunals.

27
28 And in making this request, COSIS is asking the Tribunal to do what only courts and
29 tribunals can do: to state, clearly and objectively what the current legal duties of
30 States Parties are under UNCLOS in relation to the impact of climate change on the
31 marine environment. What States then do is another matter.

32
33 Sir, that brings my submission and the submission of the Commission of Small
34 Island States to a close. I thank you and the distinguished Judges. I thank you for
35 your attention.

36
37 **THE PRESIDENT:** Thank you, Mr Lowe. This brings to an end this afternoon's sitting
38 and concludes the oral arguments of the Commission of Small Island States on
39 Climate Change and International Law. The Tribunal will sit again tomorrow morning
40 at 10:00 am when it will hear oral statements made on behalf of Germany, Saudi
41 Arabia and Australia. This sitting is now closed.