



**Request by the Commission of Small Island States on Climate Change
and International Law for an Advisory Opinion**

**Written Statement Submitted
by the Government of the Republic of Indonesia
to the International Tribunal for the Law of the Sea (ITLOS)**

15 June 2023

**Request for an Advisory Opinion from the Tribunal by the Commission of
Small Island States on Climate Change and International Law**

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I. Introduction

1. Indonesia presents this Written Statement as a response to the Tribunal's Order No. 2022/4 on 16 December 2022 and Order No. 2023/1 on 15 February 2023.
2. On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (the Commission) filed a request to the International Tribunal of the Law of the Seas (the Tribunal) for an advisory opinion with the following legal questions:

“What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea, including under Part XII:

 - a. to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
 - b. to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?”
3. The above-mentioned Orders conveyed the invitation of the President of the Tribunal to the State Parties to the 1982 UN Convention of the Law of the Sea (the Convention) to present written statements on the question submitted by the Commission to the Tribunal, and extended the time-limit within which written statements may be presented to the Tribunal to 16 June 2023. Considering this invitation positively, Indonesia as a State Party to the Convention respectfully conveys this written statement to assist the Tribunal in responding the question submitted by the Commission.

Structure of the Written Statement

4. Indonesia's written statement will consist of five chapters.
5. The First chapter is the Introduction. Chapter 2 will address the Tribunal's jurisdiction. This Chapter will cover whether the question submitted by the Commission is admissible to the Tribunal, through the assessment on the Tribunal's Rules of Procedure, the relationship between the Commission with the Tribunal, and the nature of the question itself. The Tribunal's discretionary power to render an advisory opinion is also considered.
6. Chapter 3 of this written statement provides argument on the applicable laws, should the Tribunal decide to render an advisory opinion. There are several legal frameworks to be highlighted such as the Convention, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 UN Fish Stock Agreement) and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Implementing Agreement).
7. Chapter 4 will discuss Indonesia's views on the obligation of the State Parties to the Convention, especially Part XII, in relation to climate change. This Chapter outlines whether or not specific obligation to the State Parties in relation to the pollution caused by climate change, or any specific obligation concerning the protection and preservation of marine environment from the impacts of climate change exists.
8. Lastly, Chapter 5 will provide a brief summary of Indonesia's arguments and will outline Indonesia's submissions for the proceedings.

II. Jurisdiction of the Tribunal

9. Prior to addressing the questions submitted by the Commission, it is imperative for the Tribunal to examine the issues of jurisdiction and admissibility of the request for an advisory opinion made by the Commission.
10. Article 138 of the Rules of the Tribunals specifically stipulates the jurisdiction of the Tribunal to provides an advisory opinion, which reads:
 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the

Convention specifically provides for the submission to the Tribunal of a request for such an opinion.

2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
 3. The Tribunal shall apply mutatis mutandis articles 130 to 137.
11. Further, Article 21 of Annex VI of the Convention states that “The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

The Questions Submitted by Commission to the Tribunal Are of Legal Nature

12. The procedural steps in assessing the jurisdiction of the Tribunal with regard to the request for advisory opinion submitted by the Commission is to examine whether the request has met with the elements of Article 138 above, namely (i) whether the request made by the Commission is legal questions; (ii) whether the Agreement on the Establishment of the Commission qualified as “an international agreement related to the purposes of the Convention”, and (iii) whether the request has been transmitted to the Tribunal by whatever body authorized by or in accordance with the agreement”.
13. In determining whether a question is a legal question, it is worth noting the definitions of “legal question” determined by International Court of Justice (the Court) in its various advisory opinions¹, which may include the following characteristic :
- a. A question directed to the legal consequences arising from a given factual situation considering the rules and principles of international law;²
 - b. A question susceptible of a reply based on law;
 - c. A question which expressly asks the Court whether or not a particular action is compatible with international law,³ and the fact that a question has political aspects does not suffice to deprive it of its character as a legal question⁴;

¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 153, para. 37; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15. 13 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 19, para. 17.

² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 233, para. 14

³ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, Para. 25; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 234, para. 13

⁴ *Ibid.*, para. 27

- d. A question which was framed in terms of law⁵; and
 - e. A question concerning the interpretation of provisions of the Convention and raise issues of general international law.⁶
14. Indonesia identifies that the request submitted by the Commission to the Tribunal qualifies the above criteria of legal question. The question directed to the legal consequences, and framed in terms of law, as it encompassed certain questions on specific obligations of States parties of the Convention. The reference to the Convention reflects that the question considers rules and principles of international law over a factual situation, which is a climate change and its impacts; and directly requests the interpretation of the provisions of the Convention.
15. The questions also clearly address point of request for examination by the Tribunal concerning the interpretation of provisions of the Convention including Part XII, and raise issues of its connection with the specific obligations to implement such framework in the context of marine environment and climate change impacts. It is identified that the question submitted by the Commission to the Tribunal has fulfilled the criteria set out above.

The Commission Agreement Is Related to the Purposes of the Convention

16. With regards to the second criteria/element in Article 138: “an international agreement related to the purposes of the Convention”, Indonesia finds out that such criteria are also met. The Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (the Agreement) mentioned direct reference to the Convention several times, in the preamble as well as in its articles.
17. The preamble of the Agreement affirms the rights and obligations in the respective maritime zones regulated under the Convention. It reads “Affirming the maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the 1982 United Nations Convention on the Law of the Sea, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise”.

⁵ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 23, para. 65

⁶ Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 25, para. 39

18. Further, the preamble of the Agreement clearly underlines the obligation under the Convention. It mentions “Having regard to the obligations of States under ... the 1982 United Nations Convention on the Law of the Sea...”
19. Moreover, Article 2 (1) of the Agreement specified:

The activities of the Commission, shall include, inter alia, assisting Small Island States to promote and contribute to the definition, implementation and progressive development of rules and principles of international law concerning climate change, in particular protection and preservation of marine environment, including to the jurisprudence of international courts and tribunals.
20. This direct references to the Convention along with its provisions in the Agreement therefore indicates that the Agreement is closely related to the purpose of the Convention.
21. Thus, it is safe to state that the purpose of the Commission as expressed in the Agreement, relate to the proper and effective conservation and management of marine living resources. As such, they follow closely the purposes of the Convention.

The Commission Is an Authorized Body to Request an Advisory Opinion

22. Another criterion in Article 138 of the Rules of Procedure of the Tribunal is that the request shall be transmitted by whatever body is authorized by or in accordance with the Agreement. In this regard, Article 2 (2) of the Agreement has specified that the Commission shall be authorized to request advisory opinion to the Tribunal, as follows:

Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal on the Law of the Sea (“ITLOS”) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.
23. Accordingly, the 3rd meeting of the Commission on 26 August 2022 also unanimously decided the Commission to seek advisory opinion to the Tribunal. Thus, this element has also been fulfilled in the present request.

The Agreements Confers Jurisdiction to the Tribunal

24. Referring to Article 21 of the Annex VI of the Convention, it is necessary to examine whether the Agreement fulfils the criteria of “any other agreement conferring jurisdiction to the tribunal”.
25. The term “international agreement” has been defined in Article 1 of the 1969 Vienna Convention on the Law of Treaties (1969 VCLT). In line with the 1969 VCLT, the Agreement was concluded between States, a written formed agreement embodied in a single instrument, and governed by international law.
26. In assessing whether an agreement confers jurisdiction to the Tribunal, Indonesia notes that the main consideration employed by the Tribunal is the formulation of the Article within the agreement which specifically submits to the Tribunal a request for an advisory opinion. In this regard, Article 2 (2) of the Agreement, as outlined in paragraph 22 above, has clearly conferred jurisdiction to the Tribunal to provide an advisory opinion on any legal question submitted by the Commission. Indonesia therefore concludes that the Agreement has fulfilled the criteria of “any other agreement conferring jurisdiction to the tribunal” under Article 21 of Annex VI to the Convention.

The Tribunal Has No Compelling Reasons to Refuse the Request for the Advisory Opinion by the Commission

27. It is also necessary to consider the discretionary power of the Tribunal in rendering the advisory opinion requested by the Commission. In deliberating this matter, Indonesia refers to the discretionary power exercised by the Court in rendering advisory opinion.
28. The consideration in assessing the discretionary power of the Court would include the character of the Court, both as a principal organ of the United Nations and as a judicial body. In this regard, the Court, in their advisory jurisdiction, must maintain their integrity as judicial bodies.⁷ In addition, in rendering advisory opinions, the Court cannot depart from the essential rules guiding its activity as a Court.⁸

⁷ Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10 P. 25, Para. 34;

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, Para. 25; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 416, Para. 29

⁸ Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 29

29. The refusal of the Court to render an advisory opinion should only be conducted if there are compelling reasons for the Court to do so. In *the Western Sahara (advisory opinion)*, the Court underlined that if the question is legal in nature and the Court had the competence to answer it, the Court may not refuse to render an advisory opinion.⁹
30. Indonesia, as stated in paragraphs 12-15 of this written statement, has established that the questions submitted by the Commission are legal in nature, and the reference to the Convention made it clear that the Tribunal had the competence to answer such questions. Further, there is no ongoing disputes surrounding the questions submitted by the Commission, and that there is no objection of these requests.
31. Based on the abovementioned reasons, Indonesia submits that there are no compelling reasons for the Tribunal to refuse rendering an advisory opinion on this matter, and that the Tribunal is appropriate to render the advisory opinion requested by the Commission.

Advisory Opinion by the Tribunal Has No Binding Force and Is Only Used to Assist the Commission in its Activities

32. Indonesia would like to highlight that an advisory opinion shall have no binding force, and that it is only used to assist the requesting body in its activities.¹⁰
33. Although the advisory proceedings do not require the consent of States, which signifies the difference with the basis of contentious jurisdiction to settle disputes, the reply shall only be of an advisory character, and that such advisory opinion is rendered to obtain enlightenment as to the course of action the requesting body should take.¹¹ In this regard, the advisory opinion rendered by the Tribunal shall only

⁹ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, P. 21, para. 23*

¹⁰ This argument is based on several Advisory Opinions including the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, Para. 25; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 417, Para. 33

“The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court’s opinion in order to assist them in their activities. The Court’s opinion is given not to States but to the organ which has requested it.”

¹¹ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177.*

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take.

be applicable and used to guide the Commission as the requesting body in conducting their activities.

34. It is within Indonesia's views that the Tribunal's advisory jurisdiction shall not impact the application of the Convention. As the ICJ states in the *Unilateral Declaration of Independence (advisory opinion)*, the ICJ "cannot substitute its own view as to whether an opinion would be likely to have an adverse effect."¹² In the *Threat or Use of Nuclear Weapons (advisory opinion)*, ICJ also states that "the effect of the opinion is a matter of appreciation"¹³. Indonesia notes that this indicates a meaning that the Tribunal's jurisdiction does not include the consideration on how the advisory opinion might be used by the requesting body, or the impacts of the advisory opinion, in the future, in this case in the context of climate change.

III. Applicable Laws

35. With regard to the applicable laws that may be used by the Tribunal in rendering the advisory opinion, Article 293 of the Convention regulates that the Tribunal shall apply the Convention and "other rules of international law not incompatible with this Convention".
36. The definition of "other rules of international law not incompatible with the Convention" can be assessed through the purpose of the Convention. The preamble of the Convention stated that the aim of the Convention is to establish "legal orders of the seas and ocean". In this regard, should the Tribunal wish to use other conventions or agreements in rendering the advisory opinion, the Tribunal shall assess if those conventions or agreements aim to establish legal order of the seas and ocean itself.
37. Furthermore, as the questions submitted by the Commission revolves around Part XII of the Convention, Article 237 (1) of the Convention reads "The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention."

The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused."

¹² Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, Para. 25; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 418, para. 35

¹³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 237, para. 17

38. The term “in furtherance” can be defined as the process of helping something (or someone) to develop successfully.¹⁴ In the context of climate change, the obligations of States have been regulated under special conventions and agreements, which were not established specifically to address the issues of marine environment or established in furtherance of the principles set in the Convention.
39. Based on the arguments that the aim the Convention is to establish “legal orders of the seas and ocean” and relevant agreements to the Convention are those “which may be concluded in furtherance of the general principles” of the Convention, Indonesia is of the view that specific rules of international law on climate change, i.e. Kyoto Protocol and the UN Framework Convention on Climate Change (UNFCCC) are not qualified as “other rules of international law not incompatible with the Convention”, and therefore shall not be used by the Tribunal in rendering an advisory opinion on this question.
40. Indonesia would like to recall the “compatibility test” to which conventions or agreements can be applied by the Tribunal in the Sub-Regional Fisheries Commission (SRFC) case. Para. 63 of the advisory opinion, the Tribunal employed the Convention on the Minimal Conditions for Access to Marine Resources (MCA Convention) which regulates the conservation of marine living resources in the regional level and the rights of States to exploit marine living resources in their respective jurisdictions. The use of MCA Convention in this SRFC case was applicable since its provisions reflect the foundation set in the Convention, especially on the use of maritime zones and the rights and responsibilities of States arising from there.
41. Indonesia acknowledges the fact that the Tribunal has included references to other international instruments in its cases. However, Indonesia would like to provide further comments on the conditions of the applications of other instruments as follows:
- a. In the *Responsibilities and Obligations of States with Respect to Activities in the Area* (advisory opinion of 1 February 2011), the Tribunal has cited Principle 15 of the Rio Declaration relating to the precautionary principle. However, this reference to Principle 15 was aimed at the interpretation of the Exploration Regulations, which have been included as applicable laws by the Tribunal.¹⁵

¹⁴ UNCLOS Commentary, p. 12

¹⁵ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, P. 45, Para. 125:*

- b. In the *Mox Plant (Order of 3 December 2011)*, the Tribunal cited the Treaty establishing the European Community and the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR Convention”) since it is necessary to assess the jurisdictional issue of the case.¹⁶
 - c. In the *Southern Bluefin Tuna (Order of 27 August 1999)*, the Tribunal refers to the Convention for the Conservation of Southern Bluefin Tuna of 1993, and rendered the “conduct of the Parties with regard to the Commission for the Conservation of Southern Bluefin Tuna is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea”.¹⁷
42. Based on the aforementioned cases under the Tribunal, Indonesia notes that other international instruments that can be referred to by the Tribunal shall be those which are consistent with the rights and responsibilities of States under the Convention and directly related with the applicable laws employed by the Tribunal. Therefore, specific rules of international law on climate change such as the UNFCCC and Kyoto Protocol are not considered passed the compatibility test.
43. Other rules of international law which are relevant, particularly in relation to the interpretation of treaties, is the 1969 VCLT, which was considered as reflecting customary international law. The application of the 1969 VCLT has also been used in the previous proceedings of the Tribunal as well as the Court.¹⁸
44. Based on Article 31 of the 1969 VCLT, the method of interpretation is based on any agreement relating to the treaty; or instrument in connection with the conclusion of the treaty accepted by the other parties as an instrument related to the treaty; subsequent agreement and practice on the interpretation or application of the treaty;

“The Nodules Regulations and the Sulphides Regulations contain provisions that establish a direct obligation for sponsoring States. This obligation is relevant for implementing the “responsibility to ensure” that sponsored contractors meet the obligations set out in Part XI of the Convention and related instruments. These are regulation 31, paragraph 2, of the Nodules Regulations and regulation 33, paragraph 2, of the Sulphides Regulations, both of which state that sponsoring States (as well as the Authority) “shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration” in order “to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area”.

Para. 130: “The reference to the precautionary approach as set out in the two Regulations applies specifically to the activities envisaged therein, namely, prospecting and exploration for polymetallic nodules and polymetallic sulphides. It is to be expected that the Authority will either repeat or further develop this approach when it regulates exploitation activities and activities concerning other types of minerals.”

¹⁶ MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, P. 105, Para. 40, 41

¹⁷ Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 294, para. 50

¹⁸ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, P. 28, Para. 57*

and any relevant rules of international law applicable in the relations between the parties.

45. In conducting the interpretation, Indonesia views that the Tribunal can use the subsequent agreements to the Convention, namely the 1995 UN Fish Stock Agreement and the 1994 Implementing Agreement.
46. Thus, it is the view of Indonesia that the use of those subsequent agreements to the Convention as highlighted in para 45 is compatible with the rules of interpretation in Article 31 of VCLT and qualifies as “other rules of international law not incompatible with this Convention” as set out in Article 293 of the Convention. Those agreements namely the 1995 UN Fish Stock Agreement and 1994 Implementing Agreement were established in connection with the conclusion of the Convention accepted by the parties to the Convention as instruments related to the Convention. It shall be noted however, that the subsequent agreements considered in this advisory opinion are those agreements adopted prior to the submission of this request of advisory opinion to the Tribunal by the Commission.

IV. The Convention Does Not Regulate Specific Obligations of its States Parties to Prevent, Reduce, and Control of Marine Pollution in Relation to Climate Change, and to Protect and Preserve the Marine Environment in Relation to Climate Change Impact

47. Indonesia is of the view that the Convention is an overarching legal framework for the protection of the marine environment. The Convention reflects codification of international law on the protection and preservation of the marine environment. It should be noted, however, that the Convention does not make any reference to climate change.
48. With respect to the specific obligations of states to protect and preserve marine environment from climate change impact, it is viewed that the Convention does not regulate specific obligations of its States Parties to prevent, reduce, and control of marine pollution in relation to climate change, and to protect and preserve the marine environment in relation to climate change impact. Indonesia is of the view that:
 - a. The impacts of climate change were not addressed during the negotiation of the Convention;
 - b. Pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change is not considered under the Convention.

- c. Part XII of the Convention does not provide specific obligations to the States Parties to prevent, reduce, and control of marine pollution in relation to climate change, as well as to protect and preserve the marine environment in relation to climate change impact; and
- d. The subsequent agreements established as instruments to the Convention, namely the 1995 UN Fish Stock Agreement and the 1994 Implementing Agreement also did not include consideration of climate change in the negotiation process.

The Impacts of Climate Change Were Not Addressed During the Negotiation of the Convention

- 49. The Third United Nations Conference on the Law of the Sea was convened in late 1973.¹⁹ It was negotiated over 9 (nine) sessions from 1973 to 1982 and finally adopted on 10 December 1982. At the time of the negotiations, the climate change issue was not discussed within the context of the conference of the law of the sea agenda. The text and *travaux preparatoire* of the Convention do not contain any references to climate change.
- 50. Given the above circumstances, it is logical that there is no single reference to the impacts of climate change in the the Convention. Consequently, there is also no provision in the Convention that stipulates specific obligations of States to protect and preserve marine environment from climate change impact.
- 51. During the negotiation of the Convention, states and group of states endeavored to attain various interests, among others, management and control over biological and mineral resources; recognition for a new regime of archipelagic waters; access to the sea for landlocked states; protection for states bordering straits; access to the seabed mineral resources beyond national jurisdiction.
- 52. The Convention regulates specific obligations on numerous issues in relation to the protection marine environment. For instance, Article 194 (3b), of the Convention addresses pollution from vessels, in particular, measures for preventing intentional and unintentional discharges from any kind of vessels, which include nuclear-powered ships and ships carrying nuclear.
- 53. In this regard, the Convention highlights in Article 194 (1) that States shall take all measures to prevent, reduce and control pollution of the marine environment using

¹⁹ First and Second Session (*New York, 3–15 December 1973 and Caracas, 20 June to 29 August 1974*) https://legal.un.org/diplomaticconferences/1973_los/vol1.shtml.

the best practicable means in accordance with their capabilities. Furthermore, States shall ensure that activities under their jurisdiction or control are conducted as not to cause damage by pollution to other States and their environment (Article 194 (2)).

54. The Convention provides a clear framework of obligations for States to prevent, reduce and control pollution from all sources towards marine environment, including fragile ecosystems, habitats and endangered species. It also obliged States to cooperate either directly or through international organizations to develop necessary rules and standards. Nevertheless, it is clear that the Convention does not contain any mechanism for collective action to address the climate-ocean nexus.
55. Indonesia views that through the lens of conventional approach/perspective, the Convention is silent on climate issue. At the time when the draft Convention was negotiated from 1973 to 1982, climate change was not part of the law of the sea agenda. The Convention therefore does not address an issue that was not in its business agenda, and it is intended to deal only with something that was discussed at the time when the Convention was drafted. As a matter of fact, the Convention does not have articles expressly referring to climate change or adaptation.
56. Based on the historical facts above, Indonesia views that the issue of climate change and its impacts are not addressed and not directly related to the Convention. Thus, it is clear that the Convention does not provide “specific obligations” of States pertaining to climate change impacts as questioned by the Commission in its request for advisory opinion to the the Tribunal.

Pollution of the Marine Environment that Result or Are Likely to Result from Climate Change Is Not Considered under the Convention

57. Definition of “pollution” under the Convention is defined in Article 1, which means “the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.”
58. The definition of climate change as defined in UNFCCC clearly does not have direct link with the definition of pollution in the Convention. UNFCCC in Article 1 defines climate change as “change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”. The element ‘introduced by man’ as in the Convention and ‘attributed to human activity’

as in the UNFCCC does not reflect the same meaning. The Convention is straight forward in pointing out that the introduction of substances or energy into the marine environment needs to be conducted by man, whereas UNFCCC is indirect as it attributes directly or indirectly to human activity.

59. The concept of pollution in the Convention principally developed from Principles 7 and 21 of the 1972 Stockholm Declaration, which stated that “States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.”²⁰
60. It can be inferred from the negotiation of the Convention that the negotiating States intended to formulate the obligations to prevent, reduce, and control pollution among others from lands, marine, rivers, estuaries, the atmosphere, pipelines, outfall structures, vessels, aircraft and sea-bed installations or devices towards marine environment.²¹
61. Indonesia notes that Article 212 of the Convention emphasized the importance of states to adopt laws to prevent, reduce and control pollution from marine environment from or through the atmosphere. From the negotiation, the relationship between atmosphere and marine environment is to the extent that there is a direct link between the atmosphere in superjacent airspace and the natural qualities of the subjacent ocean space.²²
62. Indonesia underlines that the formulation on the obligation to prevent, reduce, and control pollution to the marine environment from or through the atmosphere is based on the maritime zones approach regulated under the Convention, as it regulates the obligation of States to establish national laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere “within air space under their sovereignty or with regard to vessels or aircraft flying their flag or of their registry.”²³ This refers to the air space of the State’s territory (which includes the air space above land). In the case of coastal or archipelagic States, it further refers to the air space above the so-called maritime part of the State’s territory, namely the internal waters, archipelagic waters and the territorial sea.²⁴

²⁰ UNCLOS Commentary, p. 55

²¹ UNCLOS Commentary 2017, p. 1304

²² UNCLOS Commentary, P. 67

²³ UNCLOS Commentary 2017, P. 1446

²⁴ *Ibid.*

63. The term “from the atmosphere” indicates that the pollutants occur in the atmosphere and directly affect the marine environment. Based on the proposal raised by Kenya during the 2nd session of the Conference in 1974, the pollution “from the atmosphere” refer to the “accidents involving flying craft, release of toxic and harmful substances and particularly atmospheric nuclear fall-outs.”²⁵
64. Indonesia views that the interpretation of the obligation under the Convention shall be based on the original approach during the negotiation of the Convention, which are:
- a. The duty can only be restricted to the airspace under a State’s sovereignty and to vessels flying that States’ flag or vessels or aircraft of their registry;
 - b. There is a direct link between the atmosphere in that State’s airspace and the natural qualities of the subjacent ocean space of that State; and
 - c. The introduction of substances or energy into the marine environment directly or indirectly has to be made by man.

Part XII of the Convention Does Not Provide Specific Obligations to the States Parties to Prevent, Reduce, and Control of Marine Pollution in Relation to Climate Change, As Well As to Protect and Preserve the Marine Environment in Relation to Climate Change Impact

65. Indonesia notes that Part XII of the Convention addresses 3 (three) different objectives, which is the prevention, reduction, and control of pollution. To summarize, Indonesia notes that the obligation of States with regards to pollution to the marine environment are as follows:
- a. States, individually or jointly, have the obligation to take all measures in preventing, reducing, and controlling marine environment pollution and harmonize their policies;
 - b. The ‘no harm’ principle or responsibility of States not to cause environmental damage in areas outside their jurisdiction.²⁶ This also includes the obligation not to spread pollution from one area to the other²⁷; and
 - c. States are obliged to take/design measures, *inter alia*, to fully minimize toxic/harmful substances, and pollution from vessels as well as from installations and devices.²⁸

²⁵ UNCLOS Commentary, p. 67

²⁶ The Trail Smelter Arbitration

²⁷ Article 195 of UNCLOS

²⁸ “*United Nations Convention on the Law of the Sea: A Commentary*,” edited by Alexander Proelss, Amber Rose Maggio, Eike Biltza, and Oliver Daum, Munchen: Nomos Verlagsgesellschaft, 2017

66. Indonesia also attaches great importance to the nature of Part XII of the Convention which underlines the importance of cooperation in the efforts to prevent, reduce, and control pollution to the marine environment. Specific procedural and substantive obligations to implement the duty to cooperate has been regulated under Part XII of the Convention, as follows:
- a. Notify other States in case of imminent danger to the marine environment;
 - b. Eliminate the effects of pollution, prevent or minimize the damage through the creation of contingency plans; and
 - c. Minimization of the effects of major incidents.
67. Indonesia notes that Article 194 para. 2 of the Convention has included the “no harm” principle. Such principle is general principle of the international environmental law that was included in the Convention. This principle envisaged in the *Trail Smelter Case*, where States shall take all measures necessary to prevent the activities within their jurisdiction from damaging the environment of other States.²⁹ Indonesia also notes that this “no harm” principle has been acknowledged as customary in nature in the *Corfu Channel Case* in 1949, and further recognized in the Principle 21 of the Stockholm Declaration, with emphasis on how the implementation of the rights of States in utilizing the natural resources within their jurisdiction shall not cause damage to other States.
68. Part XII of the Convention regulates general obligation of the State Parties to the Convention. It does not, however, regulate any specific obligations of the States Parties to the Convention to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, or to protect and preserve the marine environment in relation with the impacts of climate change.

States’ Obligation to Preserve and Protect Marine Environment under Other Parts in the Convention and Subsequent Agreements under the Convention

69. The obligations of States to preserve and protect marine environment are also regulated under other Parts in the Convention. Article 61 of the Convention, for instance, prescribes that States have the obligation to conserve and manage their living resources in their Exclusive Economic Zone.

²⁹ Para. 1965 of the *Trail Smelter Case*: “No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”

70. *Request for advisory opinion submitted by the SRFC* also provides further explanation to this general obligation, where States are obliged to enact laws and regulations to conserve living resources and protect and preserve the marine environment.³⁰ The obligation to conduct conservation of living resources is also extended to the flag State, which should ensure compliance of vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State.³¹ The conservation of living resources is also recognized in *Southern Bluefin Tuna* case as part of the obligation to preserve and protect marine environment in the Convention.³²
71. During the negotiation of the Convention, the provision on the conservation of the marine living resources in the Exclusive Economic Zone does not include consideration on climate change impacts, especially pollution arising from climate change.
72. During the negotiation of the 1995 UN Fish Stock Agreement, as shown by the reports of the Conference session, there is no particular consideration on the pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change impacts. The only consideration is the pollution from ships, especially the fishing vessels, and its application for the precautionary principle.³³

³⁰ Para. 102 of the Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, *ITLOS Report 2015*.

“One of the goals of the Convention, as stated in its preamble, is to establish “a legal order for the seas and oceans which . . . will promote” inter alia “the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”. Consequently, laws and regulations adopted by the coastal State in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other States Parties whose ships are engaged in fishing activities within that zone.”

³¹ Para. 120 of the Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission:

“Article 192 of the Convention imposes on all States Parties an obligation to protect and preserve the marine environment. Article 193 of the Convention provides that “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.” In the *Southern Bluefin Tuna Cases*, the Tribunal observed that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (*Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70). As article 192 applies to all maritime areas, including those encompassed by exclusive economic zones, the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone because, as concluded by the Tribunal, they constitute an integral element in the protection and preservation of the marine environment.

³² Para. 70 of the *Southern Bluefin Tuna*: “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment

³³ A/CONF.164/INF/8, 26 January 1994, Para. 25, Accessed through <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/047/02/PDF/N9404702.pdf?OpenElement>

73. Another subsequent agreement under the Convention, which is the 1994 Implementing Agreement also does not include consideration on climate change, and on pollution of the marine environment that result or are likely to result from climate change.

States' Obligation Related to Climate Change Are Regulated under Specific International Instruments

74. The issue of climate change first garnered international attention in mid-1980s, and the UN General Assembly first recognized the issue through the adoption of Resolution 43/53 on the “Protection of global climate for present and future generations.” The negotiation of the UNFCCC was launched through the adoption of the UN General Assembly Resolution 45/212 in December 1990.³⁴
75. The ultimate objective of UNFCCC, as well as its related legal instruments adopted by the Conference of the Parties, as stated in Article 2, is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” This ultimate objective was condensed from the previous deliberation on climate change and existing measures taken by States or regional economic integration organizations which focused on the emissions of greenhouse gases, as identified in Resolution 45/212.³⁵
76. In the UNFCCC, there is no mention to the Convention or the previous law of the sea instruments. The only institutions whose roles are specified in Resolution 45/212 are the UN Environment Program (UNEP) and the World Meteorological Organization.
77. The mention of the “ocean” under UNFCCC is only included in Article 4 of the UNFCCC, highlighting the role of the ocean as sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol. In this regard, the promotion of sustainable management and the cooperation in the conservation and enhancement of oceans are directed to their roles and sinks and reservoirs to achieve the objective of UNFCCC itself.
78. As mentioned previously, the objective of UNFCCC is attached to the “climate system”, which in the UNFCCC is defined as “the totality of the atmosphere, hydrosphere, biosphere, and geosphere and their interactions.” In relation to Article

212 of the Convention as iterated in the previous chapters, Indonesia would like to underline that in the Convention, the relationship between atmosphere and marine environment is to the extent that there is a direct link between the atmosphere in superjacent airspace and the natural qualities of the subjacent ocean space.

79. In this regard, since the UNFCCC attaches its provisions to the “climate system” in general, it supports our argument that the obligations under the Convention on the prevention, reduction and control to the marine environment did not include climate change within its consideration. Further, the obligations under UNFCCC were not negotiated to accommodate the objective of the Convention, including the obligations of States to preserve and protect the marine environment.
80. Moreover, Indonesia observes that the efforts of the international community in reducing emissions from vessels are regulated in separate instrument, which also gives reference to the UNFCCC and Kyoto Protocol. In 1997, when adopting Kyoto Protocol, States decided to address these missions on a sectoral basis through the International Maritime Organization, which has regulatory competence over maritime shipping, under Article 2.2 of the Protocol:

“The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.”

81. In the light of the explanations from the abovementioned paragraphs, it confirms the views of Indonesia that States’ obligation related to climate change are not regulated under the Convention but rather under specific international instruments. The reduction of emissions from shipping does not give reference to the Convention, but instead to the Kyoto Protocol. This further reaffirms Indonesia’s views that the Convention was not negotiated to assign specific obligations to States concerning emission reduction under the issue of climate change.

IV. Conclusion and Submissions

82. As a conclusion, Indonesia submits the following:
- a. The Tribunal has the jurisdiction to render an advisory opinion in this case and there is no compelling reason for the Tribunal to decline rendering an advisory opinion;

- b. The applicable laws the Tribunal can utilize in rendering an advisory opinion is the subsequent agreements under the Convention, which are the 1995 UN Fish Stock Agreement and the 1994 Implementing Agreement;
- c. There is no specific obligation of the States Parties to the Convention to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, as well as to protect and preserve the marine environment in relation to climate change impact; and
- d. Should the tribunal decide to render its advisory opinion, Indonesia views that such advisory opinion shall have no binding character. It shall only be applicable and used to guide the Commission, as the requesting body, in conducting its activities.

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