



COMMISSION OF SMALL ISLAND STATES  
ON CLIMATE CHANGE AND INTERNATIONAL LAW

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24 September 2023  
Registrar  
International Tribunal for the Law of the Sea  
Am Internationalen Seegerichtshof 1  
22609 Hamburg  
Germany

**Case No. 31: Response to Judge Kittichaisaree's Question**

Excellency:

We have the honour to refer to Judge Kittichaisaree's question of 11 September 2023 to the Commission of Small Island States on Climate Change and International Law (the "Commission"), which reads as follows:

In light of Chapters 6, 7 and 8 of your Written Statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?

The Commission's written response is annexed to this letter.

Please accept, Excellency, the assurances of our highest consideration.

Payam Akhavan  
Representative of the Commission

Catherine Amirfar  
Co-Representative of the Commission

cc: Secretariat of the Commission

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

**Case No. 31**

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



**RESPONSE TO JUDGE KITTICHAISAREE'S QUESTION OF  
11 SEPTEMBER 2023**

**24 SEPTEMBER 2023**

1. On 11 September 2023, Judge Kittichaisaree put the following question to the Commission of Small Island States on Climate Change and International Law (the “Commission” or “COSIS”):

In light of Chapters 6, 7 and 8 of your Written Statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?

2. The Commission welcomes the opportunity to respond to this question in order to assist the Tribunal. Its response is organized as follows. *First*, the Commission addresses the distinction between obligations of conduct and obligations of result in international law, and the reasons why the International Law Commission (the “ILC”) has elected to abandon it for purposes of its work on State responsibility. *Second*, the Commission explains why the obligations in UNCLOS, and in particular those under Articles 192 and 194, are not susceptible to precise categorization into obligations of conduct or result. *Third*, COSIS demonstrates that the text of UNCLOS provisions in Part XII includes but also goes beyond obligations of due diligence.

### **I. The Distinction Between Obligations of Conduct and Obligations of Result Has a Limited Pedigree in International Law**

3. The distinction between obligations of conduct and obligations of result originates from civil law systems.<sup>1</sup> It was first introduced into the work of the ILC on State responsibility in 1977.<sup>2</sup> Generally understood, obligations of result require a guaranteed outcome, whereas obligations of conduct require States to conduct themselves in a specified manner, whether or not a certain objective is achieved.<sup>3</sup>

4. A precise separation and binary categorization of obligations as either obligations of conduct or of result can be difficult to maintain in practice. As observed *inter alia* by the International Law Association’s Study Group on Due Diligence in International Law, the equation of due diligence obligations with obligations of conduct may be problematic for certain types of obligations such as those that require progressive realization, sometimes also referred to as “goal-oriented obligations.”<sup>4</sup> In such instances, States have discretion in how to

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<sup>1</sup> ILC, Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/498 and Add.1-4, (1999), ¶ 57.

<sup>2</sup> ILC, Sixth Report on State Responsibility, by Mr. Robert Ago, Special Rapporteur, U.N. Doc. A/CN.4/302 and Add. 1-3, (1977).

<sup>3</sup> ILC, Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/498 and Add.1-4, (1999), ¶ 57; *see also* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 371 (1999), p. 375; *see generally*, Rüdiger Wolfrum, *Obligations of Result vs Obligations of Conduct: Some Thoughts About the Implementation of International Obligations*, LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2011).

<sup>4</sup> *See* ILA Study Group on Due Diligence in International Law, First Report (2014), p. 17; Heike Krieger and Anne Peters, *Due Diligence and Structural Change in the International Legal Order*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER (Heike Krieger, et al. eds 2020), p. 371; Rüdiger Wolfrum, *Obligations of Result vs Obligations of Conduct: Some Thoughts About the Implementation of*

achieve the result, but “the measures that are taken must be undertaken with some result in mind and the result will be key to the determination of a violation.”<sup>5</sup>

5. The difficulties arising from the distinction were also discussed in the work of the ILC on State responsibility, which at one point included two draft articles (then-draft Articles 20 and 21) that distinguished between obligations of conduct and obligations of result.<sup>6</sup> However, both States and commentators raised “serious doubts as to its usefulness,”<sup>7</sup> and based on a survey of its use in international case law, “it does not seem that the distinction between obligations of conduct and result made any difference . . . or actually contributed to an analysis of the issues.”<sup>8</sup>

6. The Drafting Committee ultimately concluded that draft Articles 20 and 21 should be deleted “on the grounds that the obligations could not always be divided as specified by the articles, that the distinction appeared to have no consequences for the rest of the draft articles.”<sup>9</sup> The ILC’s reasoning in coming to this conclusion is instructive, and can be summarized on the basis of three main grounds:

- (a) *First*, although in some instances the classification of a certain obligation may be possible and may assist in its interpretation and application, “such classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose.”<sup>10</sup> The problem with the distinction is that it implies the need for “an intermediate process of classification of obligations before questions of a breach can be resolved,” whereas, “in the final analysis, whether there has been a breach of an obligation depends on the *precise terms of the obligation*, and on the *facts of the case*.”<sup>11</sup>

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*International Obligations*, LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2011), p. 367.

<sup>5</sup> ILA Study Group on Due Diligence, First Report, p 17.

<sup>6</sup> ILC, Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/498 and Add.1-4, (1999), ¶¶ 52–80.

<sup>7</sup> *See id.*, ¶¶ 56 and 59.

<sup>8</sup> *Id.*, ¶ 64. *See also*, ¶ 68 (“[T]he distinction between obligations of conduct and result can be used as a means of the classification of obligations, but that it is not used with much consistency.”); Crawford, ¶ 59, n. 125 (citing Göran Lysén, STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY OF STATES FOR LAWFUL ACTS: A DISCUSSION OF PRINCIPLES (1997), p 62; Jean-Marie Dupuy, *Le fait générateur de la responsabilité internationale des États (Volume 188)*, Collected Courses of the Hague Academy of International Law, pp. 49–50).

<sup>9</sup> ILC, Summary Record of the 2605<sup>th</sup> Meeting, U.N. Doc. A/CN.4/SR/2605, vol I. (1999), ¶ 7. *See also* ILC, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/49 vol. I, Art. 12, ¶ 11 (the only reference of the distinction, where it is noted that the “distinction may assist in ascertaining when a breach has occurred” but that it is “not exclusive, and it does not seem to bear specific or direct consequences as far as the present articles are concerned”) (footnote omitted).

<sup>10</sup> ILC, Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/498 and Add.1-4, (1999), ¶ 77.

<sup>11</sup> *Id.* (emphases added); *see also*, ¶ 68 (“In each case the question was one of interpretation of the relevant obligation, and the value of the distinction lies in its relevance to the measure of discretion left to the respondent State in carrying out the obligation. That discretion was necessarily constrained by the primary

- (b) *Second*, there is an “immense variety” of primary rules and myriad different ways in which they are formulated. The means for achieving a result may be stated with different degrees of specificity; the ends to be achieved may—depending on the circumstances—dictate the necessary means with varying degrees of specificity; and “means and ends can be combined in various ways.”<sup>12</sup> For example:

[I]f it becomes clear that the result is not likely to be achieved, and that there are further steps open to the State which would achieve it, then the incidence of the obligation in those circumstances may become more rigorous, and even tend towards an obligation of result. Thus in practice, obligations of conduct and obligations of result present *not a dichotomy but a spectrum*.<sup>13</sup>

- (c) *Third*, some obligations simply cannot be classified in either category. There are hybrid combinations encompassing both an obligation of conduct and of result, as is the case for example with obligations to prevent, or obligations to adopt necessary domestic laws and regulations and to effectively monitor and enforce those.<sup>14</sup>

7. Thus, the ILC explains in its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts that the distinction between obligations of conduct and obligations of result, while it “may assist in ascertaining when a breach has occurred,” is “not exclusive” and “does not seem to bear specific or direct consequences as far as the present articles are concerned.”<sup>15</sup>

## II. UNCLOS Obligations Are Not Susceptible to a Precise Categorization into Obligations of Conduct or Result

8. Consistent with these observations of the ILC and commentators, there is a methodological difficulty in answering Judge Kittichaisaree’s question because the various obligations under Part XII of UNCLOS defy such binary categorization.<sup>16</sup>

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rule, and the crucial issue of appreciation was, to what extent? The distinction may help in some cases in expressing conclusions on this issue: whether it helps in arriving at them is another matter”).

<sup>12</sup> *Id.*, ¶ 79.

<sup>13</sup> *Id.*, ¶ 79 (emphasis added) (Footnotes omitted).

<sup>14</sup> *Id.*, ¶ 80; Heike Krieger and Anne Peters, *Due Diligence and Structural Change in the International Legal Order*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER (Heike Krieger, et al. eds 2020), pp. 359, 361; Rüdiger Wolfrum, *Obligations of Result vs Obligations of Conduct: Some Thoughts About the Implementation of International Obligations*, LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2011), p. 368.

<sup>15</sup> ILC, Articles on State Responsibility with Commentaries, 2001, at p. 56, ¶ 11; Belize Oral Statement, Verbatim Record, September 18 (Morning), pp. 40–41, at lines 29–14.

<sup>16</sup> COSIS Oral Statement, Verbatim Record, September 12 (Afternoon), p. 26, lines 21-45; *see also* Belize Oral Statement, Verbatim Record, September 18 (Morning), pp. 40-41, lines 36-14; International Union for Conservation of Nature Oral Statement, Verbatim Record, September 21 (Morning), p. 33, lines 38-40; Mauritius Oral Statement, Verbatim Record, September 15 (Morning), p. 27, lines 5-10; Mozambique Oral Statement, Verbatim Record, September 18 (Morning), p. 13, lines 11-33.

9. Chapters 6, 7, and 8 of COSIS’s written statement refer primarily to Articles 192 and 194. Both are, like all the other provisions of UNCLOS, treaty provisions that entail specific obligations. Strictly speaking, however, and considered in the context of Judge Kittichaisaree’s question, the Articles are not themselves specific obligations.

10. The point can be illustrated by reference to Article 192, which provides that “States have the obligation to protect and preserve the marine environment.”

11. Article 192 describes itself as an “obligation”; but that is an over-simplification. Its meaning cannot be reduced to a single obligation. For instance, the obligation to protect and preserve would be effectively nullified if a State could simply close its eyes to all evidence that the environment is under threat. The obligation thus necessarily implies a duty to have some awareness of the state of the marine environment, and of the nature and magnitude of significant threats to the environment, and of practicable measures available to prevent or mitigate those threats.<sup>17</sup> The present request for an Advisory Opinion seeks to clarify what States Parties are obliged—whether explicitly or by necessary implication—by certain UNCLOS provisions to do and not to do in relation to certain forms of marine pollution, in order to comply with their obligations under Part XII.

12. The difficulty in characterizing the obligations arising under Article 192 may be illustrated by two hypothetical examples:

- (a) An agency of State X deliberately discharges large quantities of harmful pollutants into the sea, causing immediate and serious harm to marine flora and fauna; and
- (b) State Y makes no effort whatsoever to monitor or prevent discharges of pollutants by private corporations into rivers, and thence into the sea, progressively causing serious harm to marine flora and fauna.

13. A neighboring State might seek to take action in each case; and it is evident that in each case a plausible claim can be made that State X or State Y is in breach of its UNCLOS obligations, including—but not limited to—obligations arising under Article 192.

14. It also seems to be clear that it cannot be said here that Article 192 imposes either (i) *only* “an obligation of result” or (ii) *only* “an obligation of conduct” that is violated in the two instances.<sup>18</sup> State X might be said to have breached its obligation to prevent its actions resulting in pollution of the sea and harm to the marine environment; and State Y’s action might be described as a breach consisting in its failure to conduct itself in such a manner that it could take reasonable steps to prevent pollution of the sea and harm to the marine environment. One looks like a breach of an obligation of result; the other like a breach of an

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<sup>17</sup> See, e.g., UNCLOS, Articles 198, 204(2), 205, 206; see also COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 35, lines 23-28.

<sup>18</sup> See Pierre-Marie Dupuy, *Le fait générateur de la responsabilité internationale des États* (Volume 188), in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, p. 49 (noting that Article 192 can be read as either an obligation of conduct to “protect and preserve” or as an obligation of result to achieve the protection and preservation of the marine environment).

obligation of conduct or means. But both are entailed by the basic provision in Article 192 obliging States to “protect and preserve the marine environment.”<sup>19</sup>

15. That does not exhaust the difficulty. One might also say that State X failed to conduct itself in such a manner that it could take reasonable steps to prevent pollution of the marine environment, and thus breached Article 192. And one might say that State Y breached its obligation because it failed to achieve the result that the marine environment was protected and preserved from pollution. But there are in fact many other ways in which such cases might be presented. For example, if a State were to repeal or abandon certain environmental controls relating to marine pollution, it might be argued that the very fact of regression from previous environmental controls and policies is itself an act that is not in compliance with the Article 192 obligation. To provide another example, if a State omits to assess baseline or “starting-point” standards of pollution, biological health and biodiversity, and so on, in the seas around its coasts, it may prove impossible to make any proper assessments of the impact of subsequent human activities upon those waters. A State that knows nothing of the quality of the marine environment around its coasts can scarcely be said to be conducting itself in compliance with its Part XII obligations.<sup>20</sup> But when does the result of that omission occur? As soon as the State fails to establish baseline standards against which the impact of later activities can be measured? And when might a breach of Articles 204, 205, 206, 207(2), or 208(2), arise from such circumstances? When the failure occurs (whenever that might be), or only when subsequent activities impact upon the coastal waters, or at some other time?

16. There is, moreover, a further point that complicates the interpretation of most, if not all, of the provisions of Part XII. The definition of “pollution” in UNCLOS Article 1(1)(4) includes not only “the introduction by man, directly or indirectly, of substances or energy into the marine environment” “which results” in “deleterious effects”, but also such introduction which . . . *is likely to result*” in those deleterious effects.<sup>21</sup> That in itself may make it difficult to identify the “result” of an obligation such as the Article 194(1) duty to “prevent . . . pollution of the marine environment”<sup>22</sup> and to distinguish it from “conduct” that is not in compliance with the duty. Where is the line between an obligation of result and an obligation of conduct to be drawn?

17. Plainly, the scope for such arguments in the context of any or all of the specific constellations of facts that might arise in the future is so great that it is not practicable to specify that this or that UNCLOS provision is an obligation of result or an obligation of conduct or that it belongs to some other category of obligation. These examples illustrate the problems of stipulating in advance that any given UNCLOS provision is an obligation of result or an obligation of conduct.

18. It is because of these problems, and in order to avoid inappropriate and abstract characterizations of UNCLOS provisions foreclosing future arguments that might be raised in contentious cases, that COSIS did not reduce the Part XII provisions to categories of

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<sup>19</sup> UNCLOS, Article 192.

<sup>20</sup> See, e.g., UNCLOS, Articles 198, 204(2), 205, 206 see also COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 35, lines 23-28.

<sup>21</sup> UNCLOS, Article 1(1)(4); COSIS Written Statement, § 5.II.A.

<sup>22</sup> UNCLOS, Article 194(1).

obligations of conduct, obligations of result, and so on. Nor does it appear to be necessary to attempt to do so.<sup>23</sup>

19. These problems have been noted in the past. In 1984, in criticizing the distinction between obligations of conduct and result as formulated in draft Articles 20 and 21 of the ILC's work on State responsibility referred to above, Professor Dupuy took, "*au hasard*," the example of Part XII of the then "new" Convention on the law of the sea, as one of the "innumerable" "illustrations of cases rebellious to this narrow systematization."<sup>24</sup> With respect to Article 192, he noted that "to protect and preserve" designates a conduct, but also can be read as indicating the result to be achieved: the protection and preservation of the marine environment.<sup>25</sup> Likewise, in Article 194(2), "the means and the result are mixed in the very formulation of the provision itself."<sup>26</sup> In his 1997 monograph on State responsibility, Professor Göran Lysén also used the example of Part XII to illustrate the "meaninglessness" of the attempt to distinguish between obligations of conduct and result.<sup>27</sup> As he explained, "there is not always a clear-cut line between the two types of obligations, in addition to the fact that they may be intertwined to such an extent that they lose their distinguishing features"<sup>28</sup>, and he specifically pointed to "Articles 194 and 204(1) in the Convention on the Law of the Sea."<sup>29</sup>

20. That is not to say that there is nothing useful that the Tribunal can say in these advisory proceedings, even though it has no concrete case before it. The Tribunal can say that the release of anthropogenic greenhouse gases amounts to pollution under Article 1(1)(4) of the Convention, and is in principle subject to Part XII; and that the fulfillment of the duties of assessing and reporting on risks and impacts, for example, Articles 204 to 206, and of the taking of measures that are 'necessary' under Articles 207 to 212, and so on, all necessarily entail a continuing duty to monitor and report on the health of the seas; and that where serious risks are evident the measures necessary to avert them (or, if that is not possible, to mitigate and control them) must be taken. For this, however, it is not necessary first to categorize UNCLOS obligations into obligations of conduct and obligations of result. The meaning of the UNCLOS provisions lies in what they say and what they necessarily entail, whether it is obligations to take all measures necessary,<sup>30</sup> to adopt and enforce laws and regulations,<sup>31</sup> to cooperate,<sup>32</sup> to provide technical, financial, and other appropriate assistance

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<sup>23</sup> COSIS Oral Statement, Verbatim Record, September 12 (Afternoon), p. 26, at lines 29–45.

<sup>24</sup> Pierre-Marie Dupuy, *Le fait générateur de la responsabilité internationale des États* (Volume 188), in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, p. 49 (our translation).

<sup>25</sup> *Id.*, p. 49.

<sup>26</sup> *Id.*, p. 49 (our translation).

<sup>27</sup> Göran Lysén, STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY OF STATES FOR LAWFUL ACTS: A DISCUSSION OF PRINCIPLES (1997), p. 62.

<sup>28</sup> *Id.*, p. 62, n. 31.

<sup>29</sup> *Id.*, p. 62, n. 31.

<sup>30</sup> See COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 34, lines 12-25.

<sup>31</sup> See COSIS Oral Statement, Verbatim Record, September 12 (Morning), pp. 34-35, lines 34-3.

<sup>32</sup> See COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 35, lines 5-14.



to developing States,<sup>33</sup> to undertake monitoring and assessment of planned activities,<sup>34</sup> or to protect and preserve,<sup>35</sup> among others. Such meaning can be determined only by interpreting the relevant provision in the circumstances in which it is applicable.

### III. UNCLOS Part XII Entails but Also Goes Beyond Due Diligence Obligations

21. With respect to the interpretation of the provisions of UNCLOS Part XII, COSIS submits—supported by a broad consensus among participating states and international organizations—that at least Articles 192 and 194(2) entail *inter alia* due diligence obligations.<sup>36</sup> In the words of the Seabed Disputes Chamber, “the notions of obligations of ‘due diligence’ and obligations ‘of conduct’ are connected.”<sup>37</sup> The Chamber accordingly characterized sponsoring States’ obligation “to ensure” as an obligation of conduct and not of result, and as an obligation of due diligence.<sup>38</sup> The Chamber furthermore pointed to “direct obligations” under UNCLOS and related instruments, with which States have to comply “*independently* of their obligation to ensure,”<sup>39</sup> while, at the same time, “compliance with these obligations can *also be seen as a relevant factor in meeting the due diligence ‘obligation to ensure.’*”<sup>40</sup> The Chamber listed the following as “[a]mong the most important of these direct obligations”: “the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine

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<sup>33</sup> UNCLOS, Articles 202, 203; *see also* COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 35, lines 16-21.

<sup>34</sup> UNCLOS, Articles 198, 204(2), 205, 206; *see also* COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 35, lines 23-28.

<sup>35</sup> UNCLOS, Article 192; *see also* COSIS Oral Statement, Verbatim Record, September 12 (Afternoon), p. 8, lines 19-44.

<sup>36</sup> *See e.g.*, African Union Written Statement, ¶¶ 169, 333; Bangladesh Written Statement, ¶¶ 37, 42, 51; Belize Written Statement, ¶¶ 59(c), 68; Canada Written Statement, ¶¶ 54, 62(v); Chile Written Statement, ¶ 48; Democratic Republic of the Congo Written Statement, ¶ 141; Egypt Written Statement, ¶ 30; European Union Written Statement, ¶ 14; France Written Statement, ¶¶ 103, 143; International Union for Conservation of Nature Written Statement, ¶¶ 74–75; Korea Written Statement, ¶¶ 10, 15, 29; Latvia Written Statement, ¶¶ 14, 18; Mauritius Written Statement, ¶¶ 68, 79; Micronesia Written Statement, ¶ 39; Mozambique Written Statement, ¶¶ 3.56, 3.61, 3.87(d); Nauru Written Statement, ¶ 52; The Netherlands Written Statement, ¶ 3.2; New Zealand Written Statement, ¶ 69; Portugal Written Statement, ¶ 63; Rwanda Written Statement, ¶¶ 190, 223; Sierra Leone Written Statement, ¶ 50; Singapore Written Statement, ¶¶ 29, 65.

<sup>37</sup> *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February) (“*Area Advisory Opinion*”), ¶ 111; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) (“*SRFC Advisory Opinion*”), ¶ 125. *See also Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 ICJ REP. 14 (20 April) (“*Pulp Mills Judgment*”), ¶ 187 (holding that an obligation to adopt regulatory or administrative measures and to enforce them is an obligation of conduct, requiring both parties “to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.”)

<sup>38</sup> *Area Advisory Opinion*, ¶ 110. Following this reasoning, the *SRFC Advisory Opinion* characterizes the obligation of the flag State to ensure that vessels flying its flag are not involved in IUU fishing as an obligation of conduct and as an obligation of due diligence, not an obligation of result. *SRFC Advisory Opinion*, ¶ 129.

<sup>39</sup> *Area Advisory Opinion*, ¶ 121 (emphasis added).

<sup>40</sup> *Id.*, ¶ 123 (emphasis added).

environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.”<sup>41</sup>

22. Accordingly, the due diligence required of States in the context of these obligations under Part XII is determined, at a minimum, by a series of generally accepted, objective, factors: the level of risk and the foreseeability and severity of potential harm,<sup>42</sup> the state of science,<sup>43</sup> relevant international rules and standards,<sup>44</sup> and the relevant State’s capabilities.<sup>45</sup> Given the high risk of disastrous harm from greenhouse gas emissions and climate change, these parameters of due diligence entail concrete and stringent requirements for the conduct of States.<sup>46</sup>

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<sup>41</sup> *Id.*, ¶ 122.

<sup>42</sup> See COSIS Written Statement, ¶¶ 54, 232, 281, 284, 361, 425; COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 7, at lines 1–6, pp. 9–10, at lines 17–2; African Union Written Statement, ¶¶ 171, 228; Bangladesh Written Statement, ¶ 37; Belize Written Statement, ¶ 68; Canada Written Statement, ¶¶ 54, 59; European Union Written Statement, ¶ 20; International Union for Conservation of Nature Written Statement, ¶ 79; Korea Written Statement, ¶ 10; Mauritius Written Statement, ¶ 80; Mozambique Written Statement, ¶ 3.62; Portugal Written Statement, fn. 98; Sierra Leone Written Statement, ¶¶ 64; Singapore Written Statement, ¶ 33; United Kingdom Written Statement, ¶¶ 66–67; see also *Alabama Claims (United States v. Great Britain)*, Award (14 September 1872), XXIX RIAA 125 (“*Alabama Claims Award*”), 129; ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Article 3, ¶¶ 11, 18; *Area Advisory Opinion*, ¶ 117.

<sup>43</sup> See COSIS Written Statement, ¶¶ 54, 281, 338–341, 425; COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 10, at lines 22–26; African Union Written Statement, ¶¶ 15, 127, 168, 171, 228; Bangladesh Written Statement, ¶ 37; Belize Written Statement, ¶ 68; Chile Written Statement, ¶¶ 79, 80, 96, 118(5); Egypt Written Statement, ¶ 41; European Union Written Statement, ¶ 25; International Union for Conservation of Nature Written Statement, ¶¶ 78–79; Mauritius Written Statement, ¶ 80; Micronesia Written Statement, ¶¶ 42, 44; Sierra Leone Written Statement, ¶ 64; Singapore Written Statement, ¶ 34; United Kingdom Written Statement, ¶¶ 67–68; see also *Area Advisory Opinion*, ¶ 131.

<sup>44</sup> See COSIS Written Statement, ¶ 286, 354–356, 425; COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 8, at lines 7–11; Bangladesh Written Statement, ¶¶ 40, 51; Belize Written Statement, ¶ 60; Canada Written Statement, ¶¶ 58, 62(v); Chile Written Statement, ¶¶ 51, 77, 118(4); Egypt Written Statement, ¶ 30; European Union Written Statement, ¶¶ 14, 19, 23, 24, 32; Korea Written Statement, ¶ 10; Latvia Written Statement, ¶ 21; Micronesia Written Statement, ¶¶ 46, 62; Mozambique Written Statement, ¶ 3.85; New Zealand Written Statement, ¶ 70; Sierra Leone Written Statement, ¶ 52; Singapore Written Statement, ¶ 37; see also *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016) (“*South China Sea Award*”), ¶ 941 (quoting *Nuclear Weapons Advisory Opinion*, ¶ 29); *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Award (Jurisdiction and Admissibility) (4 August 2000), UNRIIAA vol. XXIII 1-57 (2006), (“*Southern Bluefin Tuna Award*”), ¶ 52; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1997 ICJ REP. 7 (25 September) (“*Gabčíkovo-Nagymaros Judgment*”), ¶ 140; ILC, Prevention, Article 3, ¶ 4; ILC, Draft Guidelines on the Protection of the Atmosphere, with Commentaries, Guidelines 3 and 9(1).

<sup>45</sup> See COSIS Written Statement, ¶¶ 285, 425; COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 11, at lines 18–37; African Union Written Statement, ¶ 173; Brazil Written Statement, ¶ 23(iii); Canada Written Statement, ¶ 58; European Union Written Statement, ¶ 25; France Written Statement, ¶ 145, 161; International Union for Conservation of Nature Written Statement, ¶¶ 190–191, 194; New Zealand Written Statement, ¶ 57; Portugal Written Statement, fn. 98; Singapore Written Statement, ¶ 35; United Kingdom Written Statement, ¶ 69; see also *Area Advisory Opinion*, ¶ 158–159; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 ICJ REP. 43 (26 February) (“*Bosnian Genocide Judgment*”), ¶ 430; ILC, Prevention, Article 3, ¶¶ 12, 13, 17.

<sup>46</sup> See COSIS Written Statement, ¶¶ 276–287, 337–365; COSIS Oral Statement, Verbatim Record, September 12 (Morning), pp. 9–12, at lines 11–8.

23. At the same time, Article 194(2) also entails an obligation that goes beyond due diligence. It provides that States shall take “all measures necessary to ensure” that activities under their jurisdiction or control do not cause damage by pollution to other States and their environment.<sup>47</sup> As noted, the Seabed Disputes Chamber, in interpreting the obligation to “ensure” in Article 139 as an obligation of due diligence, pointed to the similar use of the term “ensure” in Article 194(2).<sup>48</sup> But, while both Article 139 and Article 194(2) use the term “ensure,” they do so differently. Article 139(1) imposes a “responsibility to ensure,” while Article 194(2) creates an obligation to “take all measures necessary,” and the phrase “necessary to ensure” defines *what* measures must be taken. This significant distinction is reflected even more clearly in the French text.<sup>49</sup>

24. In fact, the language of Article 194(2) is closest to the language used by the International Court of Justice in two cases that focused on steps necessary to achieve a defined result. In *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals*, the ICJ issued a provisional measures order that the United States of America “shall take all measures necessary to ensure” that certain individuals are not executed pending judgment on the request for interpretation, “unless and until these five Mexican nationals receive review and reconsideration” consistent with the Court’s 2004 judgment.<sup>50</sup> The Court found that one of the individuals was executed “without being afforded the review and reconsideration” provided for by the 2004 judgment, and despite having filed multiple applications.<sup>51</sup> Without any other consideration beyond this observation that the required result was not achieved, the Court concluded that this was “contrary to what was directed by the Court” in its provisional measures order and that consequently the United States “did not discharge its obligation.”<sup>52</sup> In *Jurisdictional Immunities of the State* furthermore, Germany asked the Court to order Italy “to take, by means of its own choosing, any and all steps to ensure” (“*de prendre, par les moyens de son choix, toutes les mesures nécessaires pour faire en sorte que*”) that certain Italian judicial decisions infringing Germany’s sovereign immunity cease to have effect.<sup>53</sup> Reasoning that this was warranted as a form of restitution that was neither materially impossible nor involving a burden for Italy out of all proportion to the benefit deriving from it, the Court upheld Germany’s request.<sup>54</sup> The Court held that Italy “is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.”<sup>55</sup>

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<sup>47</sup> UNCLOS, Article 194(2).

<sup>48</sup> *Area Advisory Opinion*, ¶ 113.

<sup>49</sup> COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 21, at lines 11-38; *see also* COSIS Presentation, Day 2, slide 23.

<sup>50</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgement, 1996 ICJ REP. 1 (19 January) (“*Avena Interpretation Judgment*”), ¶ 3.

<sup>51</sup> *Avena Interpretation Judgment*, ¶¶ 9, 52-53.

<sup>52</sup> *Avena Interpretation Judgment*, ¶¶ 52-53.

<sup>53</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 ICJ REP. 99 (3 February) (“*Jurisdictional Immunities Judgment*”), ¶ 137.

<sup>54</sup> *Id.*, ¶ 137.

<sup>55</sup> *Id.*, ¶ 137.

25. COSIS also submits that other obligations in Part XII, while they entail due diligence obligations, are not limited to and go beyond such obligations. This is clearest when it comes to Article 194(1), which requires States to take “all measures . . . necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.”<sup>56</sup> This is not an obligation to take some measures, or reasonable measures, or appropriate measures, or measures that a State considers necessary. Rather, States have the obligation to take “all measures . . . necessary.” In sum, Article 194(1) entails a direct and immediate obligation to take all measures objectively necessary to prevent, reduce and control pollution of the marine environment, which goes beyond a due diligence obligation. As addressed in the course of the hearing, States Parties must comply with this obligation on the basis of the best available scientific and international standards,<sup>57</sup> which require, at a minimum, taking all measures objectively necessary to limit average global temperature rise to no more than 1.5 degrees Celsius above pre-industrial levels, without overshoot, and taking account of any current emission gaps.<sup>58</sup>

26. Where Articles 194(1) and 194(2) go beyond due diligence obligations, the same is true of Article 192, whose content, in the words of the *South China Sea* tribunal, “is further detailed in the subsequent provisions of Part XII, including Article 194.”<sup>59</sup>

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<sup>56</sup> UNCLOS, Article 194(1); COSIS Oral Statement, Verbatim Record, September 12 (Morning), pp. 15-21.

<sup>57</sup> COSIS Written Statement, §7.I, II.A; COSIS Oral Statement, Verbatim Record, September 12 (Morning), pp. 25-26, lines 23-10; African Union Oral Statement, Verbatim Record, September 21 (Afternoon), p. 11, lines 21-25; Bangladesh Oral Statement, Verbatim Record, September 13 (Afternoon), pp. 19-20, lines 20-11; Belize Oral Statement, Verbatim Record, September 18 (Morning), p. 32, lines 11-25; European Union Oral Statement, Verbatim Record, September 20 (Morning), p. 35, lines 16-22; Guatemala Oral Statement, Verbatim Record, September 14 (Afternoon), p. 10, lines 38-42; International Union for the Conservation of Nature Oral Statement, Verbatim Record, September 21 (Morning), p. 33, lines 13-21, p. 36, lines 12-17; Mauritius Oral Statement, Verbatim Record, September 15 (Morning), p. 16, lines 36-43, p. 18, lines 14-23, p. 23, lines 4-39; Micronesia Oral Statement, Verbatim Record, September 15 (Morning), p. 40, lines 42-47; Mozambique Oral Statement, Verbatim Record, September 18 (Morning), p. 9, lines 5-12, p. 11, lines 17-32; New Zealand Oral Statement, Verbatim Record, September 15 (Afternoon), p. 5, lines 29-40, p. 13, lines 22-28; Portugal Oral Statement, Verbatim Record, September 14 (Morning), p. 14, lines 13-21, p. 21, lines 26-31; Sierra Leone Oral Statement, Verbatim Record, September 19 (Morning), p. 20, lines 39-47, p. 24, lines 14-19; Singapore Oral Statement, Verbatim Record, September 19 (Afternoon), p. 9, lines 19-26; Timor Leste Oral Statement, Verbatim Record, September 20 (Morning), p. 21, lines 1-6.

<sup>58</sup> COSIS Oral Statement, Verbatim Record, September 12 (Morning), p. 31, lines 14-40, pp. 34-35, lines 10-28; *see also* African Union Oral Statement, Verbatim Record, September 21 (Afternoon), p. 11, lines 21-25; Bangladesh Oral Statement, Verbatim Record, September 13 (Afternoon), p. 20, lines 1-11; Comoros Oral Statement, Verbatim Record, September 21 (Morning), p. 8, lines 19-21, 36-40; Democratic Republic of the Congo Oral Statement, Verbatim Record, September 21 (Morning), p. 23, lines 5-13; Djibouti Oral Statement, Verbatim Record, September 14 (Morning), p. 31, lines 35-40; European Union Oral Statement, Verbatim Record, September 20 (Morning), pp. 35-36, lines 24-6; Guatemala Oral Statement, Verbatim Record, September 14 (Afternoon), p. 11, lines 28-32; International Union for the Conservation of Nature Oral Statement, Verbatim Record, September 21 (Morning), pp. 42-43, lines 9-3, p. 46, lines 25-32; Mauritius Oral Statement, Verbatim Record, September 15 (Morning), p. 34, lines 37-38; Mozambique Oral Statement, Verbatim Record, September 18 (Morning), p. 12, lines 37-43, pp. 14-15, lines 38-11; New Zealand Oral Statement, Verbatim Record, September 15 (PM), p. 11, lines 12-15; Portugal Oral Statement, Verbatim Record, September 14 (Morning), p. 21, lines 26-31; Sierra Leone Oral Statement, Verbatim Record, September 19 (Morning), p. 24, lines 14-19, p. 27, lines 29-35; Singapore Oral Statement, Verbatim Record, September 19 (Afternoon), p. 6, lines 16-33.

<sup>59</sup> *South China Sea* Award, ¶ 942.

27. For these reasons, COSIS submits that the text of UNCLOS in Part XII, and in particular in Articles 192 and 194, entails but also goes beyond due diligence obligations.

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28. In sum, COSIS submits that UNCLOS obligations are not susceptible to a precise separation and binary categorization into either obligations of conduct or obligations of result. The meaning of the UNCLOS provisions lies in what their text says and what it necessarily entails, and it is ultimately for the Tribunal to determine this meaning by interpreting each relevant provision in the circumstances in which it is applicable. In this regard, the provisions in Part XII entail but also go beyond due diligence obligations.