

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Monday, 18 September 2023, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Albert J. Hoffmann presiding

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

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

Uncorrected

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

List of delegations:

STATES PARTIES

Mozambique

Ms Paula da Conceição Machatine Honwana, Representative

Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson, International Law Commission

Ms Phoebe Okowa, Professor, Queen Mary University, London; Member, International Law Commission

Mr Dire D. Tladi, Professor, University of Pretoria ; former Member, Special Rapporteur and Chair, International Law Commission

Mr Andrew Loewenstein, Partner, Foley Hoag LLP

Ms Christina Hioureas, Partner, Foley Hoag LLP

Norway

Mr Andreas Motzfeldt Kravik, State Secretary, Ministry of Foreign Affairs

Ms Dagny Ås Hovind, Adviser, Ministry of Foreign Affairs

Belize

Mr Lennox Gladden, Chief Climate Change Officer, National Climate Change Office, Ministry of Sustainable Development, Climate Change and Disaster Risk Management

Mr Sam Wordsworth KC

Mr Sean Aughey

1 **THE PRESIDENT:** Please be seated. Good morning. Today, the Tribunal will
2 continue the hearing in the *Request for an Advisory Opinion submitted by the*
3 *Commission of Small Island States and International Law.*

4
5 At the outset, I wish to note that we have been informed by Mexico that they will not
6 be participating in the hearing. The schedule of this morning's sitting has been
7 revised to take this into account. Belize, which was initially scheduled to speak this
8 afternoon, will deliver an oral statement during the present sitting. Accordingly, this
9 morning we will hear oral statements from three delegations in the following order:
10 Mozambique, Norway and Belize. There will be no sitting this afternoon.

11
12 I now give the floor to the representative of Mozambique, Ms Machatine Honwana, to
13 make her statement. You have the floor, Madam.

14
15 **MS DA CONCEIÇÃO MACHATINE HONWANA:** Good morning. Mr President,
16 members of the Tribunal, I have the honour to appear before you today on behalf of
17 the Republic of Mozambique in connection with the request for an advisory opinion
18 submitted by the Commission of Small Island States. With your permission, I would
19 like to introduce the intervention of the Republic of Mozambique.

20
21 The responsibility of rendering an advisory opinion is an important function of this
22 Tribunal as custodian of UNCLOS. This is especially the case given the weighty and
23 consequential matter before you: the effect of greenhouse gas emissions on the
24 States Parties' obligations to prevent and reduce pollution of the marine
25 environment, as well as to protect and preserve it under articles 194 and 192 of the
26 Convention. This advisory opinion will significantly influence the operation of Part XII
27 of the Convention going forward, which is what prompted Mozambique, as a strong
28 supporter of UNCLOS and its institutions, to intervene.

29
30 The devastating effects of climate change have rightly become the defining issue for
31 this generation. It is a particularly pressing issue for Mozambique which, like other
32 African States, is paying the ultimate price for an emergency not of its making.
33 African States are among the most affected by the climate change's damage to the
34 marine environment, including ocean warming, acidification, stratification and
35 deoxygenation.¹ This serious harm, if left unchecked, will gravely threaten the
36 livelihoods and sustenance of Mozambique's population.

37
38 In fact, it is already causing damage now. We have, in the last decade alone, been at
39 the forefront of devastating cyclones, storms and droughts in equal measure.² Each
40 disaster has been worse than the last and the gap between them grows only shorter.
41 The impacts being faced by our communities are disproportionate to our contribution
42 to the climate crisis. Nevertheless, we remain convinced that the way forward for the
43 international community must involve solutions that are robust and firmly rooted in
44 the values of solidarity, sustainability and equity.

¹ IPCC, "Summary for Policymakers" in Hans-Otto Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) ("**IPCC 2022, Summary for Policymakers**"), p. 9.

² Written Submissions of the Republic of Mozambique dated 16 June 2023 ("**Mozambique's Written Submissions**") ¶1.6, 3.36.

1 At the outset, Mozambique reiterates its commitment to UNCLOS and the authority
2 conferred on this Tribunal in matters of its interpretation. It believes very strongly that
3 the advisory opinion will play an important role in aligning UNCLOS obligations with
4 those under international law's broader climate change regime. It is this desire for a
5 robust equitable solution, firmly grounded in law, and considering the differentiated
6 impacts of climate change, that bring us here today. It is sincerely hoped that the
7 Tribunal's opinion will carefully outline States Parties' obligations under articles 194
8 and 192. In doing so, the Tribunal's opinion can act as a guideline for the much
9 needed development of local, national and regional programmes in line with
10 commitments in UNCLOS.

11
12 Mozambique would further add, as put forward in its written submissions, that the
13 Tribunal's opinion must take into account States Parties' common but differentiated
14 responsibilities.³ Where measures taken pursuant to articles 194 and 192 involve
15 determining individual contributions necessary for limiting global temperatures to
16 1.5°C above pre-industrial levels, developed States must assume a greater share of
17 the burden. This must include economy-wide absolute emission reduction targets
18 and providing support to developing States Parties for the implementation of their
19 obligations under UNCLOS. Solutions reached by this Tribunal must be equitable
20 and in light of developed States' historical responsibility for the climate emergency.

21
22 In essence, Mr President and members of the Tribunal, we come before you seeking
23 urgent guidance on the scope of the States Parties' obligations under UNCLOS. We
24 seek guidance on the nature of the mitigation and adaptation measures mandated by
25 the Convention that would enable us, in cooperation with the rest of the States
26 Parties, to jointly address this crisis.

27
28 No fewer than 53 States and organizations have joined us in providing written
29 submissions to the Tribunal. These States and organizations all seek guidance on
30 the proper interpretation and application of Part XII of UNCLOS. Mozambique notes
31 with strong approval that several African States as well as the African Union are
32 taking active part in these proceedings. This is in many ways an exceptional
33 development given the historically low level of our participation in advisory
34 proceedings. But this only further demonstrates the pressing importance of the
35 issues that fall to be decided by the Tribunal, not just for African States, but for the
36 international community.

37
38 Moving now to UNCLOS itself: Mozambique's core contention is that the
39 Convention's drafters wisely anticipated that any interpretation of the obligations
40 therein would not be fixed at a particular point in time; rather, the drafters deliberately
41 left the Convention's text flexible to allow it to incorporate advancements in scientific
42 knowledge and respond to new and evolving challenges to ocean governance. The
43 emission of greenhouse gases and the climate change they cause is the most
44 significant challenge presented to the Convention thus far.

45
46 The Tribunal therefore has the responsibility to ensure that its interpretation accords
47 not just with the present scientific consensus on climate change but also with the
48 lived experience of States since UNCLOS was adopted in 1982. This includes the

³ Mozambique's Written Submissions ¶13.67.

1 subsequent practice of States Parties, such as the ratification of the Paris
2 Agreement. UNCLOS was negotiated and entered into force before climate change
3 was part of public discourse. It would be myopic to ignore the profound relevance
4 that the accepted climate change science has on an interpretation of UNCLOS
5 conducted in the present day.

6
7 UNCLOS must therefore be interpreted in light of the overwhelming scientific
8 evidence that greenhouse gas emissions, which are absorbed by the world's oceans,
9 have profound deleterious effects on the marine environment and its living
10 resources. Excessive greenhouse gas emissions into the atmosphere very clearly
11 qualify as pollution of the marine environment within the meaning of article 1(1)(4) of
12 UNCLOS. Mozambique's recent experience bears graphic witness to the devastating
13 impacts that climate change has on the marine environment.

14
15 Mr President, as a State Party to UNCLOS, Mozambique sees as its solemn
16 responsibility to shed light on matters before the Tribunal by placing before it all
17 relevant information that may assist in reaching a decision.

18
19 Mozambique and its marine environment are particularly vulnerable to impacts of
20 climate change. As a low-lying coastal State, located downstream of nine major
21 rivers, Mozambique's geography has inherent problems which have been
22 exacerbated by climate change. In the past 35 years, we have encountered 75
23 natural disasters, including 13 droughts, 25 floods, 14 cyclones and 23 epidemics.
24 As stated, these disasters only grow more common. In 2016, for example, we faced
25 one of the most catastrophic droughts in our history due to the influence of El Niño.
26 In 2017, Cyclone Dineo affected nearly 55 million people. In 2019, Mozambique was
27 struck by Cyclone Idai, resulting in loss of life and infrastructure damage estimated at
28 US\$ 800 million.

29
30 On your screen is the picture of flooded homes in Mozambique in the aftermath of
31 Cyclone Idai. The cyclone created an inland ocean of 80 miles in length and 15 miles
32 in width. Only six weeks later, Cyclone Kenneth hit Mozambique, marking the first
33 time in history that a country was hit by two tropical storms in one season. This map
34 shows you the amount of cyclones that have recently threatened East Africa. In the
35 last 12 months alone, Mozambique has endured five tropical storms and cyclones.
36 Cyclone Gombe, which occurred in 2022, affected the lives of over one million
37 people.

38
39 The broader adverse effects of these disasters brought on by climate change are too
40 many to enumerate here but include loss of ecosystems, reduced food security and
41 mass displacement of populations. These would be catastrophic for any nation, but
42 Mozambique, in particular, relies heavily on fishing and marine resources to sustain
43 its economy and feed its people. The introduction of greenhouse gases into the
44 marine environment continues to threaten Mozambique's way of life and the
45 livelihood of its people – fish stocks continue to decline due to ocean warming and
46 ocean acidification; coastal communities, already experiencing significant hardship,
47 are being pushed to the breaking point.

48
49 Limiting global warming to a maximum increase of 1.5°C above pre-industrial levels,
50 as outlined in the Paris Agreement, is not only compelling but represents the

1 irreducible minimum that can be expected of States Parties to UNCLOS if climate
2 change is to be contained. This was the conclusion reached too by the IPCC in its
3 February 2022 report when it observed that temperature increases and extreme
4 weather events resulting from human activities are causing irreversible impacts more
5 rapidly than our capacity to adapt to the changes.⁴

6
7 Alone, Mozambique's own efforts to reduce the impact of natural disasters is limited.
8 Our capacity to deploy meaningful adaptation measures is impeded by high levels of
9 poverty, as well as limited technological and infrastructure development. In many
10 cases, we are forced to prioritize sanitation, food security and health needs over and
11 above the benefits that may accrue from long-term adaptation measures. We know
12 that we are not alone in facing such a situation. The experience of Mozambique and
13 other developing States in combating climate change provides further reason for the
14 Tribunal to recognize common but differentiated responsibilities and the concomitant
15 obligations on developed States to provide assistance to States who need it most.

16
17 However, within the limits of our national capacity and resources, we have
18 nevertheless made great strides in containing some of the climate change's negative
19 effects in all aspects, including agriculture and fisheries, water resources, health,
20 biodiversity and infrastructure. Mozambique is not asking other States Parties to do
21 what it does not do itself. In line with our commitments under the Paris Agreement,
22 Mozambique has devised and implemented a long-term development strategy for
23 lowering greenhouse gas emissions. For example, Mozambique adopted the
24 National Strategy for Climate Change in 2013, identifying adaptation and reduction of
25 climate risk as a national priority. The strategy includes not only preparation for and
26 responses to climate change impacts but also low-carbon mitigation and
27 development.⁵

28
29 In its updated first National Determination Report under the Paris Agreement,
30 Mozambique proposed to carry out a series of mitigation actions aimed at
31 significantly reducing greenhouse gas emissions by 2025, particularly when viewed
32 against Mozambique's actual emissions per capita.⁶ These actions include
33 promoting the use of renewable energy sources and low-carbon urbanization,
34 increasing energy efficiency, encouraging development of low-carbon agricultural
35 practices, reducing the rate of deforestation and rehabilitating degraded ecosystems.
36 Indeed, Mozambique is one of the first countries to successfully implement the
37 Forest Carbon initiative of the World Bank, evidencing its commitment and effort in
38 developing national systems for cutting emissions.⁷

39
40 To conclude, it is sincerely hoped that the Tribunal will seize this opportunity in
41 interpreting UNCLOS to clarify the differentiated measures that must be taken to
42 protect the marine environment of vulnerable States such as ours. We look earnestly
43 for guidance, too, on the principles of mitigation and adaptations that must be taken

⁴ IPCC 2022, Summary for Policymakers, p. 20.

⁵ See Republic of Mozambique, National Strategy for Adaptation and Mitigation of Climate Change, 2013-2025, available at <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC185538/>

⁶ Republic of Mozambique, *Update of the First Nationally Determined Contribution to the United Nations Framework Convention on Climate Change: Period 2020-2025*, available at https://unfccc.int/sites/default/files/NDC/2022-06/NDC_EN_Final.pdf, pp. 19, 21.

⁷ *Ibid.*, p. 19.

1 to avert irreversible harm to the marine environment. We ask, therefore, that the
2 Tribunal's interpretation of articles 194 and 192 be carried out with the
3 aforementioned in mind.

4
5 I would like to now introduce the legal team appearing for Mozambique. Our
6 advocates include Professor Phoebe Okowa of Queen Mary, University of London,
7 Professor Charles Jalloh of Florida International University and Mr Andrew
8 Loewenstein of Foley Hoag LLP. The remaining members of the legal team are
9 Professor Dire Tladi of the University of Pretoria and Ms Christina Hioureas of Foley
10 Hoag LLP.

11
12 I now request that you invite Professor Jalloh to the podium to present on questions
13 of jurisdiction. I thank you.

14
15 **THE PRESIDENT:** Thank you, Ms Machatine Honwana. I now give the floor to
16 Mr Jalloh to make his statement. You have the floor, Sir.

17
18 **MR JALLOH:** Mr President, distinguished members of the Tribunal, good morning. It
19 is equally an honour for me to appear before this Tribunal today for the first time. It is
20 also equally an honour for me to be representing the Republic of Mozambique in
21 such an historic matter.

22
23 Honourable members of this Tribunal, Mozambique's written statement
24 comprehensively contains our submissions on the core issues before the Tribunal.
25 Today, our presentations will only highlight key issues, and also respond to some of
26 the written statements of other States.

27
28 Mr President, my presentation will proceed as follows. First, I will quickly address the
29 Tribunal's jurisdiction. Second, I will then pass the podium to Professor Phoebe
30 Okowa, who will explain Mozambique's arguments on the proper interpretation of the
31 Convention. She will also deal with the due diligence obligation and the
32 precautionary principle, before handing over to Mr Andrew Loewenstein for the final
33 part of Mozambique's submission today.

34
35 Mr President, turning immediately to the threshold question of jurisdiction. In this
36 regard, while jurisdiction was for the most part not contested by most participants in
37 these proceedings, Mozambique submits two principal arguments for your
38 consideration. We consider these important because there are still States that have
39 expressed doubts about this Tribunal's advisory competence.

40
41 First, COSIS' request for an advisory opinion falls within the Tribunal's well-
42 established jurisdiction to render advisory opinions.

43
44 Second, on the facts of this case, Mozambique considers that there are no
45 compelling reasons why this Tribunal should decline its exercise of jurisdiction to
46 provide an advisory opinion. We are pleased that our argument basically aligns with
47 that of most States and international organizations that have so far participated in
48 these historic proceedings.

1 Allow me to elaborate our arguments on jurisdiction and admissibility by making
2 three points. First, article 21 of the Tribunal’s Statute provides that its jurisdiction
3 includes “all disputes and all applications submitted to it in accordance with this
4 Convention and all matters specifically provided for in any other agreement which
5 confers jurisdiction on the Tribunal.” In the *SRFC* Advisory Opinion, the Tribunal
6 confirmed that the term “all matters” in article 21 means something more than just
7 “disputes” and includes advisory opinions where provided for in any other agreement
8 which confers jurisdiction on the Tribunal.⁸ Therefore, it is article 21 read together
9 with article 138 of the Rules, which “constitute the substantive legal basis” for the
10 Tribunal to provide advisory opinions.

11
12 Last week, COSIS cogently demonstrated that their request falls within the Tribunal’s
13 advisory competence. We are in full agreement. So are most States in both their
14 written and oral statements. In fact, only three States, namely, China, Brazil and
15 India, have submitted that the full Tribunal does *not* possess advisory jurisdiction.
16 They argue, essentially, that the reference to all matters in article 21 does not
17 encompass non-contentious matters.⁹ Mozambique believes that this proposition
18 cannot stand in light of the Tribunal’s historic decision in the *SRFC* Advisory
19 Opinion.¹⁰

20
21 We acknowledge at least one State requested further clarification regarding the
22 basis of the advisory jurisdiction in the present proceedings.¹¹ We would welcome
23 such an approach. Not least because it would contribute to legal certainty for the
24 benefit of all States Parties, including those not participating in these proceedings.

25
26 Second, accepting that the Tribunal possesses advisory competence, Mozambique
27 further submits that all three preconditions for the determination of the existence of
28 the Tribunal’s jurisdiction are met.¹²

29
30 Firstly, there exists an international agreement related to the purposes of the
31 Convention providing for the submission to the Tribunal of the request for an
32 advisory opinion. COSIS is an international organization. Under article 2(a) of the
33 articles on the Responsibility of International Organizations, the International Law
34 Commission defined an “international organization” to mean “an organization
35 established by a treaty or other instrument governed by international law and
36 possessing its own international legal personality.”¹³ COSIS would fall within that
37 definition. Its founding treaty’s object is directly relevant in the sense that it is to
38 promote the rule of international law concerning climate change, including the
39 protection and preservation of the marine environment.¹⁴

⁸ *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*”), ¶ 58.

⁹ Written statement of the Federative Republic of Brazil, (16 June 2023), ¶¶ 7-9; Written statement of the People’s Republic of China, (15 June 2023), ¶¶ 11-12.

¹⁰ Written statement of the African Union (16 June 2023), ¶ 70; Written statement of the Republic of Mozambique (16 June 2023) ¶ 2.2.

¹¹ Written statement of the United Kingdom, (16 June 2023), ¶¶ 15-16.

¹² See article 138 of the Rules of the Tribunal. See also, *SRFC Advisory Opinion*, ¶ 38.

¹³ International Law Commission, Draft articles on the Responsibility of International Organizations, *Yearbook of the International Law Commission* (2011), vol. II, Part Two, article 2(1).

¹⁴ COSIS was established pursuant to the 31 October 2021 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (“COSIS Agreement”)

1 Secondly, the request for an advisory opinion was also transmitted by an authorized
2 body. COSIS is specifically authorized by its founding treaty to submit the request. It
3 did so on 26 August 2022.¹⁵

4
5 Finally, the request clearly concerns a “legal question”. The two questions raised by
6 COSIS are framed in legal terms and directly call for interpretation of articles 192
7 and 194 of the Convention.

8
9 Before moving on, we note the argument of some States that the two COSIS
10 questions are “framed in broad terms”. We would however respond, basically in
11 agreement with several other States,¹⁶ that the two questions are sufficiently clear
12 and specific. Even if the questions were to be deemed broad, Mozambique would
13 invite this Tribunal to follow the approach of the International Court of Justice in its
14 *Namibia* Advisory Opinion and decide that it is empowered to “give an advisory
15 opinion on any legal question, abstract or otherwise”¹⁷.

16
17 Mr President, and this would be my third point today, even where jurisdiction is
18 established, its exercise is technically discretionary. This is because article 138,
19 paragraph 1, of the Rules of the Tribunal provides that it “may” decide not to give an
20 advisory opinion. It is true that there have not been many advisory requests to date,
21 whether to the Seabed Disputes Chamber or the Tribunal as a whole. Nonetheless, it
22 is evident from the Tribunal’s practice not to refuse a request for an advisory opinion,
23 “except for ‘compelling reasons’”.¹⁸ In fact, to date, there exists no decision of this
24 Tribunal finding compelling reasons not to give an advisory opinion.

25
26 This eminently sensible judicial posture is consistent with the well-settled approach
27 of the International Court of Justice, which since 1945, has never found reason to
28 decline its advisory competence when such advice is properly requested by
29 competent United Nations organs pursuant to article 96 of the United Nations
30 Charter. The ICJ, as the principal judicial organ of the United Nations under article
31 94 of the Charter, takes a liberal approach that recognizes the value of providing
32 advisory opinions to the relevant UN bodies to the extent that such opinions might
33 assist them in the discharge of their functions.

34
35 This Tribunal – as the guardian of UNCLOS which is rightly referred to as the
36 “Constitution of the oceans”, which must adapt to the changing requirements of
37 international life – has compelling reasons to follow the ICJ’s practice. It should
38 therefore not lightly decline to provide a properly requested advisory opinion such as
39 that of COSIS.

40

agreed to by Antigua and Barbuda, Tuvalu, Niue, Palau, Vanuatu and Saint Lucia. See COSIS
Agreement, article 2(1).

¹⁵ See articles 3(3) and 3(5) of the COSIS Agreement. The request was transmitted to the Tribunal by
COSIS’ Co-Chairs on 12 December 2022 pursuant to article 3(3) of the COSIS Agreement.

¹⁶ Written statement of the Federal Republic of Germany, (14 June 2023), ¶ 31.

¹⁷ *Conditions of Admission of a State to Membership in the United Nations (Art 4 of Charter)*, Advisory
Opinion [1948] ICJ Rep 51, 61. See also the *Effect of Awards of Compensation Made by the United
Nations Administrative Tribunal*, Advisory Opinion [1954] ICJ Rep 51; *Legal Consequences for States
of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security
Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 27, ¶ 40.

¹⁸ *SRFC* Advisory Opinion, ¶ 71.

1 Indeed, in the present case, in Mozambique’s view, there are no compelling reasons
2 to not answer the two questions. To the contrary, in our respectful submission, an
3 advisory opinion on this vital matter is crucial for clarifying the rights and obligations
4 of States Parties in light of the existential threat posed by climate change. This is
5 particularly important for developing States like Mozambique and many other
6 countries in the Africa and the Global South that continue to bear the brunt of climate
7 change not of their own making. This Tribunal’s guidance is essential for States
8 Parties regarding how to interpret and discharge their obligations in the face of the
9 scientific consensus on the acute threats posed by climate change to the marine
10 environment.

11
12 However, the United Kingdom urges caution because COSIS is not truly an
13 “international body” contemplated by UNCLOS, and the advisory opinion may
14 implicate the obligations of States not party to the COSIS Agreement or who are
15 uninvolved in either framing the request or participating in these proceedings.¹⁹

16
17 With respect, these are not compelling reasons for refusing to render this much
18 needed advisory opinion. The fact remains that the preconditions for the exercise of
19 the Tribunal’s jurisdiction have been met. It now falls to the Tribunal to interpret
20 UNCLOS. There is no mandatory rule that international organizations require large
21 or universal membership to act on the international plane or to make requests for
22 advisory opinions. Further, UNCLOS also provides that, like for regional fishing
23 matters under article 118, States Parties must “cooperate on a global basis ...
24 through competent international organizations”.²⁰ The nature of COSIS as an
25 international organization does not detract from this point.

26
27 Mozambique further notes the written comments of some States calling on the
28 Tribunal to exercise caution so as to not create obligations for non-States Parties to
29 the agreement conferring jurisdiction or to espouse on policy issues.²¹ We are
30 confident that the Tribunal, as a specialist international judicial body, will no doubt
31 remain mindful of the wider issues and be sensitive to the impact of the advisory
32 opinion.

33
34 Mr President, distinguished members of the Tribunal, I am grateful for your kind
35 attention. Having now briefly dealt with the issue of jurisdiction in admissibility, and
36 as indicated during the opening, I would respectfully request that you give the floor to
37 my learned colleague Professor Okowa. I thank you very much.

38
39 **THE PRESIDENT:** Thank you, Mr Jalloh. I now give the floor to Ms Okowa to make
40 her statement. You have the floor, Madam.

41
42 **MS OKOWA:** Mr President, distinguished members of the Tribunal, it is indeed an
43 honour to be here this morning and to make this presentation on behalf of the
44 Government and the people of Mozambique.

45
46 Mr President, we have the particular advantage of addressing the Tribunal late in this
47 oral hearing. This has given Mozambique the opportunity to review carefully the

¹⁹ Written statement of the United Kingdom, (16 June 2023), ¶ 18.

²⁰ UNCLOS article 197.

²¹ See, e.g., Written statement of the French Republic, (16 June 2023), ¶ 16.

1 written and oral submissions presented thus far. I should add that we are very
2 grateful to COSIS for the initiative in bringing the question of climate change, a
3 matter of profound interest to all UNCLOS members, to your attention.

4
5 The key points in Mozambique's submissions are, that UNCLOS is a living
6 instrument that must be interpreted in light of the current state of scientific knowledge
7 and other existing rules and principles of international law developed by States
8 Parties. This includes the due diligence obligations contained in articles 194 and
9 192. The IPCC's scientific consensus on the harm presented by climate change is
10 globally accepted. Furthermore, the Paris Agreement, ratified by almost all UNCLOS
11 States Parties, requires States to limit global average temperature to 1.5°C above
12 pre-industrial levels – that's the "1.5°C standard".

13
14 Due diligence standards under UNCLOS, therefore, must incorporate the
15 conclusions of the IPCC and the standards set in the Paris Agreement as the
16 minimum threshold for satisfying States Parties' obligations under articles 194
17 and 192.

18
19 On a holistic interpretation of UNCLOS, States Parties' due diligence obligations
20 require them, in light of the precautionary principle, to drastically reduce their
21 greenhouse gas emissions given that even the 1.5°C standard presents a serious
22 risk of irreversible harm to the marine environment.

23
24 Following my submissions, my colleague Mr Andrew Lowenstein will then further
25 develop Mozambique's core contention that due diligence requires a differentiated
26 regime of responsibility.

27
28 The central argument in Mozambique's submissions is that UNCLOS must be
29 interpreted as a living instrument that is capable of responding to the constantly
30 evolving challenges of ocean governance. The most significant challenge it has
31 faced since it entered into force almost 30 years ago is the existential threat of
32 climate change and how to respond to it.

33
34 There are at least four reasons in support of this interpretation:

35
36 first, the text of UNCLOS anticipates a continuous process of alignment and
37 adaptation in light of scientific advancement;

38
39 second, the text of UNCLOS is consistent with the history of ocean governance,
40 which has always involved the adjustment of States Parties' obligations in light of
41 new knowledge of the world's oceans;

42
43 third, this Tribunal can therefore have recourse to subsequent developments,
44 including relevant subsequent treaty law and custom as expressly anticipated under
45 article 293 of the Convention, as other rules of international law not incompatible with
46 UNCLOS and that can be taken into account in its interpretation;

47
48 fourth, the express recognition in article 237 that UNCLOS is not a self-contained
49 regime, but that its obligations may be concretized through the development of more
50 specific rules in other instruments.

1 Mr President, this an explicit recognition that UNCLOS may be interpreted by way of
2 *renvoi to* rules external to it and this includes the UNFCCC and the Paris Agreement.

3
4 This approach should not be controversial. The story of ocean governance has
5 always been one of continuous adaptation in light of scientific and technological
6 change. For much of the law of the sea's history, the principle of *mare liberum*
7 reigned supreme. It was premised on the assumption that the seas were indivisible
8 and its resources were capable of endlessly replenishing themselves.²²

9
10 Technological and scientific advances eventually eroded the basic premises of *mare*
11 *liberum*. Fish did not endlessly replenish themselves but were being plundered by
12 large fishing fleets that threatened biological reproduction levels. The seas were not
13 boundless as modern technology made them capable of occupation and dominion by
14 States.²³

15
16 Increased public sensitivity to environmental values in the 1960s and 1970s, as well
17 as the science of ecological damage, made environmental protection of the seas a
18 necessity. International law responded with the 1958 Convention and the Third
19 United Nations Conference, leading to UNCLOS. What resulted was a carefully
20 balanced and highly successful alignment of the law on ocean governance with new
21 scientific knowledge.

22
23 Now the Tribunal is called upon to interpret UNCLOS in light of new scientific
24 knowledge once more, so as to confront a profound challenge to ocean governance.
25 Accordingly, in formulating the scope of States Parties' obligations under Part XII,
26 this Tribunal must be guided by the accepted science on climate change and the
27 steps that must be taken to avoid its most adverse effects.

28
29 Mr President, contrary to some States' submissions last week, the Tribunal is not
30 being asked to amend UNCLOS or act inconsistently with its judicial function by
31 creating new law on climate change. While formal amendments to the Convention
32 are possible under article 312, the process was made procedurally and politically
33 cumbersome in the expectation that it would in all likelihood be a very rare
34 occurrence.

35
36 You have heard a great deal already – about formal and informal processes for the
37 evolution of obligations in UNCLOS, including through judicial interpretation. This is
38 precisely what you are being asked to do here: to give effect to the living nature of
39 the Convention by taking into account circumstances not foreseen at the time it was
40 adopted.

41
42 UNCLOS effectively functions as the constitution of the world's oceans. This was first
43 put forward at the Third Conference of the Law of the Sea,²⁴ whose mandate was to

²² Hugo Grotius, *Mare Liberum* at (Ralph Van Deman Magoffin trans., 1916), p. 43 "For every one admits that if a great many persons hunt on the land or fish in a river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea."

²³ See Oscar Schachter, *The New Law of the Sea*, 178 *Recueil des Cours*, 266 (1982).

²⁴ See Tommy Koh, *A Constitution for the Oceans* (6 December 1982); see, e.g., Tulio Treves, UN Audiovisual Library of International Law, UNCLOS (10 December 1982); Yoshifumi Tanaka, *THE INTERNATIONAL LAW OF THE SEA* (4th ed. 2023), p. 40.

1 adopt a convention dealing with “all matters relating to the law of the sea ... bearing
2 in mind that the problems of ocean space are closely interrelated and need to be
3 considered a whole”.²⁵

4
5 Not only is the ambit of UNCLOS incredibly broad, but a large portion of its
6 substantive provisions were explicitly designed to respond to changing
7 circumstances. In the *Activities in the Area* Opinion, the Seabed Disputes Chamber
8 held that that UNCLOS’ due diligence obligation, with respect to environmental
9 protection, is a “variable concept” that may “change over time ... in light, for instance,
10 of new scientific or technological knowledge”.²⁶

11
12 The same was said by Judge Lucky in the *Sub-Regional Fisheries Commission*
13 opinion: UNCLOS is “dynamic and ... through interpretation ... a court or tribunal can
14 adhere to and give positive effect to this dynamism”.²⁷ This is precisely what
15 Mozambique calls on the Tribunal to do in answering the questions put to it.

16
17 Mozambique submits that to give effect to UNCLOS as a living instrument in issuing
18 its advisory opinion, the Tribunal must arrive at an interpretation that incorporates the
19 present scientific consensus on climate change and the harm greenhouse gas
20 emissions cause to the marine environment.

21
22 This is contemplated by the ordinary meaning of UNCLOS’ text, including articles
23 194 and 192. Part XII, in particular, allows for the determination of States Parties’
24 obligations with direct reference to the current state of scientific understanding.

25
26 Article 194, for example, is premised on objective scientific assessments of, among
27 other things, whether measures are “necessary to prevent, reduce or control” marine
28 pollution and the extent of “best practicable means at a State’s disposal”.²⁸

29
30 Article 192 can be understood in the same way, as States Parties have an obligation
31 to reduce greenhouse gas emissions in accordance with the best available science
32 to prevent climate change’s harm to the marine environment.²⁹

33
34 The core provisions of Part XII – articles 192 to 207 – impose a general obligation on
35 States Parties to prevent, reduce and control pollution. And pollution is broadly
36 defined and, pursuant to articles 194, 207 and 212, covers all airborne and land-
37 based sources of marine pollution, which would include greenhouse gas
38 emissions.³⁰

²⁵ UN General Assembly, Resolution 3067(XXVIII), Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and Use of Their Resources in the Interests of Mankind, and Convening of the 3rd United Nations Conference on the Law of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (1973).

²⁶ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February) (“*Activities in the Area*”) 117.

²⁷ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) Separate Opinion of Judge Lucky, 18.

²⁸ Mozambique’s Written Submissions, ¶ 3.47.

²⁹ Mozambique’s Written Submissions, ¶¶ 4.3-4.8.

³⁰ Mozambique’s Written Submissions, ¶¶ 3.7-3.19.

1 Article 194(3) also reiterates that measures adopted must deal with “all sources” of
2 marine pollution, which ought also to be wide enough to include greenhouse gas
3 emissions.³¹

4
5 This due diligence standard contained in articles 194 and 192 is, however, not
6 devoid of content. Part XII of UNCLOS anticipates the means by which the
7 obligations therein take normative shape.

8
9 In that regard, articles 200 to 206 create a scientific infrastructure envisaging a
10 process of collaborative study and research by States Parties. The results of this
11 research on the marine environment then determines the “appropriate scientific
12 criteria” for the development of rules and standards on the prevention, reduction and
13 control of marine pollution. This is complemented by obligations to conduct active
14 “surveillance of any activities which they permit” and a further consideration of
15 whether these activities are likely to cause pollution necessitating environmental
16 impact assessments.³²

17
18 In the present case, Mozambique submits that the relevant scientific knowledge must
19 include the current accepted consensus on the harm caused by climate change to
20 the marine environment. This is also borne out by an application of the general rules
21 of treaty interpretation.

22
23 The rules of treaty interpretation are not in dispute. It is accepted by all written
24 submissions to the Tribunal that addressed the matter that, pursuant to the Vienna
25 Convention on the Law of Treaties, articles 194 and 192 of UNCLOS must be
26 interpreted in good faith according to the ordinary meaning of their words, in light of
27 UNCLOS’ object and purpose.³³ Such an interpretation can include reference to
28 other relevant parts of a treaty or its drafting history.³⁴ This approach accords
29 perfectly with the arguments Mozambique has just advanced.

30
31 Additional support can be found in other rules and principles of international law,
32 including treaties and relevant norms of customary international law, which this
33 Tribunal is entitled to rely on in interpreting UNCLOS.³⁵ Accordingly, the Tribunal’s
34 interpretation of UNCLOS as a living instrument must take into account the accepted
35 science on climate change and the obligations contained in the Paris Agreement.

36
37 Dealing first with subsequent practice of the parties: Mozambique submits that the
38 Tribunal’s advisory opinion must incorporate, at the very minimum, the 1.5°C
39 standard. This can be rationalized either as a necessary measure, based on
40 scientific consensus that is necessary to control marine pollution under article 194; or
41 that is necessary to protect and preserve the marine environment under article 192;
42 or as a relevant subsequent practice within the meaning of article 31(3)(c) of the
43 Vienna Convention.

³¹ Mozambique’s Written Submissions, ¶ 3.14.

³² Mozambique’s Written Submissions, ¶¶ 4.25-4.29.

³³ Mozambique’s Written Submissions ¶ 3.3; *Activities in the Area* ¶¶ 57-58.

³⁴ Vienna Convention on the Law of Treaties, article 32. Mozambique’s Written Submissions ¶ 3.3.

³⁵ Mozambique’s Written Submissions ¶ 3.85. See Vienna Convention on the Law of Treaties, article 31(3)(c) (“There shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the Parties”).

1 With respect to custom, article 194 imports an obligation of due diligence and sets a
2 very high threshold as States Parties are required to take “all measures ...
3 necessary” to prevent, reduce and control pollution of the marine environment.
4

5 Article 192 also imports a due diligence obligation.³⁶ But the due diligence obligation
6 also enjoys standalone status as a customary norm, the contents of which can be
7 relevant to an interpretation of UNCLOS. Both articles 194 and 192 cannot be read
8 in isolation. They have to be considered with – and, as part of due diligence – other
9 principles of environmental law such as the precautionary principle.³⁷

10
11 Mr President, members of the Tribunal, in characterizing these obligations as ones of
12 due diligence, Mozambique has deliberately avoided the binary characterization of
13 obligations of “conduct” and of “result”. In fact, in the context of UNCLOS, and
14 international law generally, these labels are largely unhelpful as many obligations will
15 straddle both categories. As the late Professor James Crawford pointed out, the
16 specific measures required by an obligation are determined by that obligation’s
17 primary rule; whether or not the obligation has been performed thus turns on the
18 interpretation of the instrument in question.³⁸

19
20 With respect to UNCLOS, in some cases, such as articles 207 and 212, the
21 obligations in Part XII require States to undertake specific measures such as
22 enacting and implementing legislation to prevent marine pollution. In other cases,
23 such as article 194, States are required to adopt all necessary measures – a
24 threshold substantially higher than best efforts, which has traditionally characterized
25 pure conduct obligations.³⁹

26
27 Here Mozambique aligns itself with the analysis provided by Professor Rüdiger
28 Wolfrum that these are “goal-oriented obligations” – obligations that neither specify
29 the conduct or result necessary to achieve the goal.⁴⁰

30
31 Mozambique would therefore urge the Tribunal, in interpreting the States Parties’
32 obligations under Part XII of UNCLOS, to do so unimpeded by the unhelpful
33 restrictions implicit in categorizing those obligations as ones of conduct or of result.
34

35 Drawing together the strands of argument thus far: once the Tribunal has concluded
36 that UNCLOS imposes due diligence obligations on States Parties regarding harm to
37 the marine environment caused by greenhouse gas emissions and climate change,
38 the question then becomes what the scope of the due diligence obligation is. As has
39 been established, the normative content of articles 194 and 192 is directly informed

³⁶ Mozambique’s Written Submissions ¶ 4.16.

³⁷ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016) ¶ 942; *Activities in the Area* ¶¶ 111-120.

³⁸ James Crawford, *The International Law Commission’s articles on State Responsibility* (Cambridge University Press 2002) at p. 13, 22.

³⁹ Moreover, there has been considerable terminological confusion in the logical consequences of characterizing obligations as either conduct or result, as evidenced by the critical academic commentary on the jurisprudence of international courts and the work of the International Law Commission. Mozambique submits that the categories of obligations of “conduct or result” are neither sufficient nor exhaustive of the infinite variety of contexts in which international responsibility falls to be considered.

⁴⁰ Above p. 367-368.

1 by both scientific knowledge and subsequent practice. Mozambique's submissions
2 will now turn to what this requires of States Parties.

3
4 Mr President, members of the Tribunal, at this point in the proceedings, we are all no
5 doubt fully apprised of the severe damage that climate change is causing not just to
6 the world's oceans but also to livelihoods around the globe. Mozambique is no
7 exception. The havoc that is right now being wrought by climate change has been
8 outlined in detail in its written submissions and by the representative of Mozambique
9 earlier.

10
11 To further assist the Tribunal today, Mozambique notes in summary that: as a
12 coastal state, Mozambique is particularly vulnerable to the effects of climate change
13 on its coastal environment and infrastructure;⁴¹ that increased ocean temperatures
14 also contribute to more frequent and violent cyclones. In the past 12 months,
15 Mozambique has suffered no less than five tropical storms or cyclones.

16
17 Mozambique is also at particular risk of coral bleaching caused by increased ocean
18 temperatures. If the significant increase in greenhouse gas emissions is not
19 curtailed, then coral bleaching events will threaten a significant portion of
20 Mozambique's reefs with extinction.⁴²

21
22 The above have knock-on effects on the health of Mozambique's fisheries, on which
23 its people depend for their sustenance and livelihoods. Fisheries are responsible for
24 at least 3 per cent of Mozambique's GDP and 4 per cent of its national exports.⁴³
25 Marine foods are also responsible for 18-23 per cent of its population's nutrition.⁴⁴

26
27 Finally, over 60 per cent of Mozambique's population lives in locations that are at risk
28 of flooding and damage caused by sea-level rise.⁴⁵ This is not including the
29 population that is dependent on agriculture, also primarily in areas threatened by
30 sea-level rise.

31
32 The dire effects on Mozambique constitute local manifestations of the global
33 phenomena described in the IPCC's research, which has also been cited several
34 times in the proceedings thus far.⁴⁶ It is this reality, supported by the clearest
35 scientific evidence, that the Tribunal must incorporate into its interpretation of States
36 Parties' due diligence obligations under UNCLOS.

37
38 Applying the scientific consensus on climate change to articles 194 and 192, then, in
39 Mozambique's submission, results in the following conclusions: it is accepted that all
40 necessary measures under UNCLOS require a high threshold of due diligence in
41 order for States Parties to discharge their obligations; the best available science
42 confirms that failure to adhere to the 1.5°C standard in the Paris Agreement will

⁴¹ Mozambique's Written Submissions ¶ 3.30.

⁴² Mozambique's Written Submissions ¶ 3.37.

⁴³ Mozambique's Written Submissions ¶ 3.39.

⁴⁴ Mozambique's Written Submissions ¶ 3.39.

⁴⁵ Mozambique's Written Submissions ¶ 3.40.

⁴⁶ See, generally, IPCC, "Summary for Policymakers" in Hans-Otto Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022).

1 result in marine pollution;⁴⁷ the 1.5°C standard must therefore function as the
2 absolute minimum of what is required of States Parties under articles 194 and 192 of
3 UNCLOS.

4
5 Mozambique further submits that the 1.5°C standard is the start, but not the end
6 point, of the scope of States Parties' obligations under UNCLOS. Mozambique
7 argues that this Tribunal should find that all necessary measures pursuant to
8 UNCLOS' due diligence standard requires States Parties to reduce their greenhouse
9 gas emissions such as to bring global average temperatures below the 1.5°C
10 standard. In this regard, Mozambique expresses its support for, and is in full
11 agreement with, the submissions of the African Union in these proceedings.

12
13 Mozambique adds that reducing greenhouse gas emissions below the 1.5°C
14 standard is also in line with the precautionary principle, which is a relevant
15 customary norm in the interpretation of UNCLOS. This was accepted by the Seabed
16 Disputes Chamber in the activities in the *Area* Advisory Opinion. The Chamber held
17 that the principle is an "integral part" of States' due diligence obligations, and that it
18 mandates that due diligence be taken even "where scientific evidence concerning
19 the scope and potential negative impact of [the conduct in question is] insufficient".⁴⁸

20
21 The precautionary principle does not permit States to wait for serious or irreversible
22 damage to the environment to occur before mandating that necessary measures be
23 taken. Mr President, members of the Tribunal, the picture provided by the scientific
24 evidence is stark and the outlook is grim. Three examples suffice.

25
26 Concerning ocean acidification – the IPCC has concluded that, even following the
27 1.5°C standard – will still result in impacts to "a wide range of marine organisms and
28 ecosystems, as well as sectors such as aquaculture and fisheries".⁴⁹

29
30 As regards ocean warming, the rate of ocean warming across the world is actually
31 increasing, with higher temperatures threatening to cause knock-on effects across
32 the food chain.⁵⁰ This will still occur with global temperatures kept at the 1.5°C
33 standard.

34
35 Warmer temperatures also lead to ocean deoxygenation, which causes severe
36 impacts to aquatic species who need to absorb oxygen to survive. The IPCC
37 concluded that it is "virtually certain" that ocean deoxygenation will increase as
38 warming continues, even at the 1.5°C standard.⁵¹

⁴⁷ Mozambique's Written Submissions ¶ 3.65.

⁴⁸ *Activities in the Area* ¶ 117.

⁴⁹ IPCC, "Technical Summary" in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018), p. 37.

⁵⁰ IPCC 2014, "The Ocean" in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) Table 30-1, p. 1667.

⁵¹ IPCC, "Impacts of 1.5°C Global Warming on Natural and Human Systems" in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global*

1 The scientific evidence establishes that even at the 1.5°C standard, climate change
2 presents serious and potentially irreversible harm to the marine environment. It
3 follows from the legal principles consistent across the submissions of all States
4 Parties that the level of marine pollution and harm to the marine environment at the
5 1.5°C standard would still trigger States Parties' due diligence obligations under
6 articles 194 and 192.

7

8 It then becomes incumbent on States Parties to reduce greenhouse gas emissions
9 below the 1.5°C standard until the harm they pose is no longer serious or
10 irreversible. The assessment of when harm is no longer serious or irreversible
11 should be carried out on a case-by-case basis.

12

13 Mr President, members of the Tribunal, this concludes my presentation on the
14 interpretation of UNCLOS and the due diligence requirement. I thank you for your
15 kind attention, and I now request that you invite Mr Andrew Loewenstein to the
16 podium to present the final part of Mozambique's oral submission. Thank you for
17 your attention.

18

19 **MR PRESIDENT:** Thank you, Ms Okowa. I note that it would appear that your
20 delegation have taken up the time allotted for you to speak, so I don't know whether
21 Mr Loewenstein will be able to complete his presentation within the next five
22 minutes. Can I have an indication from your delegation, please?

23

24 I give the floor to Mr Loewenstein, if you can...

25

26 **MS OKOWA:** Mr President, may we request that you indulge our delegation by
27 giving us 10 minutes?

28

29 **THE PRESIDENT:** Yes, okay. We will give you 10 minutes, but please, I would urge
30 you to keep within that time limit. We have to be fair to all parties and we have
31 granted them all the same amount of time, so please.

32

33 **MS OKOWA:** Much appreciated.

34

35 **THE PRESIDENT:** Thank you very much. I now give the floor to Mr Loewenstein to
36 make his statement. You have the floor, Sir.

37

38 **MR LOEWENSTEIN:** Mr President, members of the Tribunal, good morning. It is an
39 honour to appear before you on behalf of the Republic of Mozambique and to do so
40 in a case of such fundamental importance. I will continue Mozambique's submissions
41 on the obligation of due diligence and will address three aspects of that obligation.

42

43 But before proceeding, Mr President, on my discussion over those aspects of due
44 diligence, I hope you will permit me to pay tribute to Professor Alan Boyle, with
45 whom I had the privilege of working, including on cases where due diligence lay at
46 the core, and had the even greater privilege of learning from him.

47

response to the threat of climate change, sustainable development, and efforts to eradicate poverty
(IPCC 2018) p. 224.

1 Mr President, I begin by pausing to explain why Mozambique considers these facets
2 of due diligence that I will address to have particular importance in the context of
3 protecting and preserving the marine environment. The questions that are directed to
4 the Tribunal ask it to describe the “specific obligations” of States Parties to UNCLOS
5 regarding the two questions that are the subject of these proceedings.
6

7 As indicated by the specificity called for by the request, it does not seek abstract or
8 theoretical answers; it calls upon the Tribunal to provide *concrete guidance*.
9 Mozambique welcomes this approach and respectfully submits that it is essential
10 that the Tribunal provide answers that will inform States as to what concrete
11 measures they must undertake, especially in view of the liability regime established
12 in article 235.
13

14 Professor Okowa addressed one aspect of that concreteness when she showed that,
15 for the specific context of greenhouse gas emissions, the due diligence obligations
16 codified in Part XII required States to undertake effective action to ensure that the
17 global temperature rise does not exceed 1.5°C. I will address Mozambique’s views
18 as to *how* States must concretely fulfill that obligation.
19

20 In doing so, I begin by noting that while every State Party to UNCLOS must
21 discharge its due diligence obligations, bearing in mind the paramount objective of
22 limiting temperature rise to 1.5°C, that does not suggest that the *means* by which
23 the obligation is discharged is the same for all States. It is not.
24

25 To the contrary, developing States like Mozambique, which bear little responsibility
26 for having created the present environmental crisis and which are not themselves
27 significant emitters of greenhouse gases, are not required to assume the same
28 burden as the developed States that contributed the most to the situation in which
29 we now find ourselves.
30

31 In that regard, the drafters of the Convention chose to weave the common but
32 differentiated responsibilities principle into the fabric of the environmental obligations
33 set out in Part XII. Indeed, the principle animates the Convention as a whole. This is
34 reflected in the Preamble, which immediately, after recognizing the desirability of
35 establishing through the Convention a legal order that promotes, among other things,
36 the protection and preservation of the marine environment, notes the “special
37 interests and needs of developing States.”⁵²
38

39 And it can be seen in article 194(1), which not only establishes the general obligation
40 that States must take “all measures consistent with” the Convention that are
41 “necessary to prevent, reduce and control pollution,” it qualifies the directive by
42 stipulating that States are to use “for this purpose the best practicable means at their
43 disposal” and are to act “in accordance with their capabilities.”⁵³
44

45 The fact that the due diligence obligation is informed by the common but
46 differentiated responsibilities principle is confirmed by other provisions of Part XII.
47 Article 207 concerns the regulation of pollution from *land-based sources*, which are,

⁵² United Nations Convention on the Law of the Sea (“UNCLOS”) (entered into force 16 November 1994), Preamble, paras. 4-5.

⁵³ UNCLOS, art. 194(1).

1 of course, among the most significant contributors to greenhouse gas emissions.⁵⁴ It
2 establishes that States Parties, in adopting laws and regulations to prevent, reduce
3 and control pollution from such land-based sources, must “tak[e] into account
4 internationally agreed rules, standards and recommended practice.”⁵⁵ And the same
5 is true with respect to the obligation to prevent, reduce and control pollution from the
6 *atmosphere* in article 212.

7
8 The common but differentiated responsibilities principle plainly qualifies as an
9 internationally agreed upon rule, standard or recommended practice. Indeed, it is an
10 important one, especially in the climate change context. More than three decades
11 ago, Principle 7 of the Rio Declaration referred to the fact that “States have common
12 but differentiated responsibilities”.⁵⁶

13
14 Moreover, the relevant instruments concerning climate change – which, as Professor
15 Okowa explained, must be taken into account when interpreting Part XII of the
16 Vienna Convention – likewise reflects the common but differentiated responsibilities
17 principle. And the same is true with respect article 2(2) of the Paris Agreement.

18
19 Similarly, article 3(1) of the UNFCCC – another instrument to which all UNCLOS
20 States Parties are also parties – records, as the first of its guiding principles, that
21 “[t]he Parties should protect the climate system ... on the basis of equity and in
22 accordance with their common but differentiated responsibilities and respective
23 capabilities.”⁵⁷

24
25 The upshot is clear: while all States must take effective action to ensure that global
26 temperature rise is limited to no more than 1.5°C, the provisions of the Convention
27 which establish that obligation do not mandate uniformity into how it is to be
28 accomplished.

29
30 So what are the differentiated responsibilities? The answer can be found in the Paris
31 Agreement, which for the reasons we have seen, must be taken into account.

32
33 Specifically, the Paris Agreement, while acknowledging that what due diligence
34 requires may depend on a State’s particular “national circumstances”,⁵⁸ sets out a
35 tripartite scheme of differentiated responsibilities.

36
37 Developed States bear the greatest responsibility. Why? Because they have greater
38 capabilities, as that term is used in the Paris Agreement in article 194(1) of UNCLOS
39 itself. Put simply, they have the scientific, technical and financial means to do more,
40 and they continue to host industrial facilities that remain significant contributors to
41 greenhouse gas emissions. Due diligence therefore requires that they do more.

⁵⁴ UNCLOS, art. 207.

⁵⁵ UNCLOS, art. 207(1).

⁵⁶ UN General Assembly, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Rio de Janeiro, 3-14 June 1992), Annex I (“**Rio Declaration**”), Principle 7.

⁵⁷ United Nations Framework Convention on Climate Change (“**UNFCCC**”) (entered into force 21 March 1994), art. 3(1).

⁵⁸ Paris Agreement, art. 2(2).

1 Mr President, the fact that developed States must do more is deeply rooted in
2 international environmental law. Principle 7 of the Rio Declaration records the
3 acknowledgement by developed countries of the “responsibility” they “bear ... in view
4 of the pressures their societies place on the global environment.”⁵⁹

5
6 And developed and developing States alike accept this. And the Paris Agreement
7 sets it out in concrete terms. You can see this in article 3(1) in the UNFCCC⁶⁰ and in
8 article 4(4) of the Paris Agreement, which specify that in undertaking a leadership
9 role, developed States should undertake economy-wide absolute emission reduction
10 targets in a manner designed to limit the increase in temperature to no more than
11 1.5°C.⁶¹

12
13 With respect to developing countries, the same provision of the Paris Agreement
14 imposes a lesser but equally important responsibility. In recognition of their
15 vulnerability, developing countries are directed to “continue enhancing their
16 mitigation efforts” and “encouraged to move over time towards economy-wide
17 emission reduction or limitation targets in the light of different national
18 circumstances.”⁶²

19
20 Mr President, as these provisions of the Paris Agreement make clear, mitigation of
21 and adaptation to threats posed to the marine environment are of central importance,
22 particularly for vulnerable developing States like Mozambique. Indeed, as the ICJ
23 recognized in the *Certain Activities* case, mitigation is fundamental to the discharge
24 of a due diligence obligation.⁶³

25
26 Mozambique, like many African States, such as Sierra Leone, is doing its utmost to
27 develop and implement such strategies, including by adopting a National Strategy for
28 Climate Change Adaptation and Mitigation. But the stark reality is that the impact of
29 such efforts is likely to remain limited unless developed States engage in robust
30 efforts to assist. There is thus an urgent need for the Tribunal to clarify that the duty
31 to cooperate obligates States to provide such assistance.⁶⁴

32
33 The Tribunal emphasized in *MOX Plant* case that the “duty to cooperate is a
34 fundamental principle in the prevention of pollution under both Part XII of the
35 Convention and general international law.”⁶⁵ International law ascribes the same
36 importance to cooperation in connection with mitigation and adaptation. This is
37 codified in numerous provisions of the Convention, including article 197, articles 200
38 and 201, 202, 203 and in Part XIV.

39
40 Mr President, this concludes my presentation. I thank you for your kind attention.

⁵⁹ Rio Declaration on Environment and Development (1992), Principle 7.

⁶⁰ United Nations Framework Convention on Climate Change (“UNFCCC”) (entered into force 21 March 1994), art. 3(1).

⁶¹ Paris Agreement, art. 4(4).

⁶² *Ibid.*

⁶³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at p. 724, para. 168.

⁶⁴ UNCLOS, arts. 123, 197, 266, 275-277.

⁶⁵ *MOX Plant (Ireland v. United Kingdom) Provisional Measures, Order of 3 December 2001*, Reports 2001, p. 95, para. 82).

1 **THE PRESIDENT:** Thank you very much, Mr Loewenstein. I now give the floor to the
2 representative of Norway, Mr Kravik, to make his statement. You have the floor, Sir.

3
4 **MR MOTZFELDT KRAVIK:** Mr President, honourable members of the Tribunal, it is
5 an honour to appear before you on behalf of the Kingdom of Norway.

6
7 Imagine for a moment, that you are floating in space. You turn your gaze to see a
8 distant pale blue dot. You look closer and realize that this object is in fact our own
9 planet. Seen from this vantage point, it seems obvious that we live on a blue planet.
10 As Norwegian author Morten Strøksnes writes: “It has been said that our planet’s
11 name shouldn’t be Earth. It would be more appropriate to call it Ocean.”⁶⁶

12
13 Mr President, members of the Tribunal, the climate crisis is grave, acute and
14 unfolding as we speak. It represents an existential threat to both present and future
15 generations. To counter, mitigate and adapt to climate change – in short, to protect
16 the atmosphere and prevent environmental disasters – a strong and robust global
17 response is required, comprising our combined and coordinated efforts.

18
19 As a coastal State and a seafaring nation with strong maritime ties, Norway fully
20 recognizes that our oceans and seas, the blue of our planet, are both at risk and
21 represent potential solutions in the face of climate change.

22
23 First, the marine environment is at severe risk from the effects of climate change,
24 through ocean warming, ocean acidification and sea-level rise.⁶⁷ Although impacting
25 on all of us and transcending all borders, there is no doubt that coastal States and
26 communities, and in particular, Small Island Developing States, are especially
27 vulnerable.

28
29 Second, changes in the marine environment due to climate change – resulting in
30 loss of biodiversity amongst other things – impact on and must be taken into full
31 account in future management of living resources.

32
33 Third, and at the same time, it has been clearly demonstrated by many, and in
34 particular by the High-Level Panel for a Sustainable Ocean Economy, that ocean-
35 based climate action represents a fundamental part of a sustainable and effective
36 global response to climate change.⁶⁸

37
38 We consider marine resources, rights, freedoms and obligations of the UNCLOS
39 system to be key to enable the critical provisions of food, energy, critical raw
40 materials and value chains necessary to accomplish the green and blue transitions.
41 As an example, in order to provide for electrification of ferries, which is a process
42 well underway in Norway, you need access to electricity and critical minerals. Thus,
43 the sovereign rights of coastal States and the high seas freedoms enshrined in
44 UNCLOS are necessary components of combating climate change and responding
45 to key needs of humanity. The sea and UNCLOS are our allies in this struggle.

⁶⁶ Strøksnes, Morten (2017), “Shark Drunk. The Art of Catching a Large Shark from a Tiny Rubber Dinghy in a Big Ocean”.

⁶⁷ E.g., IPCC (2021), “Sixth Assessment Report Working Group 1: The Physical Science Basis”.

⁶⁸ High Level Panel for a Sustainable Ocean Economy (2019), “The Ocean as a Solution to Climate Change: Five Opportunities for Action”.

1 Norway considers it imperative to acknowledge, further study and develop all these
2 linkages between climate change and the ocean. This is not a theoretical exercise;
3 it's an unfolding reality that requires reaction. It is in this context that Norway makes
4 its oral observations before this Tribunal.

5
6 Let me briefly present the outline of our statement: first, I will present a few general
7 observations on the questions of jurisdiction and admissibility; second, I will turn to
8 the UN Convention of the Law of the Sea (UNCLOS) and ascertain the Convention's
9 general character and whether the provisions Norway consider to be more important
10 in the present case also address climate change and its effects; third I will provide
11 some concluding remarks.

12
13 My objective with this intervention is not to replicate Norway's written statement.
14 Instead, I will attempt to make a few overarching remarks that I believe can give
15 guidance to the Tribunal as it deals with the task at hand.

16
17 I will first begin with a few short observations on the questions of jurisdiction and
18 admissibility. Before responding to the questions addressed to it, the Tribunal must
19 assess whether it has jurisdiction to provide an advisory opinion on the matter before
20 it. If this is so, the Tribunal must, as a second step, assess whether there are
21 convincing reasons to provide or refrain from giving an advisory opinion. In this
22 regard, Norway recalls the wording of article 138(1) of the Rules of the Tribunal,
23 which provides that "[t]he Tribunal may give an advisory opinion". Whether to give an
24 advisory opinion is thus a discretionary decision on the part of the Tribunal.

25
26 Norway will not address the question of the legal parameters around the Tribunal's
27 advisory jurisdiction. Regardless of its decision, it seems imperative from our
28 vantage point, that the Tribunal seize this opportunity and provide further clarity on
29 this issue. In Norway's view, this should entail elucidating the Tribunal's
30 understanding of its Statute,⁶⁹ in light of the Agreement for the establishment of the
31 Commission of Small Island States on Climate Change and International Law,⁷⁰ as
32 well as the Tribunal's own previous conclusions in *Request for an Advisory Opinion*
33 *Submitted by the Sub-Regional Fisheries Commission*, while at the same time
34 recognizing that the circumstances of that case might differ in certain respects from
35 the one at bar.

36
37 Additionally, the questions posed by the Commission are broadly formulated and
38 potentially wide-ranging. Therefore, Norway also encourages the Tribunal to use its
39 discretion to frame the questions in a way that will enable the Tribunal to answer
40 them in a manner that can provide practical guidance on the interpretation of the
41 Convention.

42
43 I will now, as my second point, turn to the UN Convention on the Law of the Sea.

44
45 As is well established, the means of treaty interpretation are based on the relevant
46 provisions of the Vienna Convention on the Law of Treaties, widely considered to

⁶⁹ Statute of the International Tribunal for the Law of the Sea, article 21.

⁷⁰ Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, article 2 (2).

1 reflect existing international customary law.⁷¹ Consequently, these rules should form
2 the basis for the Tribunal's Interpretation of UNCLOS.

3
4 With regard to the legal framework, Norway wishes to make three points, relating to:
5 (1) the character of the Law of the Sea Convention; (2) the nature of its provisions
6 and whether they also address climate change and its effects; and (3) the specific
7 nature of its articles 192 and 194, which Norway considers central to the present
8 case.

9
10 To the first point: a key characteristic of UNCLOS is that it establishes a set of
11 maritime zones and allocates rights, obligations and jurisdiction of coastal States,
12 flag States and other States within, across and beyond these different zones.

13
14 Thus, UNCLOS constitutes a coherent and unified legal order for the oceans and
15 seas, which in the words of the Convention's Preamble, "will facilitate international
16 communication, and will promote the peaceful uses of the seas and oceans, the
17 equitable and efficient utilization of their resources, the conservation of their living
18 resources, and the study, protection and preservation of the marine environment."
19 The Tribunal plays an important role in this regard, as a guardian of this legal order.

20
21 The Convention has also proven itself as a highly practical instrument. As confirmed
22 numerous times by the United Nations General Assembly, the Convention "sets out
23 the legal framework within which all activities in the oceans and seas must be carried
24 out". In practice, the Convention constitutes the relevant parameters for States when
25 ascertaining what activities can be undertaken and what measures implemented in
26 the different maritime areas.

27
28 The Convention is a carefully negotiated package. Its text represents a true
29 balancing act. Each part and provision represent a carefully agreed compromise.
30 The Norwegian UNCLOS chief negotiator, Ambassador and later Judge at the
31 International Court of Justice, Jens Evensen, was keen to recall how the Law of the
32 Sea draft articles were carefully conceived among expert colleagues from all over
33 the world and across geographical groups. Remarkably, consensus on the
34 constitutive instrument of what would become the "Constitution of the Oceans" was,
35 in large part, developed through active exchanges in downtown New York diners,
36 with deliberations over thin coffee and greasy pancakes.

37
38 As regards the outcome of these efforts, this was described recently by the
39 International Court of Justice in *Nicaragua v. Colombia* in the following terms:

40
41 As recognized in the preamble to the Convention, 'the problems of ocean
42 space are closely [inter]related and need to be considered as a whole'. The
43 method of negotiation at the Conference was designed against this
44 background and had the aim of achieving consensus through a series of
45 provisional and interdependent texts on the various questions at issue that
46 resulted in a comprehensive and integrated text forming a package deal.⁷²

⁷¹ Vienna Convention on the Law of Treaties, articles 31-33.

⁷² *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 48.

1 As the Court continued, the outcome was a Convention that amounted to an
2 “integrated” instrument.⁷³

3
4 Mr President, honourable members of the Tribunal, my previous reference to
5 pancakes in New York, of course, should not be seen as an attempt to dictate what
6 the members of the Tribunal should consume while deliberating – although Hamburg
7 pfannekuchen are no doubt most delicious – but this paints an accurate picture of
8 the communal spirit across delegations that helped produce a balanced and
9 universally applicable text.

10
11 The Convention is truly one of the most significant and successful multilateral
12 instruments of the twentieth century. The more than 400 articles of the text and of
13 the nine annexes that are an integral part of it are the most extensive and detailed
14 product of codification activity States have ever attempted and successfully
15 concluded under the auspices of the United Nations. It is therefore vital that the
16 Convention’s integrity, what the International Court calls its “integrated character”,⁷⁴
17 is preserved.

18
19 Norway considers that this is a relevant backdrop for the interpretation of the specific
20 provisions of the Convention.

21
22 Turning to my second point regarding UNCLOS and climate change: it has been
23 argued that UNCLOS does not apply to climate change because the term “climate
24 change” does not appear in the text itself.

25
26 Norway respectfully submits that this is not decisive. We consider that the relevant
27 exercise for the Tribunal to apply the rules of treaty interpretation in good faith to the
28 relevant terms used in the Convention. UNCLOS is a framework convention. As
29 such, its terms are of a general nature. It regulates rights, obligations and activities.
30 Norway considers that UNCLOS does not, in itself, exclude climate change and its
31 effects from its regulatory scope. To the contrary, the terms used in UNCLOS’
32 provisions on the protection and preservation of the marine environment are broad
33 enough, in their ordinary meaning, to encompass climate change and its effects.

34
35 In this regard, Norway wishes to draw the Tribunal’s attention to the fact that an
36 important part of UNCLOS’ object and purpose is “the protection and preservation of
37 the marine environment”, seemingly irrespective of the sources of pollution or
38 impact. To take an example, article 194 requires States to take measures to prevent,
39 reduce and control pollution from “any source”. Any source.

40
41 Even if the Tribunal should find that climate change impacts do not easily fall within
42 the definition of “pollution” in UNCLOS article 1(4), Norway would remind the
43 Tribunal that the general obligation to protect and preserve the marine environment
44 would remain relevant.

45
46 Turing to my third point on articles 192 and 194: Norway considers that the questions
47 posed by the Commission first and foremost invoke articles 192 and 194 of the

⁷³ *Ibid.*, para. 49.

⁷⁴ *Ibidem.*

1 Convention. In fact, the two questions posed to the Tribunal seem to mirror these
2 two provisions specifically.

3
4 Norway submits that both the obligation to protect and preserve the marine
5 environment (article 192) and the obligation to prevent, reduce and control pollution
6 (article 194) are general obligations. In addition to the general nature of their
7 wording, this is confirmed by their immediate context, as they are both situated in
8 Part XII, Section 1, titled “General Provisions”. The title of article 192 as “General
9 Obligation” further confirms its role as the overarching obligation pertaining to Part
10 XII.

11
12 Norway further submits that articles 192 and 194 contain obligations of a due
13 diligence nature. The Tribunal has itself confirmed this as regards article 192 in the
14 *SRFC* advisory opinion from 2015.⁷⁵ With respect to article 194, Norway considers
15 that this can be deduced from its wording, which obliges States to “take all measures
16 necessary” and “using for this purpose the best practicable means at their disposal”
17 “in accordance with their capabilities” and “to the fullest possible extent”.

18
19 The practical effect of the due diligence nature of these provisions entails that marine
20 activities, including the way exploration and exploitation of living and non-living
21 resources are carried out, and the way maritime transport are conducted, require
22 environmental awareness. This is a fundamental part of Norway’s marine policies,
23 including zoning planning, science-based environmental impact assessments, and
24 open, transparent and democratic debate based on active and inclusive stakeholder
25 consultations.

26
27 An example is related to the comprehensive debates pertaining to how best to
28 reduce demand for petroleum, promote offshore wind as a source of energy and
29 provide effective incentives to promote protection of the atmosphere and biodiversity.
30 This is exemplified by our emphasis within the WTO on the need to remove
31 subsidies for the use of fossil fuels in fishing activities.

32
33 This latter example brings me to a key point: a careful assessment of the relevant
34 provisions of UNCLOS reveals the importance of collective action to be taken within
35 the competent international organizations, whether at the global or regional level.
36 Standard setting and action plans in such fora are key to remove a frequent obstacle
37 invoked for national reforms, namely, the need for a level playing field and common
38 norms to avoid economic and societal disruptions. Norway would thus invite the
39 Tribunal to highlight, in particular, the contributions that are already being made and
40 that can be furthered and advanced in such key regional fora.

41
42 Returning to the legal meaning of articles 192 and 194, Norway considers that the
43 precise content of these obligations is informed by other and complementary
44 sources. First, they are immediately informed by the subsequent more detailed
45 provisions of UNCLOS part XII.⁷⁶ As an example, Section 5 develops the general
46 obligation under article 194 in relation to specific sources of pollution.

⁷⁵ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case N° 21, Advisory Opinion of 2 April 2015, para. 219.

⁷⁶ Part XII, *inter alia*, sets out requirements for States to cooperate in formulating international rules to achieve their obligations, to provide technical assistance to developing States, monitor and assess the

1 Second, the general provisions of UNCLOS Part XII have recently been
2 complemented by more detailed rules for the conservation and sustainable use of
3 biodiversity beyond national jurisdiction. Among other elements, the new BBNJ
4 Treaty contains more precise rules and stringent requirements for the use of
5 environmental impact assessments in relation to activities and enables States to
6 enact different area-based management tools, including marine protected areas. As
7 a member of the high-ambition coalition advancing a robust and effective agreement,
8 Norway warmly welcomes the adoption of this vital new part of the law of the sea
9 framework. The treaty will be signed by Norway's Prime Minister, Jonas Gahr Støre,
10 in New York later this week.

11
12 Third, Norway agrees with the argument that has been made that, according to
13 article 293 of UNCLOS, certain fundamental principles of human rights law, such as
14 the principle that "in no case may a people be deprived of its own means of
15 subsistence", represent applicable law in these proceedings. As such, that principle
16 necessarily informs the provisions of Part XII, such as articles 192 and 194.

17
18 The principle is an example of what this Tribunal has called "elementary
19 considerations of humanity", which "must apply in the law of the sea, as they do in
20 other areas of international law".⁷⁷ The Tribunal has a long tradition of elementary
21 considerations of humanity informing the interpretation of UNCLOS.

22
23 As Rolf Einar Fife has explained in general terms, "[t]his pronouncement of the
24 International Tribunal on the Law of the Sea reflects the relevance of elementary
25 considerations of humanity as a general principle of international law, and therefore
26 as a source of law in its own right."⁷⁸

27
28 The principle in question here – that in no case may a people be deprived of its own
29 means of subsistence – has, in various formulations, found application in the law of
30 the sea. One example is the *Fisheries* case, a judgment Norway is always pleased to
31 highlight, where the International Court referred to and placed emphasis on "the vital
32 needs of the population of Norway".⁷⁹

33
34 Fourth, UNCLOS Part XII must be understood with due regard for other relevant
35 rules of international law applicable in the relations between the parties. This follows
36 directly from the rules of treaty interpretation contained in VCLT article 31(3)(c). It is
37 also evident from the fact that specific provisions of Part XII explicitly oblige States of
38 "taking into account internationally agreed rules, standards and recommended

effects of any activities they permit or control, to enact national legislation to give effect to international rules on these issues, as well as laying out rules on the enforcement by different States with respect to pollution.

⁷⁷ *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p. 10, 62; *M/V "Virginia G" (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 101, para. 359; *The "Enrica Lexie" (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 204, para. 133.

⁷⁸ R.E. Fife, 'The Duty to Render Assistance at Sea: Some Reflections after *Tampa*' in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill 2003) 470, 482.

⁷⁹ *Fisheries*, I.C.J. Reports 1951, p. 142; also *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 342, para. 237.

1 practices and procedures". The Convention's references to other conventions and
2 regimes compatible with the Convention further confirm this.⁸⁰

3
4 Norway submits that the UN Framework Convention on Climate Change and, in
5 particular, the Paris Agreement, is the most relevant source of law informing the
6 interpretation of relevant UNCLOS provisions. This is because the Paris Agreement,
7 with its almost universal participation, constitutes the primary instrument prescribing
8 the current and specific obligations on States in relation to climate change. The Paris
9 Agreement represents the primary forum for increasing global climate ambitions and
10 implementation through its carefully negotiated provisions. Norway would argue that
11 the Paris Agreement as the primary legal vehicle for tackling global climate change
12 must serve as a fundamental precondition for the Tribunal's assessment.

13
14 Mr President, honourable members of the Tribunal, it is time for me to conclude
15 these observations on behalf of Norway.

16
17 I embarked by emphasizing the grave nature of the climate crisis and the urgent
18 need to collectively tackle it by increased efforts to mitigate emissions and adapt to
19 the changes that we cannot prevent. I then confirmed that Norway recognizes the
20 important links between ocean health and climate change, as well as the vital role of
21 ocean-based solutions in solving the climate crisis.

22
23 I proceeded to making the following three points in relation to the Convention.

24
25 One, UNCLOS is a "comprehensive and integrated text forming a package deal"; it is
26 a framework convention. It is a truly successful practical instrument for the governing
27 of all ocean space. It is vital that its integrity is preserved. This is an important
28 backdrop to the Tribunal's assessment of the questions posed by the Commission.

29
30 Second, seeing as it is a framework convention, the fact that the text itself does not
31 mention climate change does not mean that the Convention excludes *a priori* climate
32 change and its impacts from its scope. Rather, the question requires a good faith
33 legal interpretation based on generally recognized principles of treaty interpretation
34 as enshrined in the VCLT. In Norway's view the terms of the Convention, in their
35 ordinary meaning, are wide enough to cover climate change and its impacts.

36
37 Three, the obligations to protect and preserve the marine environment (article 192)
38 and to prevent, reduce and control pollution (article 194) are general obligations of a
39 due diligence nature. Their more precise content must be interpreted in light of other
40 relevant rules that can inform their construction. In relation to climate change, the
41 Paris Agreement is the relevant source of law for this assessment.

42
43 I will end these observations by returning to the words of Norwegian author Morten
44 Strøksnes. In his sonnet to the sea, he concludes: "The sea will do just fine without
45 us. We [on the other hand] cannot survive without the sea."⁸¹

46

⁸⁰ See UNCLOS articles 237 and 311.

⁸¹ See supra note 1.

1 Acknowledging this simple fact, our dependence on the sea and our collective
2 responsibility to ensure its health and resilience is crucial and cannot be ignored.
3 Norway certainly considers it a task of existential importance to protect and preserve
4 the marine environment and take effective measures to prevent, reduce and control
5 pollution of the marine environment, as well as combatting climate change. It is no
6 less than a generational responsibility.
7

8 Mr President, honourable members of the Tribunal, that concludes Norway's
9 observations. On behalf of Norway's delegation, myself and my colleague Dagny
10 Hovind, I thank you very much for your attention.
11

12 **THE PRESIDENT:** Thank you, Mr Kravik. We have now reached 11:40 am. At this
13 stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the
14 hearing at 12:10.
15

16 *(Short break)*
17

18 **THE PRESIDENT:** Please be seated. I now give the floor to the representative of
19 Belize, Mr Gladden, to make his statement. You have the floor, Sir.
20

21 **MR GLADDEN:** Mr President, honourable members of the Tribunal, Madam
22 Registrar, it is a great privilege to appear before you today on behalf of Belize,
23 especially in proceedings of such profound importance to Belize and to the
24 international community as a whole.
25

26 Belize is a State with a marine environment of exceptional and, indeed, international
27 importance. The Belize Barrier Reef Reserve System is the world's second largest
28 system of reefs. It has been recognized as a UNESCO World Heritage Site.
29

30 As recorded by UNESCO:
31

32 The coastal area of Belize is an outstanding natural system consisting of the
33 largest barrier reef in the northern hemisphere, offshore atolls, several
34 hundred sand cays, mangrove forests, coastal lagoons and estuaries. The
35 system's seven sites illustrates the evolutionary history of reef development
36 and are a significant habitat for threatened species, including marine turtles,
37 manatees and the American marine crocodile.
38

39 The Belize Barrier Reef Reserve System (BBRRS), inscribed as a UNESCO
40 World Heritage Site in 1996, is comprised of seven protected areas. ... The
41 largest reef complex in the Atlantic- Caribbean region, it represents the second
42 largest reef system in the world.
43

44 The Government of Belize recognizes anthropogenic climate change as the
45 country's most serious threat to sustainable development.
46

47 Belize ranks as the third country most at risk for natural hazards among small
48 developing States and fifth most at risk from progressive climate change.
49

50 As a result of the adverse impacts of climate change, in particular ocean
51 acidification, ocean warming and sea-level rise, Belize's marine environment,

1 including its systems of coral reefs, mangrove forests, coastal lagoons and estuaries,
2 is confronted by an existential threat.

3
4 In November 2021, at COP26, Belize's Prime Minister, the Honourable John
5 Briceño, made a statement underscoring the threats which climate change poses to
6 Belize's marine areas and, in particular, its fragile reef system. He stated:

7
8 Belize is the proud custodian of the Belize Barrier Reef Reserve System. ...
9 But here is the sad reality. The reef is under siege. Coral bleaching stress
10 doubled from 1.7 in the period 1985-2014 to severe Level 3 between 2014-
11 2017. The reef is dying and may be beyond the point of full restoration. Its loss
12 will be irreversible. For Belize, the Barrier Reef is more than a global beauty;
13 it also underpins our culture and our tourism industry which contributes
14 approximately 40 percent to our gross domestic product. Without the reefs,
15 Belize's economy could crumble. Our people's lives will be forever changed.⁸²

16
17 Belize also considers that it has an important voice before this Tribunal. This is not
18 just because of its exceptional and exceptionally vulnerable barrier reef system; the
19 country of Belize acts as an important sink of greenhouse gas emissions, including
20 due to the significant carbon storage in Belize's extensive forested areas. Belize has
21 been proactive on the international plane, including as a member of the Alliance of
22 Small Island States, and Belize's action within the domestic sphere demonstrates its
23 commitment to addressing the threats posed by climate change.

24
25 As explained at COP25, Belize has expanded its no-take zones from 4 per cent to
26 11.6 per cent of its seas and has legislated that its maritime economy will follow a
27 green development pathway, through the banning of offshore oil exploration.⁸³

28
29 Belize has also been a pioneer in climate finance: in November 2021, it entered into
30 the largest blue bond transaction ever executed – a debt-for-marine conservation
31 transaction valued at over US\$ 360 million.⁸⁴ Belize's actions are consistent with its
32 words.

33
34 Belize remains staunchly committed to the cause of combating climate change. Like
35 other low-lying coastal States, Belize is "on the frontline of a climate crisis for which
36 they are not responsible".⁸⁵ Belize is of the firm view that this Tribunal can play an
37 important role in clarifying the specific obligations of States Parties to UNCLOS in
38 responding to this crisis. Belize is therefore proud to be participating in the present
39 proceedings.

⁸² Statement of the Hon. John Briceño, Prime Minister of Belize, at COP26, 1 November 2021, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop26cmp16cma3_HLS_EN.pdf, pp. 1–2.

⁸³ Statement of the Hon. Omar Figueroa, Minister of Agriculture, Fisheries, Forestry, the Environment, Sustainable Development and Immigration of Belize, at COP25, December 2019, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop25cmp15cma2_HLS_EN.pdf, p. 3.

⁸⁴ Statement of the Hon. John Briceño, Prime Minister of Belize, at COP26, 1 November 2021, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop26cmp16cma3_HLS_EN.pdf, p. 3.

⁸⁵ Statement of the Hon. John Briceño, Prime Minister of Belize, to United Nations General Assembly, 24 September 2021, available at https://estatemnts.unmeetings.org/estatemnts/10.0010/20210924/ajen3uMeQSDH/nu5mhB5LlnIY_en.pdf.

1 Mr President, two members of Belize’s counsel team will address you today. I will be
2 followed by Mr Sean Aughey, who will address the Tribunal on the role played by the
3 specialized conventions on climate change, under the United Nations Framework
4 Convention on Climate Change and the Paris Agreement, in answering the question
5 on which advisory opinion has been requested. Mr Sam Wordsworth KC will then
6 present Belize’s submissions on the obligation of assessment under article 206 of
7 the Convention, as well as touching on the obligations of due diligence under
8 article 194.

9
10 Mr President, honourable members of the Special Chamber, that concludes Belize’s
11 opening statement. I now ask that you give the floor to Mr Aughey.

12
13 **MR PRESIDENT:** Thank you, Mr Gladden. I now give the floor to Mr Aughey to
14 make his statement. You have the floor, Sir.

15
16 **MR AUGHEY:** Mr President, members of the Tribunal, it is a privilege to appear
17 before you and an honour to present the submissions of Belize on the role played by
18 the specialized conventions on climate change in answering the questions on which
19 an advisory opinion has been requested.

20
21 This is an important area of some disagreement in the written and oral submissions
22 before the Tribunal.

23
24 The Tribunal’s task, as delimited by the precise terms of the questions asked, is to
25 identify “the specific obligations of States Parties to UNCLOS, including under
26 Part XII”.

27
28 The questions are focused on and limited to UNCLOS. The Tribunal is not being
29 asked to exercise its advisory jurisdiction to define the specific obligations of States
30 Parties (or non-States Parties) under any other separate independent international
31 instrument, such as the specialized conventions on climate change – a request that
32 would fall outside of its competence. Rather, the Tribunal is being asked to do no
33 more than to interpret the relevant provisions of UNCLOS, including Part XII, in
34 accordance with the usual rules on treaty interpretation.

35
36 There is a large measure of agreement among participants that anthropogenic
37 greenhouse gas emissions fall squarely within the definition of “pollution” in
38 article 1(1)(4) and that, as other participants have shown in detail, it is scientifically
39 established that such emissions are already causing significant harm to the marine
40 environment and that further emissions will cause extreme harm. Thus, Part XII of
41 UNCLOS is engaged.

42
43 This inevitable conclusion is consistent with the fact that, in a series of resolutions on
44 “The Ocean and the Law of the Sea”, the United Nations General Assembly has
45 repeatedly noted “with satisfaction” that “States [have] recognized that”

46
47 the Convention [that is, UNCLOS] provides the legal framework for the
48 conservation and sustainable use of the oceans and their resources, and
49 stressed the importance of the conservation and sustainable use of the oceans
50 and seas and of their resources for sustainable development, including

1 through their contributions to poverty eradication, sustained economic growth,
2 food security and creation of sustainable livelihoods and decent work, while at
3 the same time protecting biodiversity and the marine environment and
4 addressing the impacts of climate change.⁸⁶
5

6 Most recently, this statement was included in the recitals to United Nations General
7 Assembly resolution 77/248, which was adopted on 30 December 2022 by 159 to 1,
8 with 3 abstentions. Every State that has submitted a written statement in these
9 proceedings voted in favour of that resolution.⁸⁷ In doing so, they endorsed the
10 commonsense understanding that UNCLOS itself, as the legal framework for the
11 conservation and sustainable use of the marine environment, has an important role
12 to play in addressing the impacts of climate change on the environment.
13

14 In the present proceedings, however, an important area of disagreement has
15 emerged as to the scope of the specific obligations of States Parties in this context,
16 particularly the obligations under articles 194 and 212 to take all necessary
17 measures to prevent, reduce and control pollution of the marine environment.
18

19 The submissions of some States, skillfully developed through two broad lines of
20 argument, ultimately boil down to the proposition that the specialized conventions on
21 climate change represent the present limits of the specific obligations of States
22 Parties to UNCLOS in this context.
23

24 The argument is this: the obligations to preserve and protect the marine environment
25 under article 192, and to take measures that are “necessary” to prevent, reduce and
26 control pollution of the marine environment arising from anthropogenic greenhouse
27 gas emissions under articles 194, 207 and 212, require nothing more than the
28 undertaking and, perhaps, the good faith implementation of whatever commitments
29 States have made under the United Nations Framework Convention and the Paris
30 Agreement. In other words, you are told: “Go no further than Paris.”
31

32 Whilst it may suit some States to seek to neutralize UNCLOS so that it adds nothing
33 to the commitments, such as they are, under the UN Framework Convention and the
34 Paris Agreement, that approach does not take account of the ordinary meaning of
35 the plain words of Part XII according to the usual rules of treaty interpretation.
36

37 First, certain proponents of the neutralization objective seek to reframe the
38 interpretation question before you as a question of compliance with the specific
39 obligations under UNCLOS, and then reason backwards. Take, for example,
40 Australia’s position that, “[i]n the case of States that are parties to the UNFCCC and

⁸⁶ See e.g. United Nations General Assembly 77/248 ‘Oceans and the law of the sea’ (30 December 2022), UN Doc. A/RES/77/248 (9 January 2023), preamble (emphasis added); United Nations General Assembly 76/72 ‘Oceans and the law of the sea’ (9 December 2021), UN Doc. A/RES/76/72 (20 December 2021), preamble (emphasis added); United Nations General Assembly 75/239 ‘Oceans and the law of the sea’ (31 December 2020), UN Doc. A/RES/75/239 (5 January 2021), preamble (emphasis added); United Nations General Assembly 74/19 ‘Oceans and the law of the sea’ (10 December 2019), UN Doc. A/RES/74/19 (20 December 2019), preamble (emphasis added); United Nations General Assembly 73/124 ‘Oceans and the law of the sea’ (11 December 2018), UN Doc. A/RES/73/124 (31 December 2018), preamble (emphasis added).

⁸⁷ A/77/PV.56 (Resumption 1), pp. 6–7.

1 the Paris Agreement, compliance with those agreements satisfies the specific
2 obligation under article 194 of UNCLOS”.⁸⁸

3
4 Similarly, the European Union submits that “the open-ended and evolutionary
5 obligations under the Paris Agreement are broad enough to provide for the level of
6 due diligence which is necessary and appropriate to comply with articles 192 and
7 194 of UNCLOS”.⁸⁹

8
9 But the Tribunal’s present task of interpreting the specific obligations of Parties is
10 separate, and logically prior, to any consideration of their compliance with those
11 specific obligations. As a matter of interpretation, it is not possible for the Tribunal to
12 state in the abstract whether the due diligence obligation in article 194, variable as it
13 is between States and across time,⁹⁰ would be satisfied by compliance with any
14 particular commitment made under the Paris Agreement.

15
16 Indeed, the International Court of Justice has held that “the notion of ‘due diligence’
17 ... calls for an assessment *in concreto*”.⁹¹ The question before you also does not
18 require consideration of the operation of articles 237 or 311 of UNCLOS with respect
19 to specialized conventions on climate change.

20
21 Second, proponents of the neutralization objective also attempt to elevate the
22 significance of the specialized climate change conventions so that they become the
23 determinative and limiting factor in interpreting UNCLOS. Take Australia’s
24 submission that “Part XII of UNCLOS should not be interpreted as imposing
25 obligations with respect to greenhouse gas emissions that are inconsistent with, or
26 go beyond, those agreed by the international community in the specific context of the
27 UNFCCC and the Paris Agreement.”⁹²

28
29 For a more specific variant of this argument, see, for example, the United Kingdom’s
30 submission that “[t]he measures that are ‘necessary’ for the purpose of articles 194
31 and 212 must be determined by reference to those carefully negotiated treaties that
32 are specific to control of anthropogenic greenhouse gas emissions.”⁹³

33
34 Invoking article 31(3)(c) of the Vienna Convention, the submission asks the Tribunal
35 to pay “particularly careful regard” to the “primary importance” of the climate change
36 treaties which, we are reminded, are “the product of protracted negotiations and
37 careful compromise”. It is almost as if UNCLOS wasn’t. I will come back to article
38 31(3)(c), but, first, it is instructive to note the arguments on interpretation not being
39 advanced by the United Kingdom.

⁸⁸ ITLOS/PV.23/C31/5, p. 16, lines 24–26 (Parlett). See also p. 9, lines 23–26; p. 10, lines 46–50; p. 11, lines 39–42 (Donaghue). See similarly European Union, Written statement, paras. 28, 65 and n. 65.

⁸⁹ European Union, Written statement, para. 69.

⁹⁰ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 43, para. 117.

⁹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at p. 221, para. 430.

⁹² ITLOS/PV.23/C31/5, p. 3, lines 26–35 (Donoghue).

⁹³ United Kingdom, Written statement, para. 68(a).

1 First, it is not suggested by the United Kingdom that the ordinary meaning of the
2 word “necessary”, read in context and in light of the object and purpose of UNCLOS,
3 directs the interpreter specifically and only to the specialized conventions on climate
4 change. Plainly, it does not. The obligation is not one to take such measures as
5 individual States Parties consider to be necessary in order to discharge different
6 commitments under a different treaty, and all the more so where that different treaty
7 is (unlike UNCLOS) not specifically concerned with the preservation and protection
8 of the marine environment, and the prevention, reduction and control of pollution of
9 the marine environment.

10
11 Rather, in identifying what measures are necessary (that is, according to the ordinary
12 meaning of the term, indispensable), it is obvious that the Tribunal must have regard
13 to the best available science regarding the impacts of greenhouse gas emissions on
14 the marine environment, the threat of further extreme harm and the steps that must
15 be taken to mitigate the risk to acceptable levels. The best available science is not
16 merely, as the United Kingdom appears to suggest, “a relevant factor for States to
17 consider in making their assessment of potential measures”.⁹⁴

18
19 The assessment of what measures are objectively necessary is a separate, prior,
20 exercise, and one which is itself driven by the best available science. In this case,
21 the need for urgent measures of prevention, reduction and control could not be
22 better established given the works of the IPCC. As a separate stage of the analysis,
23 having identified what measures are in fact “necessary”, the specific obligation on
24 States Parties under article 194(1) is to take those measures using the best practical
25 means at their disposal and in accordance with their capabilities.

26
27 Additionally, the context shows that where States Parties wished to establish a
28 specific obligation to take “measures necessary to implement” internationally agreed
29 rules and standards established through competent international organizations or
30 diplomatic conference, they did so expressly, as in articles 213 and 222. The specific
31 obligations under articles 194, 207 and 212 to take all measures necessary to
32 prevent, reduce and control pollution are framed in much broader terms,
33 independent of the question of the implementation of any internationally agreed rules
34 and standards.

35
36 The context also shows that there is no assumption that the measures that are
37 necessary to implement internationally agreed rules and standards will constitute the
38 limit of the measures that are necessary to prevent, reduce and control pollution. The
39 obligation under article 207(4) and 212(3) is to “endeavour to establish global and
40 regional rules, standards and recommended practices and procedures to prevent,
41 reduce and control such pollution”.

42
43 It is not to endeavour to establish agreement on the limits of the measures that are
44 necessary to prevent, reduce and control pollution, and it should not automatically be
45 assumed that any internationally agreed rules and standards represent the limits of
46 what is necessary. Consistent with this, articles 213 and 222 establish independent
47 specific obligations with respect to the enforcement of these two, potentially different,
48 categories of measures.

⁹⁴ United Kingdom, Written Statement, para. 68(b).

1 Ultimately, the careful formulation of the specific obligations in Part XII appears to
2 reflect the common sense appreciation that, since it would be necessary to achieve
3 consensus for their adoption, internationally agreed rules and standards might reflect
4 compromises and might only contribute to, rather than secure, the ultimate objective
5 of ensuring that States Parties take measures that are, in fact, necessary to prevent,
6 reduce and control pollution of the marine environment from any given source.
7

8 Third, because UNCLOS and the specialized climate change conventions establish
9 separate independent obligations, it cannot be suggested by the United Kingdom
10 that the specialized conventions amount to subsequent practice establishing
11 agreement between the States Parties to UNCLOS as to the meaning of the term
12 “necessary” in the context of climate change. While the UNFCCC refers to the
13 importance of marine ecosystems as sinks and reservoirs of greenhouse gases,⁹⁵
14 and the Paris Agreement refers in general terms to the “oceans”,⁹⁶ neither
15 instrument contain any reference to UNCLOS or to the “marine environment” within
16 the meaning of UNCLOS.
17

18 I turn then to article 31(3)(c), which I understand to be the principal basis on which
19 the UK says that “[t]he measures that are ‘necessary’ for the purposes of articles 194
20 and 212 must be determined by reference to” the specialized conventions.⁹⁷
21 UNCLOS is, of course, not to be interpreted in a vacuum, but article 31(3)(c) requires
22 only that the Tribunal shall “take into account” such external rules, no less but no
23 more.
24

25 Importantly, relevant rules applicable in the relations between the Parties constitute
26 just one element that is to be thrown into the crucible together with the ordinary
27 meaning of the text of UNCLOS, the context, the object and purpose and so on.⁹⁸
28 Such rules do not displace or modify the ordinary meaning of the words of Part XII.⁹⁹
29 It is the interaction between the various elements that produces the legally relevant
30 interpretation.
31

32 This is what is required by the usual rules and the careful application of article 31
33 VCLT will be sufficient to meet the United Kingdom’s concern that the Tribunal
34 performs its role “fully conscious of the broader context of the global climate change
35 regime”.¹⁰⁰ The global regime falls for consideration only in that it has a certain role
36 to play in interpreting the provisions of UNCLOS. Nothing in the Convention operates
37 to incorporate these external rules so that they become part of UNCLOS.
38

39 What, then, is the relevance to the interpretation of Part XII of the non-binding
40 commitments under the Paris Agreement that States have assumed in the gradual
41 pursuit of the temperature goal?
42

⁹⁵ UNFCCC, preamble.

⁹⁶ Paris Agreement, preamble.

⁹⁷ United Kingdom, Written statement, para. 68(a).

⁹⁸ Vienna Convention on the Law of Treaties, Article 31(1)–(3); International Law Commission, Draft articles on the Law of Treaties, with commentaries, Yearbook of the International Law Commission (1966), Vol. II, at pp. 219–220 (commentary to draft articles 27–28, para 8).

⁹⁹ Vienna Convention on the Law of Treaties, article 31(1).

¹⁰⁰ United Kingdom, Written Statement, para. 7.

1 It is important to recall not only that the NDCs are not rules of international law
2 applicable in the relations between the Parties for the purpose of article 31(3)(c), but
3 also that these commitments, such as they are, fall far short of what is necessary to
4 prevent, reduce and control pollution of the marine environment, as could not be
5 clearer from the words of the IPCC.

6
7 For example, the IPCC's Special Report on the Ocean and Cryosphere, with specific
8 reference to the specialized conventions, including the UNFCCC and the Paris
9 Agreement, stated: "Existing international instruments do not adequately address
10 climate change challenges for the open ocean and coastal seas".¹⁰¹ That, of course,
11 includes Belize's coral reefs and mangrove ecosystems.

12
13 The science could not be clearer that a great deal more is needed, and it follows
14 from this that the interpretation of the specific obligations under Part XII to take all
15 the measures that are "necessary" to prevent, reduce and control pollution in this
16 context cannot be limited by reference to the modest measures that States have
17 separately and independently committed to take under the Paris Agreement.

18
19 To conclude, the Tribunal's task is to interpret the provisions of Part XII of UNCLOS
20 in a manner that gives real meaning and effect to, rather than neutralizes, those
21 provisions. The question of what measures are "necessary" to prevent, reduce and
22 control pollution of the marine environment is not to be interpreted solely or primarily
23 by reference to the separate and independent commitments under the specialized
24 conventions on climate change. While any true obligations under those specialized
25 conventions are to be taken into account, this in no way precludes the Tribunal from
26 going beyond Paris. You must go further.

27
28 Mr President, members of the Tribunal, I thank you for your kind attention and ask
29 that you call Mr Wordsworth KC to the podium.

30
31 **THE PRESIDENT:** Thank you, Mr Aughey. I now give the floor to Mr Wordsworth to
32 make his statement. You have the floor, Sir.

33
34 **MR WORDSWORTH:** Mr President, members of the Tribunal, it is a privilege to
35 appear before you for Belize, and I wish to start by taking a moment to look at the
36 dynamic currently unfolding before this Tribunal, including in the presentations that
37 we have just heard this morning, and, in doing so, to recall the myth of Sisyphus.

38
39 Sisyphus, of course, was condemned by the Greek gods to roll a large boulder up
40 the side of a mountain for all eternity. Whenever he reached the crest of the
41 mountain, the boulder would escape from his grip and roll back down to the bottom,
42 ready for an endless and dispiriting repeat.

43
44 The analogy is tolerably clear. At each COP, all States have an interest in reducing
45 the emission of greenhouse gases and are willing work together to a certain point, to
46 push this boulder of existential importance some distance up the mountain towards a

¹⁰¹ IPCC, "The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change" (2022), Table 5.9 ("Ocean Governance and Climate Change: Major Issues"), p. 541.

1 goal of the meaningful and binding obligations that are necessary to reduce
2 emissions.

3
4 But the closer the boulder gets to the summit, the more the disparities appear
5 between, on the one hand, the States that are the most adversely affected and
6 impacted by climate change, including those most exposed to sea-level rise and
7 most dependent on a healthy marine environment; and, on the other hand, there are
8 those States with less pressing or even opposing interests, mainly more developed
9 or oil-producing States.

10
11 And, so, little if anything is agreed in terms of the hard-edged legal obligations
12 needed to make concrete reductions in emissions. The boulder rolls back down the
13 mountainside, and not too distant from its original starting point, while ever more
14 severe adverse impacts are registered on land and sea, including in severe harm to
15 Belize's precious coral reefs.

16
17 And this Tribunal is now confronted by the same conflicting interests but as reflected
18 in the two broad lines of argument being put before it, which Mr Aughey has just
19 summarized. And to emphasize, the "Go no further than Paris" argument is
20 conveyed with great skill and can appear to give real meaning and effect to the
21 provisions of Part XII.

22
23 For example, France accepts that the measures adopted pursuant to Part XII must
24 be "effective". But it then says: "In this respect countries should intensify the ambition
25 of their greenhouse gas mitigation policies to place themselves on the trajectory to
26 limit greenhouse gases, as set out in article 2 of the Paris Agreement and in line with
27 the Glasgow Pact".¹⁰²

28
29 Thus, the hard-edged legal obligations under Part XII are elegantly merged into the
30 language of endeavour and ambition, where the endpoint is not the concrete
31 enforcement of the obligation to prevent, reduce and control of pollution to the
32 marine environment, but some undefined and unenforceable location along a
33 trajectory. And so the boulder comes crashing back down the mountainside.

34
35 The counterargument is that the provisions of Part XII say what they say and must
36 be interpreted according to the usual rules, which afford some relevance to the
37 UNFCCC and the Paris Agreement, but do not remove or obscure the independent
38 legal existence and meaning of what States and other parties were able to agree to
39 in the specific context of the law of the sea. Intuitively, and as just follows from the
40 more developed points that Mr Aughey has just made, only this second line of
41 argument can be correct. In short, this is the Tribunal for the Law of the Sea being
42 asked to interpret provisions of the Convention of the Law of the Sea.

43
44 And because anthropogenic greenhouse gases unquestionably meet the
45 Convention's definition of pollution, the Tribunal has the jurisdiction and the tools
46 accorded to it by the 168 States and other parties to UNCLOS to make, through its
47 advisory opinion, a hugely important contribution to the protection and preservation
48 of the marine environment. Sisyphus need not, and must not, within this context of

¹⁰² France, Written Statement, para. 112.

1 UNCLOS, be sent back to the bottom of the mountain with nothing to show for his
2 labours.

3
4 Now, against this backdrop, I wish to focus on the obligation of assessment under
5 article 206, including its interplay with articles 192 and 194. Thus far, article 206 has
6 received surprisingly little attention, despite its very real importance to the protection
7 and preservation of the marine environment.

8
9 As to articles 192 and 194, I refer the Tribunal to Belize's written statement,¹⁰³ and
10 note the broad consensus that these establish what are primarily obligations of due
11 diligence, but of a particularly elevated nature – as follows, of course, from the treaty
12 language and the extreme magnitude of the threat to the marine environment posed
13 by greenhouse gas emissions.¹⁰⁴

14
15 There are various helpful authorities to assist the Tribunal in this regard, including
16 the advisory opinions on *Activities in the Area* and the *SRFC*, although it is to be
17 emphasized that the reasoning of those decisions was focused on provisions that
18 are less demanding,¹⁰⁵ and, in particular, do not impose the stringent obligation to
19 take “all necessary measures”.

20
21 Now, due diligence in this context naturally requires monitoring and assessment of
22 risk,¹⁰⁶ and Section 4 of Part XII gives concrete form to this. Within this section,
23 articles 204 and 205 deal respectively with “monitoring of the risks or effects of
24 pollution” and “publication of reports”, while article 206 concerns the obligations of
25 assessment. Section 4 is thus concerned with obtaining and disseminating
26 knowledge, and plays a critical role in ensuring the State's compliance with its
27 obligations under articles 192 and, in particular, 194. As the precursor to taking all
28 necessary measures, the State must first inform itself of the relevant risks and what
29 is needed to prevent, reduce and control.

30
31 The obligation to assess can be seen as procedural in nature because taken in
32 isolation – that is, leaving to one side for the moment the interplay with articles 192
33 and 194 – the State is not obliged to act in a particular way by reference to the
34 knowledge acquired through the particular assessment, other than to ensure
35 publication. However, that in no sense impacts on the binding nature and importance
36 of article 206.

37
38 As correctly identified by the tribunal in the *Chagos Marine Protected Area*
39 *Arbitration*, procedural obligations – and here, it had in mind obligations of

¹⁰³ Belize's written statement, paras. 55-71.

¹⁰⁴ As to magnitude of risk, see e.g. International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Yearbook of the International Law Commission (2001), Vol. II, Part Two at p. 155, para. 18.

¹⁰⁵ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4 at pp. 38–40, paras. 126–129; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 41, paras. 110–112.

¹⁰⁶ See e.g., *Pulp Mills on the River Uruguay*, Judgment, ICJ Reports 2010, p. 14 at pp. 82–83, para. 204.

1 environmental impact assessment – “may, indeed, be of equal or even greater
2 importance than the substantive standards existing in international law”.¹⁰⁷

3
4 If oil producer X is going to develop a new field that is going to lead to Y greenhouse
5 gas emissions, and consequent harm to the marine environment, the relevant figures
6 must be quantified and also identified in terms of the likely harm, and then published
7 as required by article 205. And this really matters. Ultimately, well-informed public
8 pressure may well be one of the most important tools leading to the protection and
9 preservation of the marine environment.

10
11 Turning to the details, article 206 breaks down into three basic elements: first, the
12 trigger for its application; then, the actual obligation of assessment; and, finally, the
13 obligation of publicity.

14
15 Starting with the first of these, the trigger for application, the obligation to assess is
16 engaged “[w]hen States have reasonable grounds for believing that planned
17 activities under their jurisdiction or control may cause substantial pollution of or
18 significant and harmful changes to the marine environment”.

19
20 Whilst citing and seemingly approving the description of article 206 in the Nordquist
21 Commentary as an “essential part of a comprehensive environmental management
22 system” and as a “particular application of the obligation on States, enunciated in
23 Article 194(2)”, the Tribunal in the *South China Sea Arbitration* saw the term
24 “reasonable” as giving an element of discretion to the States concerned.¹⁰⁸

25
26 If this is so, then any discretion can only exist within the confines of what is and is
27 not reasonable, which is plainly a matter for objective determination.¹⁰⁹ And to
28 emphasize, what triggers the obligation of assessment is the objective perception of
29 risk of pollution or harm, not actual pollution or harm, as follows from the formulation
30 “may cause pollution or significant and harmful changes”.

31
32 There has been a debate as to how the two thresholds interact – and specifically
33 over whether an activity that does not risk “substantial pollution” may nonetheless
34 meet the threshold of “significant and harmful change”.¹¹⁰ It might be thought that the
35 use of the disjunctive “or” provided the straightforward answer in this debate, but in
36 any event, in the current context the question falls to be answered in light of the
37 reports of the IPCC, from which it is self-evident that anthropogenic greenhouse gas
38 emissions cause both “substantial pollution” and “significant and harmful changes” to
39 the marine environment.

¹⁰⁷ *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 322.

¹⁰⁸ *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 948, referring to S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV (M. Nordquist, gen. ed., 2002), para. 206.6(b).

¹⁰⁹ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, para. 146 .

¹¹⁰ Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary (2017)*, p. 1375, para. 11, considering Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008).

1 It is important also to emphasize that the trigger under article 206 centres around
2 “planned activities” under a State’s jurisdiction or control, which is a notably broad
3 formulation.

4
5 Most obviously, this includes all activities that meet the thresholds that are planned
6 by a developer or contractor. But the term “planned activities under their jurisdiction
7 or control” will also include a State’s intention to permit activities, including activities
8 in a particular economic area, such as a plan to allow the exploitation of a particular
9 area of oil or coal reserves, or to invest in energy production from fossil fuels. Thus,
10 the State will be able to understand both individual and cumulative impacts of all
11 planned activities and take these impacts into full consideration at an early stage of
12 policy- and decision-making.

13
14 Of course, such decision-making may already take place within a framework of
15 environmental or strategic impact assessment; we are not talking about article 206
16 imposing a massive burden. But article 206, correctly interpreted and applied,
17 ensures a focus on adverse effects of anthropogenic greenhouse gas emissions
18 specifically to the marine environment, and regardless of whether the proposed
19 development is within a maritime zone.¹¹¹

20
21 Moving, then, to the obligation of assessment: and this is of course cast in
22 mandatory terms – “they shall ... assess” – while the words “as far as practicable”
23 allow for the possibility that there may be differential requirements as between
24 developed and developing States.¹¹² The required assessment is then formulated in
25 clear and straightforward language: the obligation to “assess the potential effects of
26 such activities on the marine environment”.

27
28 There are four points to make.

29
30 First, the words “as far as practicable” do not operate as an escape valve for States
31 that are able to commit, but do not wish to commit, resources to a meaningful
32 assessment. What is “practicable” must be determined by reference to context, and
33 the context here is one of high risk of very significant harm, predicted by the IPCC as
34 a matter of “high confidence”.

35
36 With specific regard to “unique and threatened systems”, such as Belize’s coral
37 reefs, the IPCC has moreover identified “increasing numbers of systems at potential
38 risk of severe consequences at global warming of 1.5°C above preindustrial
39 levels”,¹¹³ and of course the impacts will only be much, much worse if 1.5°C figure is
40 exceeded.¹¹⁴

41

¹¹¹ See also, e.g., *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of
3 December 2001, ITLOS Reports 2001, p. 95 at p. 110, para. 82, p. 111, dispositif para. 1(c).

¹¹² *Responsibilities and obligations of States sponsoring persons and entities with respect to activities
in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory
Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 54, para. 160.

¹¹³ IPCC, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems, Special
Report: Global Warming of 1.5°C (2018), p. 253.

¹¹⁴ IPCC, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems, Special
Report: Global Warming of 1.5°C (2018), pp. 179, 229–230 (Box 3.4).

1 Second, although no details are prescribed in article 206 as to the nature of the
2 assessment, at a minimum, this will have to meet the criteria established in the
3 domestic law of the relevant State,¹¹⁵ and must contain an evaluation of the possible
4 harmful impact of the planned activities on the marine environment.

5
6 As explained in the ILC's commentary to article 7 of the Draft Articles on Prevention
7 of Transboundary Harm, which likewise does not specify what the content of the risk
8 assessment should be: "Obviously, the assessment of risk of an activity can only be
9 meaningfully prepared if it relates the risk to the possible harm to which the risk
10 could lead."¹¹⁶ In this respect, the inherent features of any meaningful EIA have been
11 helpfully drawn out in the separate opinion of Judge *ad hoc* Dugard in the ICJ Case
12 *concerning Certain Activities and Construction of a Road*.¹¹⁷

13
14 Third, I note that France in its written statement refers to the BBNJ in this context
15 and it says: "The BBNJ Agreement also includes a section on environmental impact
16 assessment to operationalize and give concrete form to the obligation set out in
17 article 206 of the Convention."¹¹⁸

18
19 But article 206 has no need to be operationalized and given concrete form. States
20 may agree to elaborate on their obligations of assessment, but it would be quite
21 wrong to suggest that article 206 does not already have hard-edged legal content.

22
23 As the Seabed Disputes Chamber aptly "stressed" in the *Activities in the Area*
24 Opinion, "the obligation to conduct an environmental impact assessment is a direct
25 obligation under the Convention".¹¹⁹

26
27 Fourth, in this respect it is also puzzling to see a passage in the Proelss
28 Commentary deducing from the outcome of *Pulp Mills* and the *MOX Plant* case, that
29 "it seems reasonable to presume that international tribunals are – in the absence of
30 precise treaty requirements – unlikely to find breaches of the duty except in cases
31 where no EIA is conducted or the EIA carried out was evidently inadequate".¹²⁰

32
33 There is simply no basis for this, either in the language of article 206 or in the
34 reasoning or outcome of those two cases. It is perhaps useful to recall that the
35 decision in *MOX Plant* concerned provisional measures alone, contained no
36 reasoning on article 206 and was decided chiefly by reference to the fact that there
37 would be no export from the MOX plant for a considerable time, i.e., not until after
38 constitution of an Annex VII tribunal.

¹¹⁵ *Pulp Mills on the River Uruguay*, Judgment, ICJ Reports 2010, p. 14 at pp. 83–84, para. 205.

¹¹⁶ International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Yearbook of the International Law Commission (2001), Vol. II, Part Two at p. 158 (commentary to Article 7, para. 6, and see also para. 7).

¹¹⁷ *Case concerning Certain Activities and Construction of a Road (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2015, p. 665 at p. 849, para. 18 (Separate Opinion of Judge *ad hoc* Dugard).

¹¹⁸ France, Written Statement, para. 124.

¹¹⁹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 50, para. 145.

¹²⁰ Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 1375, para. 11, considering Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008).

1 So there was no urgency, although “prudence and caution” required that there be an
2 order for cooperation in exchanging information concerning risks or effects of the
3 operation of the MOX plant.¹²¹ There is not a hint in the order of the Tribunal of it
4 taking a less-than-stringent approach to the marine environment pursuant to Part XII;
5 to the contrary.

6
7 If I may, I note in passing that this was a case on which I had the privilege to work
8 with our dear and departed friend, Alan Boyle.

9
10 As to the final element of article 206, a State is obliged to “communicate reports of
11 the results of such assessments in the manner provided in article 205”, that is, to
12 publish the reports itself or to provide them to the competent international
13 organizations.

14
15 Pulling these strands together, I make two final points.

16
17 First, as Belize explained in its written statement,¹²² if the marine environment is to
18 be protected and preserved from the severe harms caused by anthropogenic
19 greenhouse gas emissions, and if pollution from such emissions is to be prevented,
20 reduced and controlled, it appears essential that the meaningful assessment of their
21 environmental impacts becomes a form of reflex for planned activities within
22 article 206, with the reports of such environmental assessments then being
23 publicized.

24
25 Thus, not only the State concerned, but all States and, more broadly, the public
26 become fully informed as to potential impacts, and this, I note, could be taken as
27 reflecting an element of obligation of result.

28
29 Second, and picking up on this last point, there has been some focus before the
30 Tribunal on the characterization of article 194(1) and whether this is to be seen as an
31 “obligation of conduct” as opposed to an “obligation of result”. And Judge
32 Kittichaisaree has, of course, also asked a broader question on this, looking for
33 categorization of the relevant provisions of the Convention into obligations of conduct
34 or of result.

35
36 Now, for Belize, this is not an issue with an easy answer, and it is to be recalled that
37 the ILC elected not to include this distinction in the 2001 Articles on State
38 Responsibility, explaining that:

39
40 Article 12 also states that there is a breach of an international obligation when
41 the act in question is not in conformity with what is required by that obligation,
42 “regardless of its ... character”. In practice, various classifications of
43 international obligations have been adopted.

44
45 For example, a distinction is commonly drawn between obligations of conduct
46 and obligations of result. That distinction may assist in ascertaining when a

¹²¹ *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at pp. 109–110, paras. 72–89.

¹²² Belize Written Statement, para. 81.

1 breach has occurred. But it is not exclusive, and it does not seem to bear
2 specific or direct consequences as far as the present articles are concerned.¹²³
3

4 So, does the distinction assist the Tribunal in its current task of interpretation, where
5 it is not seeking to ascertain whether a breach has occurred? Suppose the Tribunal
6 were faced with a concrete case, where an environmental assessment under article
7 206 revealed that a given planned activity would inevitably lead to a massive release
8 of methane gas and consequent adverse impact to the marine environment.
9

10 The obligations of due diligence under article 194 would likely require not merely
11 conduct, but also a specific result in the form of a decision that the planned activity
12 could not proceed as proposed. So we would not see this issue of characterization
13 that is capable of a straightforward answer and respectfully query how much it could
14 assist the Tribunal in the abstract.
15

16 To conclude, Mr President, members of the Tribunal; the entirety of Part XII is of the
17 greatest importance in the current emergency and must be recognized as such if the
18 endless torment of Sisyphus is to be cut short so far as concerns the marine
19 environment.
20

21 And for Belize, it is critical that the Tribunal pay close attention to, and identify in its
22 advisory opinion, the specific obligations under article 206 and interpret these in a
23 way that gives them their true meaning and effect.
24

25 That concludes the oral submissions of Belize, and I thank you, Mr President,
26 members of the Tribunal, for your attention.
27

28 **THE PRESIDENT:** Thank you, Mr Wordsworth.
29

30 This brings us to the end of this morning. The Tribunal will sit again tomorrow
31 morning at 10 a.m. when it will hear oral statements from the Philippines and Sierra
32 Leone.
33

34 This sitting is now closed.

¹²³ International Law Commission, Articles on State Responsibility with Commentaries, 2001, at p. 56, para. (11).