

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Monday, 25 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
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List of delegations:

STATES PARTIES

France

Ms Sandrine Barbier, Deputy Director of Legal Affairs, Ministry for Europe and Foreign Affairs

Mr Mathias Forteau, Professor, University of Paris Nanterre

Ms Valérie Bore Eveno, Lecturer, University of Nantes

Italy

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Mr Roberto Virzo, Professor of International Law, University of Messina

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Mr Ben Juratowitch KC, Barrister, Essex Court Chambers

Ms Amy Sander, Barrister, Essex Court Chambers

Ms Belinda McRae, Barrister, Twenty Essex

Ms Courtney Grafton, Barrister, Twenty Essex

1 **THE PRESIDENT:** Please be seated. Good morning. Today we will continue the
2 hearing in the *Request for an Advisory Opinion submitted by the Commission of*
3 *Small Island States and International Law*. This morning we will hear oral statements
4 from France, Italy, The Netherlands and the United Kingdom.

5
6 I now invite the representative of France, Ms Barbier, to make her statement. You
7 have the floor, Madam.

8
9 **MS BARBIER:** Mr President, distinguished members of the Tribunal, it is, for me, a
10 great honour to represent my country before the Tribunal. In participating in these
11 proceedings, it is the opportunity for France to reaffirm its full support for this
12 Tribunal and the vital role which it plays. It is also the opportunity to recall our
13 attachment to the international law of the sea and particularly to the “Constitution of
14 the Oceans” which UNCLOS constitutes.

15
16 I should also like to express personally, and also on behalf of the French Republic,
17 our sincere condolences to the family and friends of Professor Alan Boyle, who had
18 placed his internationally recognized skills at the service of COSIS in these
19 proceedings.

20
21 Mr President, distinguished members of the Tribunal, “Humanity has opened the
22 gates of hell.”¹ This image evoked last week by the UN Secretary-General in his
23 opening speech of the Climate Ambition Summit mirrors a terrifying reality. Climate
24 change is causing catastrophes right here and now, to which this summer’s events in
25 Greece, Turkey, Canada and Libya bear dramatic testimony.

26
27 Climate change is all the more urgent when twinned with cascade effects which
28 could threaten the very existence of some States. It is, in particular, the case with the
29 rise in the level of the oceans. France has vast maritime areas extending over more
30 than 10 million km²; 97 per cent of these areas are situated in France’s overseas
31 territories, whose sovereignty, let me point out, is not in dispute in the instant
32 proceedings.² But given this rather specific geography, France is thus rather
33 concerned and worried by these developments and stands in full solidarity in
34 particular with Small Island Developing States, which are feeling the full force of the
35 effects of sea-level rise.

36
37 It is in the context of this urgency that France, like the entire European Union, is
38 committed to an ambitious climate protection approach, as can be seen from the set
39 of instruments which we have recently adopted with the aim of cutting our
40 greenhouse gas emissions by 40 per cent by 2030 and becoming carbon neutral by
41 2050.³ The adoption of such instruments is more necessary than ever to protect our
42 environment as a whole and particularly our seas and oceans.

43
44 Scientists have been warning us for a long time now that this change was taking
45 place and we must take heed of these data. The written statements and oral

¹ <https://www.un.org/sg/en/content/sg/statement/2023-09-20/secretary-generals-opening-remarks-the-climate-ambition-summit>

² TIDM/PV.23/C31/9, hearing of 15 September 2023 (a.m.), p. 16, lines 40-42 (Mauritius).

³ <https://www.statistiques.developpement-durable.gouv.fr/edition-numerique/chiffres-cles-du-climat/22-politiques-de-lutte-contre-le>

1 submissions informed by these scientific findings are evidence of the consensus on
2 the harmful of effects of rising CO₂ emissions on the seas and oceans that play such
3 a key role in climate regulation.

4
5 In this respect, we welcome the convergence of views between the participants in
6 these proceedings on the need to rely on available scientific data to establish the
7 materiality of pollution of the marine environment within the meaning of article 1 of
8 the Convention and to define the means and techniques available to deal with them.
9 The reports and the findings of the Intergovernmental Panel on Climate Change
10 (IPCC) are abundantly quoted in a number of written statements and oral
11 submissions.⁴

12
13 Mr President, the instant request for an advisory opinion is fundamental, and
14 international law has to play a central role in the protection of the oceans. The
15 response that the Tribunal is asked to give to this request for an advisory opinion
16 must bear witness to the strength of multilateralism and the need for the international
17 community to cooperate effectively and in a spirit of solidarity on environmental and
18 climate issues – not to protect our own individual homes but the home to us all, to
19 echo the famous phrase of French President Jacques Chirac in 2002 that our house
20 is burning and we are looking elsewhere.⁵

21
22 These advisory proceedings are taking place in an international context that is
23 encouraging in many respects. They form part of a widespread awareness of the
24 vital importance of the oceans and a need to develop the legal framework to better
25 preserve the marine environment.

26
27 A first example in this regard is the adoption in June of the agreement on the
28 conservation and sustainable use of marine biological diversity of areas beyond
29 national jurisdiction (the BBNJ Agreement). This represents a major step towards
30 preserving the biological diversity of the high seas and the Area. Last week's signing
31 of this Agreement by more than 70 States and the European Union is a very positive
32 sign of States' determination to reinforce protection of the marine environment.

33
34 The Agreement on Fisheries Subsidies concluded on 17 June 2022 at the WTO
35 represents another encouraging development, given that it will contribute to the
36 sustainable development of fish stocks. Other equally fundamental negotiations are
37 still under way: within the International Seabed Authority with regards to the
38 exploitation of mineral resources in the Area; at the upcoming Dubai Climate Change
39 Conference (COP28); and within the UN International Negotiating Committee on

⁴ See, for example TIDM/PV.23/C31/6, hearing of 13 September 2023 (p.m.), p. 21, lines 20-32 (Bangladesh); TIDM/PV.23/C31/9, hearing of 15 September 2023 (a.m.), p. 18, lines 9-16 (Mauritius); TIDM/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 6, lines 10-18 (New Zealand); TIDM/PV.23/C31/12, hearing of 19 September 2023 (a.m.), p. 7, lines 30-36 (Philippines); *ibid*, p. 28, lines 20-25 (Sierra-Leone); TIDM/PV.23/C31/14, hearing of 20 September (a.m.), p. 22, lines 31-37 (Timor-Leste); *ibid*, p. 24, lines 1-19 (European Union).

⁵ See, for example TIDM/PV.23/C31/6, hearing of 13 September 2023 (p.m.), p. 21, lines 20-32 (Bangladesh); TIDM/PV.23/C31/9, hearing of 15 September 2023 (a.m.), p. 18, lines 9-16 (Mauritius); TIDM/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 6, lines 10-18 (New Zealand); TIDM/PV.23/C31/12, hearing of 19 September 2023 (a.m.), p. 7, lines 30-36 (Philippines); *ibid*, p. 28, lines 20 à 25 (Sierra-Leone); TIDM/PV.23/C31/14, hearing of 20 September (a.m.), p. 22, lines 31-37 (Timor-Leste); *ibid*, p. 24, lines 1-19 (European)

1 Plastic Pollution working towards a plastic pollution treaty with the aim of adopting a
2 text before the end of 2024. Lastly, the prospect of the third United Nations Ocean
3 Conference to be held in Nice in 2025, and co-chaired by France and Costa Rica,
4 will help to keep marine environmental protection at the top of the political agenda
5 and bring these different processes together.
6

7 These advisory proceedings also fit within the context of discussions being held
8 within the International Law Commission (ILC) on sea-level rise in relation to
9 international law. This work is essential, in particular to meet the need to secure
10 maritime area limits of States concerned. France would like to rehearse the written
11 statement it sent to the ILC on this subject and the fact that it interprets the
12 Convention as allowing recourse to fixed baselines.⁶
13

14 Finally, the ICJ has, in parallel, received from the UN General Assembly a request
15 for an opinion on a question which has a clear nexus with the present proceedings.
16 The referral for an opinion to the Inter-American Court of Human Rights on 9
17 January 2023 by Colombia and Chile concerning the climate emergency and human
18 rights is also in the same vein. This concomitance testifies to the global interest in
19 the issue of environmental protection in view of the consequences of climate change.
20

21 In France's opinion, it is essential that the responses provided by international courts
22 and tribunals should be both convergent and consistent. Nothing would be more
23 damaging to international climate law and international law for protection of the
24 marine environment than for States and international organizations to be confronted
25 with divergent interpretations of the relevant applicable law. At the same time, this
26 compelling need for legal consistency should not lead to a restrictive interpretation of
27 the rules in force, which would fail to take into account the contemporary needs of
28 the international community.
29

30 Mr President, distinguished members of Tribunal, today's proceedings in which we
31 are taking part today are in line with this context and they require the full attention of
32 us all. Our intention this morning isn't to repeat what already appears in France's
33 written statement – which I'd like to refer the Tribunal to – but to focus on those
34 points which we deem the most important in these proceedings, be it the jurisdiction
35 of this Tribunal to hand down the advisory opinion and applicable law – which I will
36 return to shortly – or certain substantive questions which we will deal with in turn,
37 together with Professor Forteau.
38

39 Mr President, I shall say but little on the jurisdiction of your Tribunal to entertain this
40 advisory opinion, given the numerous discussions that already took place within the
41 framework of the proceedings that led to your Advisory Opinion of 2015, and
42 considering the broad consensus on this issue in the written and oral submissions.⁷

⁶ In this sense, see https://legal.un.org/ilc/sessions/74/pdfs/french/slr_france.pdf

⁷ See, for example, TIDM/PV.23/C31/5, hearing of 13 September 2023 (a.m.), p. 19, lines 4-5 (Germany); TIDM/PV.23/C31/7, hearing of 14 September 2023 (a.m.), p. 1, lines 39-41 (Chile); TIDM/PV.23/C31/8, hearing of 14 September 2023 (p.m.), p. 6, lines 12-14 (Guatemala); TIDM/PV.23/C31/9, hearing of 15 September 2023 (a.m.), p. 40, lines 11-12 (Federated States of Micronesia); TIDM/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 17, lines 1-3 (Republic of Korea); TIDM/PV.23/C31/11, hearing of 18 September 2023 (a.m.), p. 6, lines 32-33 (Mozambique); TIDM/PV.23/C31/12, hearing of 19 September 2023 (a.m.), p. 26, lines 48-50 (Sierra Leone);

1 Contrary to what a handful of States have maintained,⁸ France considers that the
2 Tribunal is competent to deal with the present request for an opinion, but it also
3 considers that it is important for the Tribunal to seize the opportunity afforded by the
4 instant case to define the conditions of its advisory jurisdiction more precisely.

5
6 Now, a request for an opinion may indeed be consensual and useful in one case but
7 in another could be particularly inappropriate and problematic. It is, therefore, up to
8 the Tribunal to use appropriate and sufficiently precise criteria to prevent any misuse
9 the advisory proceedings.

10
11 In particular, I should like to point out that the Tribunal's jurisdiction is limited *ratione*
12 *materiae* by the statutory rules governing it and by the question put to it.⁹ In the
13 instant proceedings, this question seeks only to identify the existing and specific
14 obligations owed under the Convention¹⁰ without this preventing the Tribunal from
15 referring, for the purposes of interpretation, to other relevant rules of international law
16 than those cited in the question put to it.¹¹

17
18 In this respect, I would like to return to the question of the relationship between the
19 Convention and external rules, as this question is particularly important in the context
20 of the present case and seems to be the subject of differing assessments.

21
22 Firstly, with regard to the scope of article 237 of the Convention, there are
23 differences of opinion as to its characterization. Is it a coordinating clause or is it a
24 *renvoi* clause?

25
26 In the view of France, article 237 constitutes a coordinating or compatibility clause
27 between, on the one hand, the Convention on the Law of the Sea, including Part XII
28 on the general principles and objectives of the Convention and, on the other hand,
29 the relevant external obligations in accordance with the imperative of consistency
30 and mutual support.¹²

31
32 Indeed, the external rules referred to in article 237 are intended solely for the
33 purposes of connecting these rules with the Convention. Moreover, the same
34 external rules may be relevant to the interpretation of the Convention either when the
35 Convention refers to them in substantive provisions, for example, in articles 207 or
36 212, or under the general rule of interpretation codified in article 31 of the VCLT (the
37 Vienna Convention on the Law and Treaties), as an element of context, subsequent
38 practice or relevant rule of international law applicable in relations between parties.

39
40 So, it is within this framework that France believes the relationship between
41 UNCLOS and other relevant international conventions – in particular the Framework

TIDM/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p. 44, lines 43-46 (Viet Nam);
TIDM/PV.23/C31/16, hearing of 21 September 2023 (a.m.), p. 4, lines 34-36 (African Union/Comoros).
⁸ See, for example, TIDM/PV.22/C31/8, hearing of 14 September 2023 (p.m.), p.18, lines 2-34 (India);
TIDM/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 23, lines 40-45 (China); see also
written statement of Brazil, pp. 2-3, paras. 6-9.

⁹ Written statement of France, p. 5, para. 13.

¹⁰ Written statement of France, p. 6, paras. 15-16.

¹¹ Written statement of France, p. 7, paras. 18.

¹² Written statement of France, p. 16-17, paras. 43-45.

1 Convention on Climate Change and the Paris Agreement – has to be addressed. It's
2 an issue that's been assessed in various ways by the participants in the instant
3 proceedings,¹³ and Professor Forteau will return to it.

4
5 For my part, I would just like to emphasize that the conclusion of the 1992
6 Framework Convention, like the Paris Agreement, is in line with the general
7 principles set out in the Convention within the meaning of article 237(1), and that
8 these conventions are also relevant for the purposes of interpreting the Convention
9 on the Law of the Sea.¹⁴ This means that the provisions of these climate conventions
10 may thus help to clarify and inform the content of the specific obligations of States
11 Parties to the Convention, including by means of an evolutionary approach (having
12 regard to the harmful effects that climate change can or is likely to cause). But they
13 cannot however, impose on these States, under the Convention, treaty obligations to
14 which they may not have consented.

15
16 Mr President, distinguished members of the Tribunal, if you allow me, I would now
17 like to jump into the substantive issues that the instant request raises.

18
19 The question put to your Tribunal concerns only the obligations – and I would like to
20 emphasize the word “obligations” – that States are required to undertake under
21 UNCLOS, to, if I may summarize, protect and preserve the marine environment in
22 relation to the impacts of climate change.

23
24 However, among these obligations, the obligation to take the necessary measures to
25 this end – which Professor Forteau will address – necessarily implies recognition of
26 the States' right to regulate.¹⁵ This right to regulate appears to be the corollary of the
27 obligation to act; they are two sides of the same coin. Such recognition by your
28 Tribunal would be particularly useful in ensuring the full effectiveness of the regime
29 laid down by the Convention, in particular, Part XII. Indeed, it is in the light of this
30 inherent right of States to regulate in the public interest – a right well established in
31 general international law, as Sierra Leone recalled last week¹⁶ – that certain treaty
32 obligations must be interpreted in accordance with article 31(3)(c) of the VCLT.

33
34 Here, I would like to focus on the tensions that can arise between foreign investment
35 law and climate – more generally environmental – policies. For a long time, some
36 have been tempted to give precedence to economic interests over environmental
37 protection, which is no longer viable given the state of our planet.

38
39 Aware of the need for stronger action to achieve the objectives in the fight against
40 climate change, my government – like other European Union Member States – has
41 decided to withdraw from the Energy Charter Treaty,¹⁷ effective as of 8 December

¹³ See, for example, TIDM/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 5, lines 36-38 (New Zealand); TIDM/PV.23/C31/13, hearing of 19 September 2023 (p.m.), p.11, lines 34-37 (Singapore); TIDM/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p.8, lines 24-29 (Timor-Leste). Cf., see in particular, TIDM/PV.23/C31/8, hearing of 14 September 2023 (p.m.), p. 19, lines 7-20 (India).

¹⁴ Written statement of France, p. 15, para. 37.

¹⁵ See, in this sense, written statement of Mozambique, p. 29, para. 3.69.

¹⁶ TIDM/PV.23/C31/12, hearing of 19 September 2023 (a.m.), p. 36, lines 4-6.

¹⁷ <https://www.tresor.economie.gouv.fr/Articles/97189b64-0ff2-42df-8f06-fd6b7ee2b03a/files/a59a9fe0-f41b-4cab-8246-f52b6217dd16>

1 2023. The provisions of this treaty are incompatible with the need to protect the
2 climate and with France's commitments under the Paris Agreement.

3
4 With this in mind, we believe that only this measure will guarantee an end to the
5 excessive protection of fossil fuel production activities that are harmful to the
6 environment. It is also to give priority to the protection of the marine environment that
7 France has undertaken not to exploit deep sea mineral resources, even if the
8 solution must certainly not be sought in unilaterally. Ecosystems and the marine
9 environment know no national boundaries, and the solution must be found
10 collectively within a multilateral framework.

11
12 This brings me to my final point to highlight the essential nature of the duty to
13 cooperate. Cooperation is, of course, the path that we must take because it's a
14 political imperative and because we are legally bound to it. And we are delighted that
15 the participants in these proceedings are largely in agreement on this point.¹⁸ As
16 your Tribunal described in 2001 in the *Mox Plant* case, the Convention establishes
17 the duty to cooperate as a "fundamental principle in the prevention of pollution of the
18 marine environment",¹⁹ not only by devoting the entirety of Section 2 of Part XII to it
19 but also in that this duty informs a large number of other provisions of the
20 Convention. The importance of this duty to cooperate was also reiterated by the ICJ
21 in the *Pulp Mills on the River Uruguay* case back in 2010²⁰ and by the *South China*
22 *Sea Arbitration* award in 2016.²¹

23
24 Of crucial importance to the effective implementation of the regime to protect and
25 preserve the marine environment,²² the duty to cooperate also responds to a strong
26 logical and social need. Because of the cumulative impact and the unity of the
27 marine environment, damage to the environment resulting from greenhouse gas
28 emissions generates environmental problems on a global scale common to all States
29 on the planet. Let me give you an example: this need is the basis for the duty to
30 cooperate, laid down in guideline 8(1) of the draft guidelines on the protection of the
31 atmosphere adopted by the International Law Commission on second reading in
32 2021.²³

33
34 Cooperation isn't a pipe dream; it allows, in practical terms, the establishment of the
35 normative framework needed to protect the marine environment, and it testifies to

¹⁸ See, for example, TIDM/PV.23/C31/4, hearing of 12 September 2023 (p.m.), p. 10, lines 10-24 (COSIS); TIDM/PV.23/C31/5, hearing of 13 September 2023 (a.m.), p. 114, lines 16-30 (Australia); *ibid*, p. 26, lines 26-33 (Saudi Arabia); TIDM/PV.23/C31/7, hearing of 14 September 2023 (a.m.), p. 18, lines 34-37 (Portugal); TIDM/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 8, lines 21-27 (New Zealand).

¹⁹ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 110, para. 82.

²⁰ ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, *I.C.J. Reports 2010*, p. 49, para. 77; <https://icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-FR.pdf>

²¹ *South China Sea Arbitration*, PCA No. 2013-19, Award of 12 July 2016, para. 985, *Recueil des sentences arbitrales*, vol. XXXIII, p. 539: https://legal.un.org/riaa/cases/vol_XXXIII/153-617.pdf

²² See, in particular, written statement of New Zealand, paras. 45, 55, 59, 64.

²³ International Law Commission, Draft guidelines on the protection of the atmosphere, guideline 8, paragraph 1, *in* Report of the International Law Commission on the work of its seventy-second session (2021), A/76/10, p. 12: https://legal.un.org/ilc/reports/2021/french/a_76_10.pdf; see also commentary, p. 37-41.

1 our determination to strike a balance between our own interests as States and our
2 mutual interests as a community. To quote Judge Wolfrum: “The duty to cooperate
3 denotes an important shift in the general orientation of the international legal order. It
4 balances the principle of the sovereignty of States and thus ensures that community
5 interests are taken into account vis-à-vis individualistic State interests”.²⁴
6

7 The various processes I mentioned earlier, such as the conclusion of the BBNJ
8 Agreement or the ongoing negotiations on the plastic pollution treaty, are a perfect
9 illustration of this willingness to find such compromises to ensure better protection of
10 the environment, in particular the marine environment.
11

12 The duty to cooperate requires us, as a community, to define environmental
13 protection rules on the basis of available scientific knowledge. It is, therefore, an
14 effective means of preventing and adapting to potential or proven disturbances of the
15 marine environment. The preservation of ecosystems depends on this adaptability.
16 Risks and damage are both evolving and, as I said earlier, the marine environment
17 knows no boundaries.
18

19 Targeted, individual measures are useful and even essential for preserving the
20 marine environment, but they will not suffice to contain its degradation. We need to
21 act collectively. This is true, firstly, from a strictly normative point of view and we fully
22 share COSIS’s assertion that “GHG emissions call for a sophisticated regulatory
23 response supported by international coordination informed by internationally agreed
24 standards.”²⁵
25

26 This is also true in a broader perspective. The major challenge we face requires us
27 to scale up and have a different conception of our international solidarity. That was
28 the aim of the Summit for a New Financial Pact held in Paris in June, which clearly
29 highlighted the fact that the fight against climate change requires an overhaul of our
30 global financial system, in particular with a view to helping developing countries meet
31 their obligations in this respect, but also by adapting our policies for financing and
32 taxing carbon-based activities. In this sense, this summit is in line with the Paris
33 Agreement which puts mitigation, adaptation and financing on an equal footing in the
34 fight against climate change, whereas the Framework Convention 1992 favoured
35 mitigation.
36

37 For France, this solidarity is expressed in concrete terms through climate financing
38 for developing countries to the tune of EUR 7.6 billion in 2022, including EUR 2.6
39 billion for adaptation, as recalled at the Climate Ambition Summit last week.²⁶ This
40 financial commitment goes beyond what was planned at COP21 in 2015. This
41 solidarity is also expressed by the proposal supported by France, together with the

²⁴ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, Separate opinion of Judge Wolfrum, *ITLOS Reports 2001*, p. 135: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/A10-O-3_dec_01-SO_W.pdf

²⁵ Written statement of COSIS, p. 89, para. 316.

²⁶ <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/climat-et-environnement/actualites-et-evenements/2023/article/la-france-depasse-largement-ses-engagements-en-matiere-de-financements-pour-le>

1 European Union and its Member States, to set up an unprecedented mandatory
2 financing mechanism for a capacity-building fund as part of the BBNJ Agreement.

3
4 Mr President, distinguished members of the Tribunal, I would like to thank you for
5 your patient and kind attention, and I would now give the floor, if you allow me,
6 to Professor Mathias Forteau for the remainder of the speaking time allotted to
7 France.

8
9 **THE PRESIDENT:** Thank you, Ms Barbier. I now invite Mr Forteau to make his
10 statement. You have the floor, Sir.

11
12 **MR FORTEAU:** Thank you, Mr President. Mr President, distinguished members of
13 the Court, it is a great honour for me to appear before you today and to speak in
14 these proceedings on behalf of my country.

15
16 This morning I am going to go through a number of substantive elements in addition
17 to the important observations that have just been made by the Agent for France. Of
18 course, it is impossible in the time allotted to us to go over all of the arguments
19 exchanged in the course of these proceedings. Moreover, it is not useful nor
20 expedient to do so, because a lot has already been said over the last two weeks of
21 hearings, and we think that the Tribunal would be grateful at this stage in the
22 proceedings to see us go straight to the heart of the matter and to keep it as succinct
23 as possible.

24
25 I shall, therefore, confine myself to a number of observations on points that strike us
26 as being the most important, without any prejudice to France's position concerning
27 the other points under discussion.

28
29 I shall go through five points in turn, beginning with a number of observations on
30 what is covered by the first question, in other words, whether greenhouse gas
31 emissions and the deleterious effects of climate change constitute pollution of the
32 marine environment within the meaning of the UN Convention on the Law of the Sea.

33
34 To begin with, we have to start by identifying what constitutes the marine
35 environment. The States Parties to these proceedings seem to be in agreement that
36 we should apply an inclusive interpretation of this expression that encompasses both
37 its geographical and material aspects.

38
39 Geographically, the marine environment comprises all of the maritime areas
40 governed by the Convention, both within and beyond national jurisdiction, from
41 internal waters to the high seas and the Area. These areas include not just the water
42 column but also estuaries and the coastline (at least as regards its relation with
43 maritime areas for the latter). They also include the seabed and its subsoil.²⁷

44
45 Materially, the marine environment is not just an area but also an ecosystem that's
46 characterized by the wealth of its biodiversity of which the numerous components
47 interact with each other.²⁸ Now, this "ecosystemic" approach was largely shared by

²⁷ Written statement of France, p. 18-20, paras. 48-50.

²⁸ Written statement of France, p. 20-21, paras. 51-52.

1 other States in their written statements and during the hearings and so I will not go
2 over them again. Pollution of the marine environment is, thus, likely to affect
3 biodiversity and the functioning and the balance of marine ecosystems, all at once.

4
5 As regards the sources of pollution affecting the marine environment, France
6 considers, like the vast majority of the participants in these proceedings, that
7 anthropogenic greenhouse gas emissions are a source of pollution of the marine
8 environment, and that, consequently, the obligations under Part XII do apply
9 thereto.²⁹

10
11 Similarly, there is a broad consensus among the participants in these proceedings
12 that greenhouse gas emissions are included under different forms of pollution
13 covered by the Convention, in particular, pollution from land-based sources as set
14 out in article 207, and pollution from and through the atmosphere, which is provided
15 for under article 212.³⁰

16
17 In addition, as regards the concept of harm to the marine environment, we should
18 recall that article 1 of the Convention adopts a broad definition of pollution of the
19 marine environment. Without going over the different points set out in our written
20 statement,³¹ it is important to recall here that the expression “results or is likely to
21 result” in article 1 presupposes consideration of the effects that are both proven or
22 certain, and of potential deleterious effects.

23
24 When the potential effects are also concerned, the precautionary approach comes
25 into play. As we set out in our written statement, scientific considerations such as the
26 assessments of IPCC play a decisive role here.³² When the information available is
27 insufficient to allow us to assess the potentially deleterious effect on the marine
28 environment of a planned conduct, that conduct should be avoided. That is what
29 explains the need for seabed mining activities in the Area to be prohibited, as France
30 recalled at the 28th session of the International Seabed Authority in July.³³

31
32 Protection of the marine environment must remain an imperative in carrying out
33 activities in the Area, insofar as the ecosystem of the deep sea is essential to
34 stabilize the climate and protect marine biodiversity. As a consequence, it is
35 particularly necessary that account be taken of the major uncertainties surrounding
36 the consequences of deep seabed mining that could affect the important role of the
37 oceans.

38
39 Having clarified that, there are differing views among the participants in these
40 proceedings as to the scope of damage covered by the request for an opinion. It is
41 our view that all effects of pollution of the marine environment do not necessarily

²⁹ Written statement of France, p. 23, para. 57.

³⁰ Written statement of France, p. 28-31, paras. 67-71.

³¹ Written statement of France, p. 35, para. 80. See also, for example, written statement of Singapore, para. 14; written statement of Chile, para. 30; written statement of Rwanda, para. 89; written statement of the Democratic Republic of the Congo, para. 42.

³² Written statement of France, p. 41, para. 92.

³³ Statement of France of 26 July 2023 on point 8 of the agenda, Assembly, 28th session of the International Seabed Authority, p. 3-4: <https://www.isa.org.jm/wp-content/uploads/2023/07/France.pdf>

1 come under the definition of “pollution of the marine environment” within the meaning
2 of UNCLOS.

3
4 For instance, the fact that climate change leads to ocean warming and, as a result,
5 can jeopardize the right to food because of the potential loss of fishing resources,
6 does not mean a violation of the right to food is pollution of the marine environment
7 that would be covered by the relevant obligation under UNCLOS – I repeat,
8 obligations *under UNCLOS*. Of course, this is without any prejudice to the situation
9 of other international rules that do not fall under the jurisdiction *ratione materiae* of
10 this Tribunal.

11
12 These advisory proceedings are limited to the obligations incumbent upon the parties
13 under UNCLOS, and consequently to the damage caused to the marine environment
14 as such. In saying this, I do not mean that other effects or other damage might not
15 be covered by the scope of other international rules such as the right to a healthy
16 environment or the right to food. It simply means that this does not fall within the
17 scope of the question put to the Tribunal nor of its jurisdiction.

18
19 Mr President, this brings me to my second point. One of the questions that has been
20 the subject of much debate before you, and where there is division among the
21 participants,³⁴ deals with the nature of the obligations laid down by Part XII of the
22 Convention: are these obligations of conduct or obligations of result?

23
24 The discussions around this point have somewhat been obscured by the fact that
25 there is a conceptual confusion surrounding this distinction.³⁵ What is more, different
26 definitions have been given at different times, *inter alia*, during the work carried out
27 by the International Law Commission, as has been observed quite rightly by certain
28 authors.³⁶ So, we have to begin by clarifying what exactly is meant today by
29 “obligation of conduct” and “obligation of result”.

30
31 The fundamental difference between them is that, with an obligation of conduct, the
32 obligation is not to reach a result in every single case. The obligation of conduct is an
33 obligation to take all measures necessary to avoid an event or damage from
34 occurring but without necessarily guaranteeing that it is not going to happen.³⁷

35
36 Given this definition, there is no doubt in our minds – and this is true of the majority
37 of those taking part in these proceedings³⁸ – that the substantive obligations under
38 Part XII of the Convention (the situation is different for certain procedural obligations)

³⁴ See, for example, ITLOS/PV.23/C31/9, hearing of 15 September 2023 (a.m.), p. 13, line 6 (Latvia) and p. 27, lines 7-10 (Mauritius); ITLOS/PV.23/C31/11, hearing of 18 September 2023 (a.m.), p. 13, lines 31-33 (Mozambique); *ibid.*, p. 40-41, lines 29 *et s.* (Belize).

³⁵ See the second report of the Special Rapporteur of the ILC, James Crawford, on the responsibility of States, A/CN.4/498 and Add. 1 to 4, 1999, paras. 52-92.

³⁶ V. P. d'Argent, “Les obligations internationales”, *Recueil des cours de l'Académie de droit international de La Haye*, tome 417, 2021, p. 150 *et s.*; C. Economidès, “Content of the Obligation: Obligations of Means and Obligations of Result”, in J. Crawford, A. Pellet, S. Olleson (dir.), *The Law of International Responsibility*, OUP, 2010, p. 374 *et s.*

³⁷ Written statement of France, p. 47-48, paras. 103-104.

³⁸ See, for example, ITLOS/PV.23/C31/13, hearing of 19 September 2023 (p.m.), p. 2, lines 21-26 (Singapore) or ITLOS/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p. 44, lines 5-13 (Viet Nam).

1 are obligations of conduct. The Seabed Disputes Chamber recognized this in its
2 Advisory Opinion of 2011,³⁹ as did the International Law Commission in its
3 commentary on article 3 of the 2001 Articles on the Prevention of Transboundary
4 Harm from Hazardous Activities.⁴⁰

5
6 This observation also applies to article 194(1) of UNCLOS. Indeed, this provision
7 does not lay down an “obligation to prevent, reduce and control pollution of the
8 marine environment”, as suggested by COSIS during the hearings.⁴¹ The
9 grammatical structure of paragraph 1 of article 194 is different: what this article lays
10 down is an obligation to *take all measures necessary to prevent, reduce and control*
11 *pollution of the marine environment*. This formulation is typical of obligations of
12 conduct and this is confirmed by the reference that follows immediately in the same
13 provision where it refers to using the “best practicable means” that States have at
14 their disposal.

15
16 Conversely, trying to turn this obligation of conduct into an obligation of result would
17 imply a commitment on *each* State to ensure that the marine environment is *never*
18 contaminated by *any* pollution which, assuming that this obligation even made
19 sense, would not correspond to existing law, either at global, regional or national
20 level.

21
22 Having clarified this, there are four fundamental points to be specified.

23
24 First of all, there is nothing disparaging or pejorative in characterizing an obligation
25 as an obligation of conduct rather than an obligation of result. And as others have
26 already noted, there are obligations of result that are vague or ambiguous as there
27 are obligations of conduct that are extremely precise.⁴²

28
29 Second, invoking obligations of conduct is particularly appropriate in the context of
30 climate change. As indicated by COSIS, “climate change is a moving target”,⁴³ thus
31 we must focus on the measures to be taken and the need to adapt or toughen them
32 in order to provide an effective response to the worsening and evolving situation of
33 climate change. In 2011, your Tribunal confirmed this when it said that the concept of
34 an obligation of conduct is “a variable concept” and that “[i]t may change over time
35 as measures considered sufficiently diligent at a certain moment may become not
36 diligent enough in light, for instance, of new scientific or technological knowledge. It
37 may also change in relation to the risks involved in the activity.”⁴⁴

³⁹ *Responsibilities and obligations of States 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. 41-42, paras. 110-113.

⁴⁰ ICL, Draft articles on the Prevention of Transboundary Harm from Dangerous Activities, article 3 and paragraphs 7-8 of the commentary, *Yearbook of the ICL 2001*, Vol. II(2), p. 164-165.

⁴¹ TIDM/PV.23/C31/3, hearing of 12 September 2023 (a.m.), French version, p. 18, lines 44-45 (“Article 194, paragraph 1, posits, therefore, a compound duty : that of preventing, reducing and controlling pollution of the marine environment”) (COSIS).

⁴² M. Forteau, A. Miron and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ-lextenso, Paris, 2022, p. 1092, No. 732.

⁴³ ITLOS/PV.23/C31/4, hearing of 12 September 2023 (p.m.), p. 30, lines 10-11 (COSIS).

⁴⁴ *Responsibilities and obligations of States 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. 43, para. 117.

1 Obligations of conduct by their very nature have a twofold advantage in that they are
2 legally binding on States and in a way that evolves and is adaptable to situations.⁴⁵
3 In the face of changing threats and effects of climate change, these obligations of
4 conduct are central. They are all the more so since they make it possible to focus
5 attention on the measures to be taken now before it's too late, before the "fateful
6 moment" referred to last Thursday by the Democratic Republic of the Congo.⁴⁶
7

8 Third, as the International Law Commission correctly pointed out in 1977, the
9 distinction between obligations of conduct and of result "must not obscure the fact
10 that every international obligation has an object or, one might say, a result, including
11 the obligations called obligations 'of conduct' or 'of means'".⁴⁷ As regards article 194
12 of the Convention, such a purpose is clearly identified: we must take "all measures"
13 that are "necessary to prevent, reduce and control pollution of the marine
14 environment".
15

16 Fourth, we are in full agreement with COSIS that an assessment of what constitutes
17 a necessary measure to this end is determined objectively and cannot be left to the
18 sole discretion of States.⁴⁸ These different elements have led France to underscore
19 in its written statement that obligations of conduct laid down by UNCLOS are in the
20 context of climate change are "exigent" and "particularly severe".⁴⁹ In light of the
21 serious and urgent nature of the situation, we have to go further than a general
22 obligation of conduct. There has to be a more "severe" approach in terms of
23 diligence.⁵⁰
24

25 This brings me to my third point: the principle of common but differentiated
26 responsibilities. The substance of this principle confirms that we are indeed talking
27 about obligations of conduct, as these can vary in what is imposed upon each State
28 in the light of its specific situation. As underscored by the Seabed Disputes
29 Chamber, the criteria for implementing the obligation of precaution "may be stricter"
30 for developed States than for developing States,⁵¹ and France confirms that that is
31 indeed the case.⁵²
32

33 Agreements on climate change that have been adopted since the 1992 Rio
34 Declaration have gradually made it possible to have a more precise understanding of
35 the meaning of the principle of CBDR and respective capabilities. Based on the
36 objective disparity of the economic development levels of countries, and appealing to

⁴⁵ See ITLOS/PV.23/C31/4, hearing of 12 September 2023 (p.m.), p. 30, lines 16-27 (COSIS).

⁴⁶ TIDM/PV.23/C31/16, hearing of 21 September 2023 (a.m.), p. 25, lines 18-29) (Democratic Republic of the Congo).

⁴⁷ *Yearbook of the ILC*, 1977, Vol. II, para. 8, commentary of draft article 20 on the responsibility of States, p. 13: "The distinction referred to above must not obscure the fact that every international obligation has an object or, one might say, a result, including the obligations called obligations 'of conduct' or 'of means'."

⁴⁸ TIDM/PV.23/C31/3, hearing of 12 September 2023 (a.m.), French version, p. 20-21 (COSIS).

⁴⁹ Written statement of France, p. 47, para. 103, and p. 49, para. 107.

⁵⁰ Written statement of France, p. 71, para. 144.

⁵¹ *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. 54, para. 161.

⁵² Written statement of France, p. 54, para. 113.

1 equity, this principle is necessary so that each country, at its own level, can
2 contribute to the climate targets set by the Paris Agreement.

3
4 The countries that have historically been the greatest GHG emitters and the largest
5 consumers of abiotic resources have a particular responsibility to bear in reducing
6 their impact on the environment. The other countries are entitled to pursue their
7 legitimate economic and social development. The principle of CBDR acknowledges
8 this by allowing for a more flexible and balanced approach that takes account of the
9 specific requirements and capabilities of each nation. This being said, it should be
10 pointed out, as the European Union did last week,⁵³ that this principle should not be
11 used as a pretext to escape the responsibility that weighs on all States, both
12 individually and collectively, to protect oceans against climate change.

13
14 We note that COSIS has been very clear that it is not just developed States that bear
15 the responsibility to take action – even if they are called on to “continue taking the
16 lead”, according to the wording of the Paris Agreement.⁵⁴ According to COSIS, it is
17 for each State “to do their fair share to protect the marine environment.” COSIS has
18 moreover made it clear that the “major polluters are not limited to developed
19 States.”⁵⁵ At the same time, and as provided for by the Paris Agreement, due
20 account has to be taken of the situation of the least developed countries and Small
21 Island Developing States which are particularly vulnerable in the face of climate
22 change and its effects.

23
24 Mr President, I would like to move now to my fourth point concerning environmental
25 impact assessments. As we underscored in our written statement, the BBNJ
26 Agreement contains a section on environmental impact assessment, the purpose
27 being to operationalize and give concrete form to the obligation set out in article 206
28 of UNCLOS. In this regard, the BBNJ Agreement defines, taking full account of the
29 climate changes and their effects, the means to implement the obligation to conduct
30 environmental impact assessments for activities that are planned in international
31 maritime areas and that are likely to cause significant and harmful changes to the
32 marine environment.⁵⁶

33
34 The BBNJ Agreement lays down in particular – and this is worth pointing out here –
35 the obligation to ensure that *cumulative* impacts of planned activities should be
36 examined and evaluated when conducting an environmental impact assessment.⁵⁷
37 Consideration of the cumulative aspect of damage to the marine environment should
38 – to our mind – be included in contemporary international case law on the obligation
39 to carry out environmental impact assessments and should be given due account by
40 this Tribunal in these advisory proceedings.⁵⁸

⁵³ ITLOS/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p. 27 (lines 8-27) (EU).

⁵⁴ Article 4, para. 4, Paris Agreement; see also the last preambular paragraph and article 9, para. 3.

⁵⁵ ITLOS/PV.23/C31/1/Corr.1, p. 25, lines 35-38 (COSIS); see also, for example, ITLOS/PV.23/C31/12, hearing of 19 September 2023 (a.m.), p. 31, lines 33-35 (Sierra Leone); ITLOS/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p. 18, lines 17-26 (Timor Leste). See also, *inter alia*, written statement of Portugal, paras. 38-41.

⁵⁶ Written statement of France, p. 61, para. 124; p. 82, para. 160.

⁵⁷ BBNJ Agreement, article 31(1)(c).

⁵⁸ ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, *I.C.J. Reports 2010*, p. 83, para. 204; *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.*

1 I come now, Mr President, to my fifth and final point: the relationship between
2 UNCLOS and the Paris Agreement. It would seem that there are two conflicting
3 views here. You have those who see in the Paris Agreement a limit beyond which
4 UNCLOS should not venture and those who consider that the Convention goes
5 beyond the Paris Agreement.⁵⁹

6
7 In truth, this is not the best way to set out the terms of the debate. It is not a question
8 of choosing between these two treaties, nor to decide whether one affords greater
9 protection than the other. Indeed, it is a rather dangerous game to play trying to
10 denigrate the Paris Agreement to better draw out, in contrast, the possibilities that
11 UNCLOS would offer. Some speakers have suggested that, contrary to UNCLOS,
12 the Paris Agreement doesn't contain real obligations.⁶⁰ In the view of France, the
13 Paris Agreement is indeed a source of legally binding obligations, and in these
14 advisory proceedings it is vital not to undermine the authority of that agreement.

15
16 Having made that clear, I think I can say that things are both simple and harmonious,
17 and France would like to clarify its position on this score because it would seem that
18 it was misinterpreted by one of the participants in the proceedings last week.⁶¹

19
20 On the one hand, each of the relevant treaties – UNCLOS and climate commitments,
21 starting first and foremost with the Paris Agreement – contains its own obligations,
22 independently, and each of these treaties, each of these obligations counts, is
23 important and must be respected. *Pacta sunt servanda*. It is all the more so because
24 the different agreements and obligations do not contradict each other, as recalled by
25 the European Union,⁶² Comoros⁶³ and the African Union.⁶⁴ So, it is not a question of
26 making a choice from among them as if they were mutually exclusive. On the
27 contrary, they should be applied together *in their full complementarity*, in awareness
28 of the fact that they mutually bolster each other for the purpose of ocean protection.

29
30 On the other hand, when the provisions of these agreements overlap, it is important
31 to embark upon a consistent and harmonious interpretation.⁶⁵ This is the case, *inter*
32 *alia*, when determining, under the obligations of conduct of UNCLOS, the quantified

Costa Rica), Judgment, 16 December 2015, *I.C.J. Reports 2015*, p. 705-707, paras. 101-105, p. 719-723, paras. 146-162. See also ITLOS, *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. 49-52, paras. 141-150.

⁵⁹ See, for example, ITLOS/PV.23/C31/5, hearing of 13 September 2023 (a.m.), p. 6, lines 13-19, p. 9, lines 23-26 and p. 16, lines 20-26 (Australia); ITLOS/PV.23/C31/8, hearing of 14 September 2023 (p.m.), p. 17, lines 30-38 (India); ITLOS/PV.23/C31/9, hearing of 15 September 2023 (a.m.), p. 34, lines 37-38 (Mauritius); ITLOS/PV.23/C31/10, hearing of 15 September 2023 (p.m.), p. 27, lines 37-46 (China); ITLOS/PV.23/C31/11, hearing of 18 September 2023 (a.m.), p. 30 *et s.*, lines 19 *et s.* (Belize); ITLOS/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p. 16-17, lines 13 *et s.* (Timor Leste).

⁶⁰ ITLOS/PV.23/C31/4, hearing of 12 September 2023 (p.m.), p. 28, lines 33-38 (COSIS); or ITLOS/PV.23/C31/16, hearing of 21 September 2023 (a.m.) p. 22, lines 42-43, de la version anglaise (Democratic Republic of the Congo).

⁶¹ ITLOS/PV.23/C31/11, hearing of 18 September 2023 (a.m.), p. 35, lines 23-33 (Belize).

⁶² ITLOS/PV.23/C31/14, hearing of 20 September 2023 (a.m.), p. 25-26, starting on line 45 (EU).

⁶³ ITLOS/PV.23/C31/16, hearing of 21 September 2023 (a.m.), p. 6, lines 27-31 (Comoros).

⁶⁴ ITLOS/PV.23/C31/17, hearing of 21 September 2023 (p.m.), p. 4-5, lines 31 *et s.* (AU).

⁶⁵ Written statement of France, p. 15, para. 38.

1 targets to be pursued in the global response to the threat of climate change.
2 Reference should be made to the Paris Agreement here because it is this agreement
3 that has set a specific global limit for the Earth's maximum temperature increase that
4 all States must make efforts to pursue.⁶⁶

5
6 Once again and to conclude, Mr President, that does not mean that the Paris
7 Agreement would, by this very fact, set aside the specific obligations under
8 UNCLOS. These specific obligations continue to apply to the protection and
9 preservation of the marine environment in all their scope and rigour in a
10 complementary fashion to what is provided for under the Paris Agreement.

11
12 Mr President, distinguished members of the Tribunal, this brings me to the end of the
13 oral statement by the French Republic, and on behalf of the French delegation, I
14 would like to thank you most warmly for your patient and careful attention. Thank
15 you.

16
17 **THE PRESIDENT:** Thank you, Mr Forteau. I now invite the representative of Italy,
18 Mr Zanini, to make his statement. You have the floor, Sir.

19
20 **MR ZANINI:** Mr President, distinguished members of the Tribunal, it is an honour for
21 me to appear before you, and to do so on behalf of Italy.

22
23 I will be addressing the Tribunal mainly on matters of procedure. With your
24 permission, Mr President, Professor Roberto Virzo will then follow with some more
25 comments concerning the applicable law.

26
27 The issues of jurisdiction have been addressed in our written statement.⁶⁷ In the
28 present submission, therefore, I will not repeat the detail of all we argued there,
29 although Italy maintains it in full. I will simply reiterate that, in Italy's view, the
30 Tribunal may also exercise an advisory jurisdiction in this case. In fact, the combined
31 provisions of article 21 of the Statute of the Tribunal and the ones contained in the
32 pertinent "other agreement" expressly conferring advisory jurisdiction on the Tribunal
33 constitute the legal basis of such jurisdiction. As the Tribunal itself made clear in its
34 advisory opinion of 2015: "Article 21 and the 'other agreement' conferring jurisdiction
35 on the Tribunal are interconnected".⁶⁸ Consequently, Italy qualifies article 21 of the
36 Statute as an "enabling *renvoi* clause".

37
38 I also confirm that, in Italy's view, the request in the present Case No. 31 seems to
39 satisfy all the conditions required by article 138 of the Rules of the Tribunal.⁶⁹
40 Therefore, Italy shares the view of other States Parties⁷⁰ that no compelling reasons
41 exist in the present case for the Tribunal to decline its power to give the advisory
42 opinion requested.

⁶⁶ See, for example, in this sense, written statement of Bangladesh, para. 42 and paras. 46-48; or ITLOS/PV.23/C31/13, hearing of 19 September 2023 (p.m.), p. 7-9 (starting on line 36) (Singapore).

⁶⁷ Italy, written statement (WS), 15 June 2023, paras. 5-11.

⁶⁸ ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 58.

⁶⁹ *Ibidem*, para. 59.

⁷⁰ See, for example, Germany, WS, 14 June 2023, para. 28; New Zealand, WS, 15 June 2023, para. 29.

1 I would like to add a few observations concerning the role of the States Parties to
2 United Nations Convention on the Law of the Sea in both written and oral
3 proceedings.

4
5 As a starting point, it is worth recalling that as one of the results of the “enabling
6 *renvoi* clause”, the legal questions on which the Tribunal may give an advisory
7 opinion cannot but be formulated by the body authorized by or in accordance with
8 the “other agreement”. Hence, the States Parties to UNCLOS not members of the
9 organization which submitted the request for the advisory opinion do not take part in
10 the drafting of the legal questions.⁷¹

11
12 Precisely with regard to the legal questions asked to the Tribunal, I would like to
13 focus on the role of the States Parties to UNCLOS invited to submit written
14 statements and take part in the oral proceedings, as well as the function of their
15 written and oral statements.

16
17 Mr President, members of the Tribunal, Italy considers that this role could be twofold:
18 namely, States can express their views both on the request for an advisory opinion
19 and on the specific legal questions asked.

20
21 Regarding the first role, States Parties to UNCLOS may present their general views
22 on the request for the advisory opinion. This is, of course, not a matter of expressing
23 a form of consent, which indeed, as the Tribunal also clarified, is “not relevant”.⁷²
24 Italy is aware that the a-consensual basis is one of the hallmarks of the advisory
25 jurisdiction of international courts and tribunals.

26
27 However, especially when the request is made by an organization or body with a
28 relatively small number of members, the statements submitted to the Tribunal may,
29 *inter alia*, indicate whether there is a widespread interest in the request of the
30 advisory opinion among the other States Parties to UNCLOS.

31
32 The greater the number of States Parties which feel the need for the advisory
33 opinion or consider it appropriate, the more it can be deemed that the very interest in
34 the advisory opinion is not confined to the requesting body. It could also be inferred
35 that a significant number of States Parties recognize a substantial interconnection
36 between the UNCLOS and the other agreement conferring advisory jurisdiction on
37 the Tribunal.

38
39 A different situation would be if the statements submitted did not show that the other
40 States Parties felt the need for or desirability of the advisory opinion. Although this,
41 as stated above, in no way affects the possible existence of the advisory jurisdiction,
42 it would be perceived, first, that the Tribunal is asked to give an advisory opinion on
43 legal issues considered relevant mainly, if not exclusively, under the “other

⁷¹ With reference to the specificities of Case No. 21, see ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission, Déclaration de M. le juge Cot*, para 8: “La demande a été rédigée par les Etats de la [Commission sous-régionale des pêches], représentant les intérêts, certes légitimes, des Etats côtiers. Mais les Etats du pavillon n’ont pas été associés à la rédaction des questions”. See also France, WS, 16 June 2023, para. 22.

⁷² ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, para. 76.

1 agreement". Secondly, that the interconnection between UNCLOS and the "other
2 agreement" conferring advisory jurisdiction on the Tribunal is merely formal.

3
4 With specific reference to the present case, most of the States Parties to UNCLOS
5 that submitted written statements recognized that the requested advisory opinion
6 may be of not exclusively interest to the Commission of Small Island States on
7 Climate Change and International Law (COSIS).

8
9 Some States expressed a genuine endorsement in favour of an advisory opinion of
10 the Tribunal in Case No. 31.⁷³ I would recall here, for example, that the Federated
11 States of Micronesia strongly encouraged the Tribunal to give the requested advisory
12 opinion. According to the Federated States of Micronesia; such an advisory opinion
13 could represent

14
15 a vital tool in support of efforts by COSIS and other members of the
16 international community to protect present and future generations – and the
17 natural environments bequeathed to us by our ancestors – from the scourge
18 of anthropogenic greenhouse gas emissions, particularly on the marine
19 environment.⁷⁴

20
21 For its part, Italy concluded its written statement by emphasizing that

22
23 The Tribunal could assist COSIS Member States and, more generally, all other
24 States Parties to UNCLOS to correctly implement Part XII provisions also in
25 the light of other existing obligations under international environmental law
26 emerged since 1982.⁷⁵

27
28 Regarding the role of UNCLOS and Member States on the specific legal questions
29 asked, Italy respectfully recalls that, through their written and oral statements, the
30 States Parties to UNCLOS have the possibility to express their views on the specific
31 legal questions asked, as well as on the law applicable by the Tribunal. While
32 Professor Virzo, with your permission, Mr President, will deal with the latter, I will
33 briefly focus on the object and purpose of the legal questions submitted to the
34 Tribunal.

35
36 Italy considers that the legal questions legitimately formulated by COSIS, in a fully
37 autonomous manner, are aimed at the identification by the Tribunal of certain
38 obligations of the States Parties to UNCLOS.

⁷³ See, for example, Bangladesh, WS, 16 June 2023, para. 53; Belize, WS, 16 June 2023, para. 4; Mauritius, WS, 16 June 2021, para. 90; Mozambique, WS, 16 June 2023, para. 1.7; Nauru, WS, 15 June 2023, para 67; Norway, WS, 15 June 2023, para. 2.5; Sierra Leone, WS, 16 June 2023, para. 8.

⁷⁴ Federated States of Micronesia, WS, 16 June 2023, para. 69.

⁷⁵ Italy, WS, 15 June 2023, para. 20. See also, for example, The Netherlands, WS, 16 June 2023, para. 7.1.: "The Netherlands considers that, through its advisory opinion, the Tribunal could raise awareness and provide guidance on the protection and preservation of the marine environment and/or the prevention, reduction and control of pollution of the marine environment. In this manner, the advisory opinion could contribute to the interpretation and application of the obligations arising from the Convention, in particular the obligations arising from Part. XII of the Convention".

1 Although in the exercise of its advisory jurisdiction, the Tribunal may “even
2 reformulate the question”,⁷⁶ this does not seem strictly necessary in the present
3 case. In Italy’s view, the legal questions asked have a clear⁷⁷ and unambiguous
4 object and purpose. More precisely, the real legal questions upon which the advisory
5 opinion of the Tribunal is sought are the mere identification and “elucidation”⁷⁸ of
6 specific obligations of States Parties to UNCLOS concerning the protection and
7 preservation of the marine environment.

8
9 Appropriately, it was not asked by COSIS: “What are the legal responsibilities of
10 States Parties to UNCLOS with respect to the deleterious effects that result or are
11 likely to result from climate change, including through ocean warming and sea-level
12 rise, and ocean acidification, which are caused by anthropogenic greenhouse
13 emissions into the atmosphere?”

14
15 Nor was it asked: “What are the legal consequences for States Parties to UNCLOS
16 arising from the deleterious effects that result or are likely to result from climate
17 change, including through ocean warming and sea-level rise, and ocean
18 acidification, which are caused by anthropogenic greenhouse emissions into the
19 atmosphere?”

20
21 Accordingly, Italy respectfully contends that issues of international responsibility –
22 which indeed were not even expressly requested by COSIS during these oral
23 hearings – should not be relevant at all in ITLOS Case No. 31.⁷⁹

24
25 With these remarks, Mr President, on the object and purpose of the legal questions
26 submitted in the present case to the Tribunal, my intervention ends.

27
28 Mr President, distinguished members of the Tribunal, I thank you for your kind
29 attention and would now request that you give the floor to Professor Roberto Virzo.

30
31 **THE PRESIDENT:** Thank you, Mr Zanini. I now invite Mr Virzo to make his
32 statement. You have the floor, Sir.

33
34 **MR VIRZO:** Mr President, distinguished members of the Tribunal, it is an honour to
35 appear before you, and to do so on behalf of Italy. My task today is to address
36 certain issues of applicable law.

37
38 At the outset, I would respectfully point out that the authoritative identification and
39 “elucidation”⁸⁰ of the obligations pertaining to climate change impacts – *currently*
40 falling within the scope of the UNCLOS – would also serve for the purpose of the
41 proper fulfilment of the Convention.

42
43 Like any international treaty in force, the UNCLOS “must be performed” by the
44 States Parties to it in good faith. This second part of the customary rule codified in

⁷⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 38.

⁷⁷ See also Germany, WS, 14 June 2023, para. 30.

⁷⁸ COSIS, WS, 16 June 2023, para. 427.

⁷⁹ See also Australia, WS, 16 June 2023, para. 19; Portugal, WS, 16 June 2023, para. 5.

⁸⁰ COSIS, WS, 16 June 2023, para. 427.

1 article 26 of the Vienna Convention on the Law of Treaties (VCLT) establishes an
2 obligation of conduct and expresses, *inter alia*, the dynamic conception of treaties as
3 living instruments. Continuous and dynamic performance in good faith covers most
4 of the treaty provisions. It also extends to, among others: (a) international rules and
5 standards existing at the time of the *actual* application of the treaty and to which
6 specific treaty clauses refer; (b) where provided for, coordination clauses with other
7 international treaties, including *subsequent* treaties.

8
9 That said, Italy shares the view of other States Parties⁸¹ that “climate change and
10 ocean acidification caused by the introduction of anthropogenic greenhouse gas
11 emissions into the atmosphere fall within the meaning of “pollution of the marine
12 environment” for the purposes of article 1(1)(4) of UNCLOS”.⁸² Accordingly, although
13 not expressly mentioned, these types of pollution of marine environment, are likely to
14 fall within the scope of Part XII of the Convention.

15
16 While there seems to be no doubt on this point, it is nevertheless necessary to
17 identify what “specific obligations” exist in this regard for States Parties to UNCLOS.
18 It is, indeed, with respect to this question that COSIS ultimately “seek[s] guidance”.⁸³

19
20 Mr President, members of the Tribunal, Italy, maintaining in full what it argued in the
21 written statement, considers that, for the purposes of identifying such obligations, the
22 interpretative criterion of systemic integration and the coordination clause contained
23 in article 237 of the Convention may also be relevant.

24
25 Apropos of systemic integration, for the sake of brevity and opportunity, I respectfully
26 refer here to what Italy argued in the written statement.⁸⁴ Instead, as to article 237 of
27 UNCLOS, I will, first, briefly recall the three core points we made there.
28 Subsequently, I will address some additional remarks concerning the possible
29 application of this provision to the case at hand.

30
31 In Italy’s view, first, article 237 contains a treaty coordination clause which confines
32 its scope to the relationship that can be established between Part XII of UNCLOS
33 and certain categories of international treaties.

34
35 Second, unlike the subordination and non-incompatibility clauses laid down in
36 article 30(2) of the Vienna Convention on the Law of Treaties, article 237 does not
37 state that “the provisions of [the] other treaty prevail”; rather, in coordinating Part XII

⁸¹ See, for example, Australia, WS, 16 June 2023 para. 24; Bangladesh, WS, 16 June 2023, para. 30; Belize, WS, 16 June 2023, para. 52; Canada, WS, 16 June 2023, para. 16; Democratic Republic of the Congo, WS, 13 June 2023, para. 187; Egypt, WS, 16 June 2023, para. 26; European Union, WS, 15 June 2023, para 42; Federates States of Micronesia, WS, 16 June 2023, para. 31; France, WS, 16 June 2023; para. 78; Mauritius, WS, 16 June 2023, para. 72; Mozambique, WS, 16 June 2023, para. 3.19; Nauru, WS, 15 June 2023, para. 38; New Zealand, WS, 15 June 2023, para. 39; Portugal, WS, 16 June 2023, para. 71; Republic of Korea, 16 June 2023, para. 12; Rwanda, WS, 17 June 2023, para. 214; Sierra Leone, WS, 16 June 2023, para. 58; Singapore, WS, 16 June 2023, para. 18; The Netherlands, WS, 16 June, para. 4.7; Vietnam, WS, 16 June 2023, para. 1.3.

⁸² United Kingdom, WS, 16 June 2023, para. 42.

⁸³ To repeat *mutatis mutandis* ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 76.

⁸⁴ Italy, WS, 15 June 2023, paras. 15-23.

1 with other treaties, it establishes a “double relationship of compatibility”.⁸⁵ More
2 precisely, the provisions of Part XII are without prejudice to those treaties, but the
3 obligations assumed under the latter “should be carried out in a manner consistent
4 with the general principles and objectives”⁸⁶ of UNCLOS.

5
6 Third, article 237 allows a constant opening of UNCLOS to any special convention
7 and agreement that is likely to better protect and preserve the marine environment.

8
9 Mr President, members of the Tribunal, I now turn to my additional remarks.

10
11 Two international agreements on which – given the object, purpose and scope of the
12 questions submitted – the Tribunal could provide guidance to States Parties on
13 whether and to what extent it is possible, under article 237 of UNCLOS, to
14 coordinate them with Part XII of the Convention are: the 1992 United Nations
15 Framework Convention on Climate Change (UNFCCC) and the 2015 Paris
16 Agreement.

17
18 Both are subsequent to the UNCLOS. Consequently, it should first be assessed
19 whether they fall within the category covered by article 237(1) of agreements
20 “concluded in furtherance of the general principles set forth” in the Convention.

21
22 In this regard, it does not seem relevant that the agreements falling into this category
23 have, as their main object and purpose, the protection and preservation of the
24 marine environment. In order to make the coordination clause operational, it is only
25 required that States Parties to UNCLOS assume “specific obligations [under these
26 agreements] with respect to the protection and preservation of the marine
27 environment”.

28
29 It is not even necessary that the treaties in question are formally – as, for example, in
30 the case of the 1995 agreement on management and conservation of straddling and
31 highly migratory fish stocks – “agreements for the implementation” of certain
32 UNCLOS provisions; rather, in order to make the coordination clause operational, it
33 is required that the substantial obligations concerning the protection and
34 preservation of the marine environment established by the subsequent treaties
35 implement “the general principles set forth” in the Convention.

36
37 Hence, in Italy’s view, both the UNFCCC and the Paris Agreement may be qualified
38 as agreements “concluded in furtherance of the general principles set forth” in the
39 Convention, within the meaning of article 237(1) of UNCLOS.

40
41 An additional factor that the Tribunal might consider is specifically related to the case
42 at hand. It consists of the *ratione personae* scope of the external multilateral
43 agreement.

44
45 In fact, unlike a contentious case submitted to an UNCLOS court or tribunal, where it
46 is sufficient to find that the pertaining agreements falling within the categories of
47 article 237 are in force between the parties to the dispute; and, unlike an advisory

⁸⁵ Italy, WS, 15 June 2023, para. 13. See also, New Zealand, oral statement, 15 September 2023: ITLOS/PV.23/C31/10, p. 4, lines 11-12 (Hallum).

⁸⁶ UNCLOS, Article 237(2).

1 proceeding where the questions asked to the Tribunal expressly concern the
2 interaction of a specific multilateral environmental treaty with the UNCLOS,
3 regardless of whether there is a coincidence of contracting parties between that
4 multilateral treaty and the Convention, in the present case, at least for reasons of
5 judicial propriety, it should be ascertained that the agreement to be coordinated with
6 the Convention through article 237 binds almost all States Parties to UNCLOS.

7
8 Mr President, members of the Tribunal, the condition just mentioned exists with
9 regard to both the UNFCCC and the Paris Agreement. All States Parties to UNCLOS
10 are also parties to the UNFCCC and, with one exception, to the Paris Agreement.

11
12 In the light of the foregoing, Italy considers that, for the purposes of these advisory
13 proceedings, article 237 allows the coordination of the UNCLOS with the UNFCCC
14 and the Paris Agreement.

15
16 Let me now respectfully return to one of the core points made in our written
17 statement. Article 237 does not affirm the prevalence of external agreements but
18 aims, precisely, at coordinating them with the UNCLOS. It is, therefore, a question of
19 clarifying how– to borrow Professor Mbengue’s suggestion – the relationship of
20 “complementarity and mutual supportiveness”⁸⁷ between the UNCLOS and the
21 pertaining external agreements is concretely established.

22
23 In Italy’s view, with reference to the case at hand, it could first be determined in
24 relation to which “specific obligations, assumed by States” under the UNFCCC and
25 the Paris Agreement, Part XII is “without prejudice”, so that they might be included
26 among the specific obligations that COSIS seeks to identify in its request. Second, it
27 could be provided guidance on how those specific obligations “should be carried out
28 in a manner consistent with the general principles and objectives”⁸⁸ of the
29 Convention, and in order “to produce a coherent system of obligations”.⁸⁹

30
31 That leads to my final remarks.

32
33 The complementary relationship between the UNCLOS, on the one hand, and both
34 the UNFCCC and the Paris Agreement, on the other, should also be considered in
35 light of the “legal order for the seas and oceans”.⁹⁰

36
37 In the 2015 Advisory Opinion, the Tribunal clarified that

38
39 laws and regulations adopted by the Coastal State in conformity with the
40 provisions of the Convention for the purposes of conserving the living
41 resources and protecting and preserving the marine environment within its
42 exclusive economic zone, constitute part of the legal order for the seas and
43 oceans established by the Convention.⁹¹

⁸⁷ COSIS oral statement, 11 September 2023: ITLOS/PV.23/C31/2, p. 30, line 36 (Mbengue).

⁸⁸ UNCLOS, Article 237(2).

⁸⁹ New Zealand, oral statement, 15 September 2023: ITLOS/PV.23/C31/10, p. 5, lines 4-5 (Hallum).

⁹⁰ UNCLOS, Preamble (4).

⁹¹ ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 102.

1 Coherently, even “obligations under other conventions on the protection and
2 preservation of the marine environment”,⁹² consistent with the UNCLOS, and other
3 rules of international law not incompatible with the Convention, which may be taken
4 into account by means of the interpretative criterion of systemic integration, also
5 reflected in article 293 of UNCLOS, could “constitute part of the legal order for the
6 seas and oceans”.⁹³

7
8 The latter is a living legal order, open to new values emerging in the international
9 community and in which the UNCLOS, the “Constitution of the Oceans”,⁹⁴ is central.
10 The mentioned other sources that may constitute part of it complement the
11 Convention and dynamically contribute to the progressive “achievement of [its]
12 goals”⁹⁵ including the “equitable utilization of [marine] resources, the conservation of
13 the [marine] living resources and the study, protection and preservation of the marine
14 environment”.⁹⁶ In addition, for the achievement of these goals, “the interest and
15 needs of mankind as whole, and, in particular the special interests and needs”⁹⁷ of
16 small island States adversely affected by sea-level rise and climate change should
17 not be disregarded.⁹⁸

18
19 Mr President, distinguished members of the Tribunal, this concludes the oral
20 statement of Italy in these advisory proceedings. I deeply thank you for your kind
21 attention.

22
23 **THE PRESIDENT:** Thank you, Mr Virzo, for your statement. We have now
24 reached 11:17.

25
26 May I get an indication from the representative from the Netherlands if you wish to
27 take the floor now? If you wish, Mr Lefeber, I give you the floor.

28
29 **MR LEFEBER:** Thank you, Mr President. Mr President, distinguished members of
30 the International Tribunal for the Law of the Sea, it is an honour to appear before you
31 today on behalf of the Kingdom of the Netherlands to participate in this hearing with
32 regard to the *Request for an Advisory Opinion on Climate Change and International*
33 *Law*. I will present to you, further to its written comments submitted on 16 June 2023,
34 some additional observations of the Kingdom with respect to this request.

35
36 The Kingdom would first like to refer to the advisory proceedings before the
37 International Court of Justice on climate change and international law, for which the

⁹² UNCLOS, Article 237.

⁹³ ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 102.

⁹⁴ TOMMY KOH, *A Constitution for the Oceans*, in UN, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), xxxiii.

⁹⁵ UNCLOS, Preamble (5).

⁹⁶ UNCLOS, Preamble (4).

⁹⁷ UNCLOS, Preamble (5).

⁹⁸ According to some States Parties to UNCLOS, the principle “in no case may a people be deprived of its own means of subsistence” – codified in Common Article 1(2) of the 1966 International Covenant and Civil Rights and of the 1966 International Covenant on Economic, Social and Cultural Rights – could be relevant in order to take into account such special interests and needs. See Chile, oral statement, 14 September 2023: ITLOS/PV.23/C31/16, p. 12, lines 16-29 (Fuentes Torrijco); Nauru, oral statement, 14 September 2023: ITLOS/PV.23/C31/18, p. 29, lines 24-27 (Bjorge); Mauritius, oral statement, 15 September 2023: ITLOS/PV.23/C31/19, p. 15, lines 39-42 (Koonjul).

1 deadline for the submission of written statements is 22 January 2024. The Kingdom
2 has co-sponsored the request for this advisory opinion to be given by the
3 International Court of Justice. Given that both requests for an advisory opinion
4 before the Tribunal and before the International Court of Justice relate to climate
5 change and international law, the Kingdom would like to encourage the timely
6 delivery of an advisory opinion by this Tribunal. This will ensure that this advisory
7 opinion can inform the advisory proceedings before the International Court of
8 Justice.

9
10 The Kingdom would further like to highlight that as a Member State of the European
11 Union, it aligns itself with the written and oral statements presented on behalf of the
12 European Union.

13
14 Mr President, the Kingdom would like to turn to the substance of the questions posed
15 in the present request for an advisory opinion, starting with the scientific basis
16 underlying the request.

17
18 Along with air pollution and the loss of biological diversity, the Kingdom recognizes
19 climate change as one of the three planetary crises. The Kingdom believes that this
20 triple planetary crisis and its deleterious effects can and should be addressed in a
21 holistic and integrated manner. This is thus the approach taken by the Kingdom in
22 these advisory proceedings.

23
24 Like others that have presented statements to the Tribunal, the Kingdom takes the
25 work of the Intergovernmental Panel on Climate Change as the basis for its
26 statements. In this respect, the Kingdom would like to express its appreciation to the
27 Commission of Small Island States on Climate Change and International Law for its
28 extensive scientific presentation during its oral statement.

29
30 On the basis of the work of the Intergovernmental Panel on Climate Change, it is
31 evident that both the process of the absorption of energy leading to ocean warming,
32 as well as the process of the absorption of carbon dioxide resulting in ocean
33 acidification, negatively impact the marine environment.

34
35 It is becoming clear in these proceedings that there is a widely shared view that
36 human activities directly or indirectly cause the climate to change. This view finds its
37 basis in the United Nations Framework Convention on Climate Change, which
38 defines climate change as a change of climate which is attributed directly or
39 indirectly to human activity. This framing is important for the remainder of our
40 statement.

41
42 Mr President, it is the view of the Kingdom that the Convention was designed to be a
43 “living treaty”. This means that the Convention serves as a “framework” for the
44 coordination between and harmonization of the Convention and other relevant
45 existing and future legal instruments and frameworks.

46
47 The Kingdom notes that many statements refer to this open, dynamic and
48 progressive character of the Convention, thereby acknowledging that the Convention
49 is designed to leave room for the development and substantiation of its provisions in
50 a variety of manners. As expressed by the European Union in its oral statement, the

1 architecture of the Convention is not one of an isolated regime. This means that its
2 provisions are intended to enable the interaction with other rules and principles of
3 international law.

4
5 The Kingdom does therefore not share the views expressed by some participants
6 that no specific obligations can be derived from the Convention with respect to
7 climate change, because climate change was not discussed during the negotiations
8 of the Convention.

9
10 In fact, as many participants have argued, the open, dynamic and progressive
11 character of the Convention leaves room for the further development of general
12 obligations enshrined in the Convention, such as articles 192 and 194.

13
14 Mr President, these provisions are at the heart of this request for an advisory
15 opinion. In this respect, like others, the Kingdom wishes to highlight the European
16 Union's view that the different legal regimes are to be applied in conjunction. This
17 means that it is not necessary to apply the principle of *lex specialis*, as that principle
18 is used to resolve treaty conflicts, whereas no conflict exists between the rules
19 concerned, as I will address in more detail shortly.

20
21 In addition, the Kingdom wishes to emphasize that it shares the view that the global
22 climate regime does not prevent the Tribunal from interpreting the obligations
23 relating to climate change and its effects upon the marine environment flowing from
24 the Convention.

25
26 Mr President, I will now turn to the substance of the provisions that are central to
27 these advisory proceedings, and, to be specific, those are articles 192 and 194 of the
28 Convention.

29
30 It is undisputed that article 192 establishes the general obligation of Parties to
31 protect and preserve the marine environment, which, in the view of the Kingdom,
32 reflects customary international law. This obligation applies to all marine areas, both
33 within and beyond national jurisdiction, as was confirmed by the arbitral tribunals in
34 the *Iron Rhine Arbitration* and the *South China Sea Arbitration*.

35
36 Mr President, the Kingdom notes that the content of article 192 of the Convention is
37 further developed in the subsequent provisions of Part XII of the Convention. This
38 includes article 194. This article establishes the obligation for States to take
39 measures to prevent, reduce and control pollution of the marine environment. I will
40 turn to the meaning of "pollution" shortly. For now, it suffices to say that, through
41 article 194, States are obliged to take measures, be it individually or collectively, to
42 achieve the goal of this provision; that is, to prevent, reduce and control pollution.

43
44 Both articles 192 and 194 of the Convention are obligations of conduct. The
45 Kingdom underscores some of the views presented that measures *need* to be taken
46 in order to prevent, reduce and control pollution of the marine environment. The
47 wording of article 194 is "States shall take" and "to ensure". Such wording assumes
48 that such measures *must* be taken. However, contrary to what has been argued by
49 some participants before this Tribunal, this in itself does not lead to the conclusion
50 that this is an obligation of result.

1 Mr President, in this respect, it follows from the *Advisory Opinion of the Seabed*
2 *Disputes Chamber on the responsibilities and obligations of States sponsoring*
3 *persons and entities with respect to activities in the Area* that the obligation “to
4 ensure”, as enshrined in paragraph 2 of article 194 of the Convention, “is not an
5 obligation to achieve”. Rather, in the wording of the Seabed Disputes Chamber, “it is
6 an obligation to deploy adequate means, to exercise best possible efforts, to do the
7 utmost, to obtain this result”. In the present proceedings, the result to be obtained
8 relates to the prevention, reduction and control of pollution in accordance with
9 article 194.

10
11 This also follows from the judgment of the International Court of Justice in the case
12 concerning *Pulp Mills on the River Uruguay*. Here, the Court stated that an obligation
13 to adopt regulatory or administrative measures, and enforce them, is an obligation of
14 conduct, and, because of its characterization as an obligation of conduct, the Court
15 concluded that it is also an obligation of due diligence.

16
17 That the obligation is one of conduct, and thus to exercise due diligence, does not, in
18 any way, mean that it results in a low level of environmental protection. The question
19 then arises, what precisely is the specific content of this due diligence obligation?
20

21 In its Advisory Opinion, the Seabed Disputes Chamber determined that the content
22 of the due diligence obligation cannot be described in precise terms; rather, it is a
23 variable concept. In this sense, the content of the obligation and the measures that
24 need to be taken so as to comply with the obligation of due diligence, may vary
25 according to circumstances. It may, for example, change in relation to the risks
26 involved in an activity, and the standard of due diligence has to be more severe for
27 riskier activities.

28
29 In particular, scientific or technological knowledge is very important to establish the
30 standard of due diligence that needs to be acted upon. As the Seabed Disputes
31 Chamber stated: “Due diligence may change over time as measures considered
32 sufficiently diligent at a certain moment may become not diligent enough in light, for
33 instance, of new scientific or technological knowledge”.
34

35 This is clearly applicable to climate change. The Kingdom wishes to note the
36 importance of the precautionary principle, meaning that lack of full scientific certainty
37 shall not be used as a reason for postponing cost-effective measures to prevent
38 environmental degradation. This should thus be taken into account in determining
39 the standard of due diligence exercised.
40

41 Mr President, the Kingdom agrees with other participants that the obligation to
42 exercise due diligence under articles 192 and 194 of the Convention applies to every
43 single State. The Kingdom also shares the views expressed that capabilities of
44 States differ. In this respect, the Kingdom would like to refer to the work of the
45 International Law Commission on the Prevention of Transboundary Harm from
46 Hazardous Activities.

47
48 In its commentaries, it observed that
49

1 the degree of care expected of a State with a well-developed economy and
2 human and material resources and with highly evolved systems and structures
3 of governance is different from States which are not so well placed. Even in
4 the latter case, vigilance, employment of infrastructure and monitoring of
5 hazardous activities in the territory of the State, which is a natural attribute of
6 any Government, are expected.
7

8 These observations are also relevant for climate change law and policy, in particular
9 the adoption of mitigation and adaptation measures, to which I will now turn your
10 attention.
11

12 Mr President, mitigation and adaptation measures find their origin in the United
13 Nations Framework Convention on Climate Change and related instruments, such as
14 the Paris Agreement. In the view of the Kingdom, the obligations enshrined in
15 articles 192 and 194 of the Convention include the adoption of such mitigation and
16 adaptation measures.
17

18 Whereas mitigation measures seek to regulate the concentration of greenhouse
19 gases in the atmosphere that have an anthropogenic origin, adaptation measures
20 are intended to respond to actual or expected impacts of climate change, including
21 on the marine environment.
22

23 In the context of mitigation measures, the principle of common but differentiated
24 responsibilities and respective capabilities is relevant, as reflected in the system of
25 nationally determined contributions under the Paris Agreement. This system has not
26 only been designed to reflect differentiated responsibilities and historical emissions,
27 but also to reflect respective capabilities. This should be taken into account in the
28 degree of care expected of States to comply with their international obligations. In
29 complying with these obligations, States should, individually or collectively,
30 implement mitigation measures.
31

32 In the context of adaptation measures, the principle of common but differentiated
33 responsibilities and respective capabilities is relevant as well. Bearing in mind this
34 principle, the international community, including coastal States as well as all States
35 with respect to the Area, are responsible for the implementation of adaptation
36 measures to enhance the climate resilience of the marine environment. Such
37 measures will vary from State to State depending on State-specific circumstances,
38 including the conditions of their natural environment and their socioeconomic status.
39

40 As for the European part of the Kingdom, of which a substantial part is situated
41 below sea level, it requires the Netherlands to consider how to continue to manage
42 its coast with sand nourishment in the coming decades, in order to guarantee the
43 safety of the Netherlands in the future. As for the Caribbean part of the Kingdom,
44 which have some of the most pristine coral reefs in the world, it requires enhancing
45 the resilience of those reefs to protect them against ocean warming and ocean
46 acidification.
47

48 An example of a *collective* measure enhancing the climate resilience of the marine
49 environment is the designation and management of marine protected areas, as well
50 as other area-based management tools, including in accordance with the Agreement

1 under the United Nations Convention on the Law of the Sea on the Conservation and
2 Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

3
4 Mr President, the applicability of article 194 of the Convention is based on the
5 occurrence of pollution of the marine environment and the prevention, reduction and
6 control thereof. In its written statement, the Kingdom explained why it considers the
7 deleterious effects of climate change and ocean acidification, as well as the harm
8 resulting from such effects, to fall within the meaning of the phrase “pollution to the
9 marine environment” as defined in article 1(4). The Kingdom has not been convinced
10 by the view, expressed by a few participants, suggesting otherwise, nor does it agree
11 with the view that the obligations under article 194 do not relate to climate change,
12 its effects and ocean acidification.

13
14 Furthermore, the Kingdom took note of statements that merely focused on land-
15 based sources of pollution and sources of pollution from or through the atmosphere
16 in response to the questions before the Tribunal. As a consequence, these
17 statements only address the interaction between the obligations related to these
18 sources under the Convention and the obligations under the United Nations
19 Framework Convention on Climate Change and related instruments.

20
21 In the view of the Kingdom, other sources of pollution mentioned in the Convention
22 may also contribute to climate change and ocean acidification, such as pollution by
23 dumping, pollution from vessels, and pollution from installations and devices in the
24 exploitation of the natural resources of the seabed and subsoil.

25
26 Accordingly, the Kingdom has addressed the interaction between the obligations
27 related to *all these* sources with other instruments, frameworks and bodies. These
28 do not only include the United Nations Framework Convention on Climate Change
29 and its related instruments; they also include instruments under the auspices of
30 international organizations, in particular the International Maritime Organization and
31 the International Civil Aviation Organization.

32
33 These organizations have assumed responsibilities for reducing emissions from
34 greenhouse gases from shipping and aviation, respectively, and are pursuing
35 strategies to achieve such reductions. This has also been convincingly illustrated by
36 the International Maritime Organization in its statements before the Tribunal.

37
38 Mr President, such initiatives are examples of the furtherance of the general
39 principles and objectives set forth in this Convention relating to the protection and
40 preservation of the marine environment and the protection, reduction and control of
41 pollution thereto in accordance with article 237 of the Convention.

42
43 Several participants have referred to the general duty of cooperation enshrined in
44 article 197 of the Convention in respect of the marine environment and consider this
45 duty to be a fundamental principle of international environmental law. The Kingdom
46 agrees, as the Tribunal held, in the case concerning the *Mixed Oxide Fuel Plant*, that
47 cooperation is a “fundamental principle in the prevention of pollution of the marine
48 environment under Part XII of the Convention and general international law and that
49 rights arise therefrom”.

1 Furthermore, some participants have referred to loss and damage to the marine
2 environment resulting from the adverse effects of climate change. The Kingdom
3 would observe that this issue has not been explicitly raised in the questions posed in
4 the request for an advisory opinion. However, the issue becomes pertinent once the
5 implementation of mitigation measures and adaptation measures have not proven
6 effective to prevent damage to the marine environment, including the loss of marine
7 biological diversities, in areas within and in areas beyond the limits of national
8 jurisdiction.

9
10 The Kingdom wishes to note that the issue of loss and damage resulting from
11 climate change is being addressed under the United Nations Framework Convention
12 on Climate Change, which includes decisions on the establishment of the Warsaw
13 International Mechanism for Loss and Damage Associated with Climate Change
14 Impacts, as well as on Funding Arrangements for Responding to Loss and Damage
15 Associated with the Adverse Effects of Climate Change, including a Focus on
16 Addressing Loss and Damage.

17
18 The Kingdom considers that damage to the marine environment, including the loss of
19 marine biological diversities, in areas within and in areas beyond the limits of
20 national jurisdiction, could be addressed under these initiatives relating to loss and
21 damage resulting from the adverse effects of climate change.

22
23 In this context, the Kingdom considers that particular relevance should be given to
24 the obligation, under the Convention on Biological Diversity, to rehabilitate and
25 restore degraded ecosystems and promote the recovery of threatened species, *inter*
26 *alia*, through the development and implementation of plans or other management
27 strategies.

28
29 Mr President, distinguished members of the Tribunal, the Kingdom considers that,
30 through its advisory opinion, the Tribunal has a unique opportunity to raise
31 awareness and provide guidance on the protection and preservation of the marine
32 environment and/or the prevention, reduction and control of the pollution of the
33 marine environment.

34
35 In this manner, the advisory opinion will contribute to the interpretation and
36 application of the obligations arising from the Convention, in particular the obligations
37 arising from Part XII of the Convention. This would also contribute to the
38 advancement of the holistic implementation, in a coherent and cooperative manner,
39 of the obligations under the Convention and the obligations under other relevant
40 legal instruments and frameworks and relevant global, regional, subregional and
41 sectoral bodies.

42
43 Mr President, honourable members of this Tribunal, I now conclude my presentation.
44 The Kingdom would like to thank the Tribunal for her time and attention and looks
45 forward to its Advisory Opinion on Climate Change and International Law. I thank
46 you.

47
48 **THE PRESIDENT:** Thank you, Mr Lefeber, for your statement. We have now
49 reached 11:45. At this stage, the Tribunal will withdraw for a break of 30 minutes. We
50 will continue the hearing at 12:15.

1 **THE CLERK OF THE TRIBUNAL:** All rise.

2
3 (Short break)

4
5 **THE PRESIDENT:** Please be seated. I now invite Mr Juratowich to make his
6 statement on behalf of the United Kingdom. You have the floor, Sir.

7
8 **MR JURATOWITCH:** Mr President, members of the Tribunal, it is an honour to
9 appear before you to seek to assist you with the task that lies ahead of you. That
10 task is simultaneously very broad and very delicate.

11
12 In this final session, the United Kingdom seeks to assist the Tribunal by identifying
13 the considerable common ground, and then focusing on the central issues with
14 which the Tribunal will need to grapple. The United Kingdom emphasizes six areas
15 of common ground.

16
17 The first concerns the definition in article 1(1)(4). Nearly all participants accept that
18 the actual or likely deleterious effects on the marine environment caused by
19 anthropogenic greenhouse gas emissions constitute “pollution of the marine
20 environment”.⁹⁹ This, of course, means that the pollution regime in Part XII is
21 engaged by greenhouse gas emissions. If the Tribunal endorses this approach, that
22 alone will be significant.¹⁰⁰

23
24 The second concerns the scope of the Tribunal’s enquiry. Whilst, in theory, the
25 request goes beyond Part XII, no party has seriously engaged with any provision
26 outside it and the associated definitional provisions. The Tribunal can thus limit its
27 opinion to relevant obligations in Part XII.

28
29 The third concerns the character of the obligations in Part XII. It is common ground
30 that articles 192 and 194 are governed by the due diligence standard. The same is
31 true for the duties to take cooperative action under Part XII.¹⁰¹

32
33 The fourth is that the IPCC’s reports emerging from its Sixth Assessment Cycle
34 reflect best available science on the issues of climate change and ocean
35 acidification, and their effects on the marine environment. The Tribunal endorsing
36 this common ground would also be a significant result.

37
38 The fifth is that the UNFCCC and the Paris Agreement are relevant to the
39 interpretation of obligations in Part XII. How they are relevant is a different matter
40 and I will ultimately focus on that.

41
42 The sixth concerns the approach to the dispositive part of the Tribunal’s forthcoming
43 opinion. The Tribunal may recall, having seen slides during the presentation of
44 COSIS, the proposed dispositive part. The Tribunal may also recall the level of

⁹⁹ Cf India Oral Submissions, ITLOS/PV.23/C31/8, p. 17 (lines 40-49) (Rangreji); China Oral Submissions, ITLOS/PV.23/C31/10, p. 28 (lines 1-50) – p. 29 (lines 1-9) (Ma); see further Indonesia written statement, paras. 58 and 81.

¹⁰⁰ See generally Commission of Small Island States on Climate Change and International Law (‘COSIS’) Oral Submissions, ITLOS/PV.23/C31/4, p. 25 (lines 40-43) (Lowe).

¹⁰¹ See, e.g., COSIS written statement, paras. 319-320 and 327.

1 generality of those paragraphs. COSIS asks the Tribunal for a dispositive part that
2 takes the terms of the relevant Part XII provisions and recognizes that they are
3 engaged by anthropogenic greenhouse gas emissions. That much is common
4 ground. The common ground ends where COSIS adds to what UNCLOS says by
5 including the 1.5°C temperature goal and a stipulation as to timing, and to that I will
6 also come.

7
8 Conscious of that significant common ground, the United Kingdom will use its time
9 today on three subjects: first, jurisdiction, discretion, and characterization of the
10 request; second, States' obligations to take "necessary measures" under articles 194
11 and 212; and third, the duty of cooperation.

12
13 Ms Sander will address you on the duty of cooperation, and I will deal with the first
14 two subjects. Before I do, the United Kingdom pays tribute to Professor Alan Boyle
15 who passed away during the course of this hearing. He will be greatly missed.

16
17 Members of the Tribunal, like most participants, the United Kingdom does not
18 challenge the existence of the Tribunal's advisory jurisdiction. It recognizes the
19 Tribunal's finding in *SRFC* that it had such a jurisdiction.¹⁰²

20
21 The United Kingdom shares the views of several States¹⁰³ that the Tribunal could
22 take this opportunity to elaborate on the basis of its advisory jurisdiction. In
23 particular, the United Kingdom seeks clarification as to how an agreement
24 empowering an international organization to seek an advisory opinion confers
25 jurisdiction on the Tribunal to issue one for the purposes of article 21 of its Statute.¹⁰⁴
26 Turning to discretion, the Tribunal is now faced with a request in very different
27 circumstances from *SRFC*.

28
29 Unlike the *SRFC*,¹⁰⁵ the type of international organization making the request is not
30 expressly referred to in UNCLOS. Nor are its functions described in UNCLOS.
31 Instead, COSIS was created by two States,¹⁰⁶ without consultation with all other
32 UNCLOS States Parties. Nonetheless, prominent among the purposes and activities
33 of COSIS is seeking advisory opinions from the Tribunal concerning the obligations
34 of *all* States Parties to UNCLOS.

¹⁰² See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 ('**SRFC Advisory Opinion**'), Operative Clause, para. 1.

¹⁰³ Germany Oral Submissions, ITLOS/PV.23/C31/5, p. 19 (lines 31-35) (Von Uslar-Gleichen); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 24 (lines 29-31) (Mohammed Algethami); Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 5 (lines 40-44) (Ortega Lemus); India Oral Submissions, ITLOS/PV.23/C31/8, p. 16 (lines 21-23) (Rangreji); Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 6 (lines 21-24) (Jalloh); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 21 (lines 26-35) (Motzfeldt Kravik).

¹⁰⁴ United Kingdom written statement, para. 15.

¹⁰⁵ UNCLOS, article 118.

¹⁰⁶ The COSIS Agreement entered into force with the signatures of Antigua and Barbuda and Tuvalu on 31 October 2021 (see article 4(2) providing that "[t]his Agreement shall enter into force upon signature by two or more States"). Membership of COSIS now also includes Palau, Niue, Vanuatu, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, and the Bahamas.

1 In *SRFC*, the Tribunal found that the object of the SRFC’s request was “to seek
2 guidance in respect of its own actions”.¹⁰⁷ Here, the Commission does not seek
3 guidance in respect of its own actions, but on the obligations of all UNCLOS States
4 Parties in relation to climate change and ocean acidification.

5
6 The United Kingdom considers that risks arise from a small group of States being
7 able to request ITLOS advisory opinions through a treaty of restricted membership
8 devised for that principal purpose. This is all the more so when the questions posed
9 concern the obligations of all States Parties to UNCLOS. To use the words of Judge
10 Cot in *SRFC*, there are “dangers of abuse and manipulation” in future cases.¹⁰⁸
11 These are dangers that are not protected against by article 21 of the Statute,
12 article 138 of the Rules or the Tribunal’s approach to its advisory jurisdiction in
13 *SRFC*.

14
15 The United Kingdom therefore invites the Tribunal to identify parameters governing
16 the exercise of its discretion for the purpose of both this and future cases, as set out
17 in paragraph 20 of its written statement. Two are particularly relevant to this case.

18
19 The first concerns the content of the question and the scope of the answer. The
20 request must ask a legal question that is framed with enough specificity to ensure
21 that in answering it, the Tribunal acts compatibly with its judicial function. The
22 Tribunal was explicit in *SRFC* that a request must be “clear enough to enable it to
23 deliver an advisory opinion”.¹⁰⁹

24
25 It is implicit that the scope of the question cannot go beyond what can feasibly and
26 properly be addressed in advisory proceedings. This is not just a matter of focusing
27 only on Part XII. The Tribunal will wish to keep in mind the procedure it has adopted
28 in this case when determining the scope of, and level of detail in, its opinion.

29
30 Distinguished Judges: 33 States and 10 intergovernmental organizations filed written
31 statements, spanning nearly 1,500 pages. Participants were not afforded an
32 opportunity to file a reply statement, although several States requested that
33 opportunity.

34
35 COSIS was granted two full days to make its oral submissions. That allowed it to
36 make 20 separate presentations from 20 individual advocates. Two of those
37 advocates were testifying scientific experts. They appeared despite the well-
38 established and important distinction between expert evidence and advocacy in
39 international practice,¹¹⁰ and despite the lack of notice to States that this would
40 occur. The United Kingdom’s position is that this approach to expert evidence is
41 contrary to principle and should be avoided in any future case.

¹⁰⁷ *SRFC* Advisory Opinion, para. 76.

¹⁰⁸ See Separate Declaration of Judge Cot in the *SRFC* Advisory Opinion proposing that the Tribunal
“provide a procedural framework” and establish “a coherent system” (paras. 9 and 13).

¹⁰⁹ *SRFC* Advisory Opinion, para. 72.

¹¹⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (‘**Pulp Mills**’), Separate Opinion of Judge Greenwood, para. 27.

1 Each State Party has been allotted a maximum of just one hour to make its oral
2 submissions. That is not enough time to respond to all relevant points arising from
3 the extensive written submissions or the extensive oral submissions of COSIS.

4
5 The United Kingdom respectfully invites the Tribunal to take this procedural context
6 into account when considering the appropriate ambit of its advisory opinion.

7
8 The second factor on discretion is the importance of the request comprising a legal
9 question concerning one or more obligations under UNCLOS, or an agreement
10 implementing it. The Tribunal is not the appropriate forum for the interpretation or
11 application of other treaties. This factor is of real significance in the present case,
12 given the specialized climate treaty regime.

13
14 We come now to a point about the objective characterization of the request. The
15 Tribunal is asked to identify the “specific obligations” under Part XII that are relevant
16 to climate change and ocean acidification. This requires the Tribunal to identify and
17 to describe the content and meaning of those obligations. The Tribunal is not asked
18 to identify means by which States may comply with those obligations. The Tribunal
19 will have recognized that a number of arguments made to it have nonetheless
20 focused on what would be necessary to comply with obligations in light of scientific
21 evidence, rather than on the identification, content and meaning of the relevant
22 obligations.

23
24 While I am on matters outside scope, the United Kingdom notes that the Falkland
25 Islands have been raised before you.¹¹¹ The United Kingdom’s position is well known
26 and so I need say nothing further on it.

27
28 Distinguished Judges, that brings us to my second subject: what is meant by
29 “necessary measures” in articles 194 and 212.

30
31 To resolve that issue in this context, the Tribunal will need to consider two questions.

32
33 First, what is the relationship between best available science and States’ legal
34 obligations to take “necessary measures” to prevent, reduce and control climate
35 change and ocean acidification?

36
37 Second, what is the relevance of the specialized climate treaty regime to UNCLOS,
38 and in particular, to articles 194 and 212?

39
40 I turn first to best available science.

41
42 The Seabed Disputes Chamber has already acknowledged that best available
43 science is relevant to obligations that are subject to a due diligence standard. In its
44 2011 Opinion, the Chamber considered the content of obligations in article 139(1)
45 and article 4(4) of Annex III “to ensure” a particular state of affairs.¹¹² It held that

¹¹¹ Argentina’s Oral Submissions, ITLOS/PV.23/C31/6, p. 11 (lines 28-41) (Herrera).

¹¹² *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, p. 10 (*‘Activities in the Area, Advisory Opinion’*), para. 107 and following.

1 these were “obligations ‘of conduct’ and not ‘of result’”.¹¹³ It also held that the
2 concept of due diligence may vary with “new scientific or technical knowledge”.¹¹⁴
3 The Chamber referred to article 194(2) as an example of a provision falling within
4 that category of obligations.¹¹⁵ In doing so, it rightly drew no relevant distinction
5 between the language of article 194(2) and that of article 139(1).¹¹⁶
6

7 This brings us to the role of the current IPCC reports in the present case.
8

9 The approach of COSIS is that “[s]ettled scientific conclusions based on current and
10 best available evidence dictate what is ‘necessary’”.¹¹⁷ “Dictate” is a strong word.
11 You have also been told that you must “follow the science”.¹¹⁸
12

13 This line of argument has the practical effect of seeking to elevate the findings and
14 recommendations made in the current Panel reports to the status of binding legal
15 obligations through the operation of articles 194 and 212. That, with respect, is not a
16 permissible approach, for two reasons.
17

18 First, asking the Tribunal to declare what States must do because of what the
19 science says is not asking the Tribunal to declare the content or meaning of
20 UNCLOS obligations, “specific” or otherwise. It is asking the Tribunal to explain what
21 States must do at the present time to comply with those obligations in light of
22 particular scientific evidence. That, members of the Tribunal, is not what the request,
23 objectively characterized, calls for.
24

25 The second reason would only become relevant if the Tribunal were nonetheless to
26 consider compliance to be a matter within scope. It is that both the precise content of
27 the due diligence standard and its application to any given facts ultimately remain
28 legal questions, not scientific ones.
29

30 The United Kingdom accepts that the recommendations in the current IPCC reports
31 are a highly relevant factor when a State is assessing what measures are objectively
32 necessary for the purposes of complying with its obligations under articles 194 and
33 212. But the Panel reports are not the beginning and end of the enquiry.
34

35 Pursuant to the plain terms of UNCLOS and the established jurisprudence, there are
36 factors relevant to a State’s assessment of “necessary measures” beyond best
37 available science. Some of those factors may point in different directions from
38 others, and a State must weigh them in any particular circumstance. I will identify
39 eight.
40

41 First, practical considerations are crucial. Article 194(1) makes clear that States are
42 to use “the best practicable means at their disposal” and act “in accordance with their
43 capabilities”. An assessment of what is “necessary” cannot be separated from

¹¹³ *Activities in the Area*, Advisory Opinion, para. 110.

¹¹⁴ *Activities in the Area*, Advisory Opinion, para. 117.

¹¹⁵ *Activities in the Area*, Advisory Opinion, para. 113.

¹¹⁶ Cf COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 21 (lines 18-35) (Thouvenin).

¹¹⁷ COSIS written statement, para. 338.

¹¹⁸ Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 21 (lines 11 and 40), p. 22 (line 2), p. 30 (line 28) (Sands).

1 practical realities. A State is permitted to consider economic, political, social and
2 other factors that may affect what is practicable for a particular State at a particular
3 time.

4
5 Second, the degree of risk of harm generated by any particular conduct is a relevant
6 consideration. This is consistent with the Chamber's recognition, which you have
7 heard many times, that "the standard of due diligence has to be more severe for
8 riskier activities",¹¹⁹ as emphasized by many participants.¹²⁰

9
10 Third, States' obligations to take necessary measures under Part XII include a duty
11 to avoid activities causing damage to other States. Article 194(2) makes this
12 express.

13
14 Fourth, the concept of effectiveness reinforces the need to take measures under
15 Part XII that are targeted, timely and as far-reaching and efficacious as possible.¹²¹
16 On this, the Panel's recognition of the need for deep, rapid and sustainable cuts to
17 emissions and to have regard to tipping points¹²² is particularly significant, but it is
18 not the entire test.

19
20 Fifth, within UNCLOS, the precautionary principle¹²³ remains relevant insofar as
21 there is any remaining scientific uncertainty as to the character or extent of the likely
22 harm, the risk of it eventuating, or the efficacy of mitigatory measures.¹²⁴ This means
23 that any such uncertainty cannot justify inaction or more limited action.

24
25 Sixth, the results of monitoring and assessment conducted by a State pursuant to
26 articles 204 or 206, and any reports made available to States Parties pursuant to
27 article 205, may also be relevant to an assessment of what measures are necessary.

28
29 Seventh, under article 194(1) States shall take measures "individually or jointly as
30 appropriate" and "shall endeavour to harmonize their policies". UNCLOS does not
31 divorce what is necessary from what is capable of being agreed.

32
33 Related to that, eighth, the provisions of the specialized climate treaty regime inform
34 the content of the due diligence standard under Part XII, and I will return to the
35 question of how they do so.

36
37 Distinguished Judges, that best available science is not the only relevant factor is
38 illustrated by the issue of the significance to be given to the 1.5-degree temperature
39 goal.

¹¹⁹ *Activities in the Area*, Advisory Opinion, para. 117.

¹²⁰ See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 9 (lines 3-5) and p. 10 (lines 1-2) (Brunnée); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 20 (lines 30-31) (Sands); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 2 (lines 33-37) (Yee); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 27 (lines 29-30) (Bouquet).

¹²¹ See further United Kingdom written statement, paras. 85-87.

¹²² For the climate system, 'tipping points' refers to a critical threshold when global or regional climate changes from one stable state to another stable state: IPCC, 2019: Glossary, p. 699.

¹²³ As explained in the United Kingdom written statement at para. 76, the precise status and content of the principle are unsettled.

¹²⁴ See further United Kingdom written statement, paras. 75-78; cf Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 28 (lines 10-13) (Jalloh).

1 Several participants take the view that “necessary measures” under UNCLOS must
2 be aimed at limiting average global temperature rise specifically to 1.5 degrees
3 above pre-industrial levels. This is on the basis that the IPCC has concluded that
4 limiting temperature rise to this level would significantly reduce the risks and harm of
5 climate change.¹²⁵
6

7 This, with respect, incorrectly seeks to elevate scientific information to the status of a
8 legal obligation under UNCLOS, without accounting for the other factors I have
9 identified.

10
11 The United Kingdom accepts that the Panel has, with medium to high confidence,
12 identified a 1.5-degree rise as the threshold which, if exceeded, causes the risk of
13 extreme effects of climate change to begin to move from moderate to high.¹²⁶ The
14 United Kingdom also accepts that this scientific conclusion is a highly relevant factor
15 to take into account when States are assessing what steps they must take to comply
16 with articles 194 and 212.

17
18 But the Panel reports are one of many factors that States must consider. To focus
19 exclusively on the science on 1.5 degrees is to underestimate the complex and
20 competing factors that States must weigh in practice.

21
22 Treating 1.5 degrees as a limit with the force of law derived from Part XII also
23 ignores the character of the relevant obligations. They are due diligence obligations.
24 There is common ground on the due diligence character of articles 192, 194, and
25 197 through to 204.¹²⁷ The same characterization also applies to articles 206, 207,
26 212, 213 and 222. They are all obligations of conduct, not of result.¹²⁸ As the
27 Tribunal has heard many times, this means that States are obliged to “deploy
28 adequate means, to exercise best possible efforts, to do the utmost, to obtain [the
29 relevant] result”.¹²⁹
30

¹²⁵ See e.g., African Union written statement, paras. 202 and 220-221; Bangladesh written statement, paras. 35, 42, 45-48; COSIS written statement, para. 425; IUCN written statement, para. 108; Micronesia written statement, para. 51; Mozambique written statement, para. 3.65; Nauru written statement, paras. 56 and 66; COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 30 (lines 30-35) (Amirfar) and ITLOS/PV.23/C31/4, p. 29 (lines 25-28) (Lowe); Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 12 (lines 37-41) (Okowa); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 24 (lines 16-19) and p. 27 (lines 29-35) (Tladi).

¹²⁶ See 2018 Special Report on Global Warming of 1.5°C, p. 11, figure SPM.2.

¹²⁷ COSIS written statement, paras 319-320 and 327; see also, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 10 (lines 28-30) and page 13 (lines 18-20) (Brunneé) (in respect of articles 192 and 194), New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 12 (lines 10-11) (Skerten) (in respect of articles 192 and 194); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 18 (lines 5-6) (Hwang) (in respect of articles 192 and 194); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 13 (lines 1-11) (Paparinskis) (in respect of “key rules”, e.g., articles 194, 204, 206, and 207); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 9 (lines 5-8) (Middleton), p. 15 (lines 30-33) (Stoeger) and p. 20 (lines 28-39) (Bouquet) (in respect of articles 192, 194 and 197).

¹²⁸ See, para. 18 above; see further *Activities in the Area*, Advisory Opinion, para. 110; endorsed by the Tribunal in *SRFC* Advisory Opinion, paras. 128-129.

¹²⁹ *Activities in the Area*, Advisory Opinion, para. 110; endorsed by the Tribunal in *SRFC* Advisory Opinion, paras. 128-129.

1 Those participants that are seeking to give the 1.5-degree goal legal significance
2 through the rubric of “necessary measures” assume that the “result” towards which
3 States must exercise “best efforts” under UNCLOS is the 1.5-degree goal. It is not.

4
5 In *Activities in the Area*, the “result” was the sponsored contractors’ compliance with
6 article 139(1) and article 4(4) of Annex III.¹³⁰ That is clear from the terms of those
7 provisions.

8
9 In the context of article 194(1), the relevant “result” is also clear on the face of the
10 provision. It is the prevention, reduction and control of pollution. The Netherlands
11 made the same point this morning. For article 194(2), the result is that activities
12 within a State’s jurisdiction or control do not cause damage by pollution. The
13 meaning of article 194 is not that a number identified by best available science at a
14 given point in time is the result towards which States must expend their efforts. Any
15 result at which States must aim under article 194 cannot be so specifically described.

16
17 As the Tribunal has in mind, however the result at which States must aim is
18 described, the content of the obligation is to exercise due diligence to achieve it.
19 There is no legal obligation to achieve it.

20
21 The attempt to give 1.5 degrees legal significance under UNCLOS is further
22 undermined by the words used in the provision of the Paris Agreement that refers to
23 1.5 degrees, which is article 2(1)(a).

24
25 It is to the relationship between the climate change treaties and the due diligence
26 standard in UNCLOS that I now turn.

27
28 Like many participants,¹³¹ the United Kingdom’s position is that the UNFCCC and the
29 Paris Agreement have primary importance in the context of climate change. The
30 provisions of those treaties inform the content of States’ obligations under Part XII of
31 UNCLOS.

32
33 The Tribunal will provide significant guidance by being specific about how and why
34 the Framework Convention and the Paris Agreement are relevant to the questions
35 before it. There are five different and complementary bases for such relevance.

36
37 First, they contain specific rules that elaborate the “general obligation” in article 192
38 to preserve the marine environment.

39
40 Second, they are an example of “joint” measures for the reduction of greenhouse
41 gas emissions for the purposes of article 194(1).

42

¹³⁰ *Ibid.*

¹³¹ See European Union written statement, paras. 28 and 93; IUCN written statement, paras. 96 and 194; Mauritius written statement, paras. 47 and 50-51; Norway written statement, p. 3; Portugal written statement, para. 65; Singapore written statement, para. 38; see also Australia written statement, paras. 31, 39 and 41; Micronesia written statement, para. 47; New Zealand written statement, para. 94(f). See also, e.g., Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 17 (lines 6-7) (Koonjul); Indonesia Oral Submissions, ITLOS/PV.23/C31/9, p. 6 (lines 24-26) (Jinangkung); China Oral Submissions, ITLOS/PV.23/C31/10, p. 23 (lines 36-37) - p.24 (lines 1-2) (Ma); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 26 (lines 10-12) (Motzfeldt Kravik).

1 Third, they contain internationally agreed rules or standards for the purposes of
2 article 212(1). UNCLOS States Parties are obliged to take them into account in
3 adopting domestic laws and regulations under article 212.

4
5 Fourth, they contain relevant rules of international law to be taken into account in the
6 interpretation of Part XII of UNCLOS, by operation of the rule reflected in
7 article 31(3)(c) of the Vienna Convention. The United Kingdom of course recognizes
8 that the Framework Convention and the Paris Agreement, on the one hand, and
9 UNCLOS on the other, are separate treaties, with separate obligations.¹³²

10
11 The essential point is that the Tribunal will wish to interpret Part XII so that its
12 meaning is harmonious with the climate change treaties. This is not a case of
13 different treaties being in conflict. It is a case in which States are to be presumed to
14 intend coherence and consistency across their treaty obligations.

15
16 Fifth, they are additionally relevant because of their creation of relevant fora for
17 international cooperation, including for the purposes of articles 197 and 212(1) of
18 UNCLOS. Article 222 then requires States to implement legal obligations agreed in
19 those fora by adopting appropriate domestic laws and regulations.

20
21 I have already analyzed the 1.5-degree goal in the context of best available science.
22 I return to it now to illustrate the more general relevance of the Paris Agreement to
23 the interpretation of Part XII obligations.

24
25 Some participants have relied on the Paris Agreement's reference to the 1.5-degree
26 goal as constituting an "agreed" threshold and thus an "internationally agreed ...
27 standard" for the purposes of articles 207(1) and 212(1). This is said to require
28 "necessary measures" to be targeted at the 1.5-degree goal.¹³³

29
30 There are two key difficulties with this approach.

31
32 First, the obligation in articles 207(1) and 212(1) – where the phrase "internationally
33 agreed ... standards" is found – is limited in character. It only concerns the adoption
34 of domestic laws and regulations and it is only to "take into account" relevant
35 internationally agreed rules and standards. That is not an obligation to take
36 necessary measures.

37
38 Second, it is not clear on what basis the reference in article 2(1)(a) of the Paris
39 Agreement to the 1.5-degree goal could be said to constitute an "internationally
40 agreed standard" when one considers, even superficially, what it actually says and
41 the context in which it says it. Article 2(1) addresses the Paris Agreement's "aims". In
42 that context, article 2(1)(a) refers to: "Holding the increase in global average

¹³² COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 28 (lines 15-21) (Lowe), Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 3 (line 24) (Yee).

¹³³ COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 30 (lines 4-10) and p. 34 (lines 12-25) (Amirfar). As to the 1.5 degree goal under the Paris Agreement representing a "standard" under articles 207 and 212 more generally, see, e.g., Bangladesh Oral Submissions, ITLOS/PV.23/C31/6, p. 20 (lines 9-11) (Amirfar); Comoros Oral Submissions, ITLOS/PV.23/16, p. 9 (lines 10-20) (Coppens); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 26 (lines 11-13) (Sands); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 7 (lines 18-23) (Yee).

1 temperature to well below 2°C ... and pursuing efforts to limit the temperature
2 increase to 1.5°C.” The reference to 1.5 degrees in the Paris Agreement cannot be
3 isolated from the true sense of the provision in which it occurs. International law
4 abhors cherry-picking.

5
6 The primary relevance of the Paris Agreement to this case is in construing the terms
7 of articles 194 and 212(2). The United Kingdom’s interpretative case is not that
8 articles 194 and 212(2) contain a *renvoi* to the Paris Agreement that operates to
9 deprive them of any meaningful independent effect.¹³⁴ Nor has the United Kingdom
10 said that the Paris Agreement constitutes a “subsequent agreement” or “subsequent
11 practice” between the parties to UNCLOS.¹³⁵ Nor do any provisions of UNCLOS
12 incorporate any provisions of the Framework Convention or Paris Agreement so as
13 to make them also obligations pursuant to UNCLOS.¹³⁶

14
15 The United Kingdom’s case is straightforward: like many participants,¹³⁷ it contends
16 that the obligation to take “necessary measures” should be interpreted taking into
17 account the Framework Convention and the Paris Agreement as required by the rule
18 in article 31(3)(c) of the Vienna Convention. That is not a matter of limiting, diluting or
19 “neutralizing”¹³⁸ UNCLOS, but of interpreting it harmoniously with the relevant, more
20 specialized treaty on climate change. The contentious question is what this means in
21 practice.

22
23 The United Kingdom’s position is that the Paris Agreement can be taken to reflect a
24 near-universal consensus on the measures that States must take to combat climate
25 change in view of best available science. Those measures are introduced by a
26 preamble expressly “recognizing the need for an effective and progressive response
27 to the urgent threat of climate change on the basis of the best available scientific
28 knowledge”.

29
30 Notwithstanding that preamble, the Paris Agreement does not go on to impose a
31 binding temperature rise limit of 1.5 degrees, as the Tribunal is effectively being
32 asked to impose through UNCLOS. The way that the Paris Agreement does treat the
33 temperature rise goal should inform what legal meaning is to be given to what is
34 “necessary” under articles 194 and 212.

35
36 Members of the Tribunal, the general words of articles 194 and 212 of UNCLOS
37 cannot credibly be interpreted as imposing more stringent or more specific
38 obligations than the Paris Agreement, which is the specialist climate change treaty
39 specifically addressing the measures to be taken.

40
41 If States are to be obliged to take measures that collectively reduce emissions to a
42 level that ensures that the increase to global average temperatures is limited to
43 1.5 degrees, or to reach global peaking of greenhouse gases within a certain time

¹³⁴ Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 30 (line 14) - p. 32 (line 9) (Aughey).

¹³⁵ Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 33 (lines 8-12) (Aughey).

¹³⁶ Cf Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 8 (lines 14-17) (Okowa).

¹³⁷ See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/2, pp. 35 (lines 24-28) (Mbengue); Mozambique Oral Submissions, ITLOS/PV.23/C31/11 p. 12 (lines 33-35); Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 33 (lines 18-23) (Aughey).

¹³⁸ Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 30 (lines 32-35) (Aughey).

1 period, States can, of course, collectively agree to that, including by way of
2 amendment to the Paris Agreement pursuant to its article 22.

3
4 The invitation to ITLOS appears to be to impose through advisory proceedings
5 concerning the very general obligations in Part XII of UNCLOS a precise limit that
6 has thus far not been agreed in the forum dealing specifically with the topic. That is
7 both wrong as a matter of law, and would risk undermining rather than enhancing
8 cooperation on this vital issue in practice.

9
10 Like several other States,¹³⁹ the United Kingdom's position is that it is unnecessary
11 and would be inappropriate for the Tribunal to offer an interpretation of any provision
12 of the Framework Convention or the Paris Agreement.

13
14 The interpretation and implementation of those treaties involve highly technical
15 matters, the relevance and impact of which extend far beyond the law of the sea,
16 and on which the Tribunal has not received full submissions. They are also matters
17 that it is unnecessary for the Tribunal to opine on in order to answer the request
18 made to it, which focuses exclusively on UNCLOS obligations. It is sufficient for the
19 Tribunal to recognize the primary importance of those treaties and their relationship
20 with the relevant provisions in Part XII.

21
22 The United Kingdom does, however, invite the Tribunal to bear a number of
23 important points in mind concerning the climate change treaties:

24
25 The Framework Convention, the Paris Agreement, the annual decisions of the
26 Conferences of the Parties under their auspices and their multitude of implementing
27 decisions that exist already and that will be created in the future constitute a dynamic
28 system. That system is the product of regular negotiations resulting in careful
29 compromise between States that can shift over time. It is through that vital process
30 that States cooperate to reach consensus on the complex matters with which they
31 are confronted at any given time.

32
33 That careful compromise reflects a balance of competing objectives and interests
34 both within and between States, and, accordingly, the Tribunal is invited to have
35 careful regard to the scope of its judicial function, appreciating the delicate balances
36 inherent in and managed through the global treaty regime concerning climate
37 change.

38
39 The United Kingdom recognizes that some States, including but not only small island
40 States, are very understandably of the view that those treaties and processes are not
41 moving fast enough or doing enough in the light of the dangers they, in particular,
42 already face and will continue to face.

43
44 The United Kingdom agrees that comprehensive action needs to be taken quickly
45 through the Framework Convention and Paris Agreement processes, and other fora
46 dealing with greenhouse gas emissions, and that existing commitments need to be

¹³⁹ Brazil written statement, para. 20; Canada written statement, para. 61; Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 23 (lines 15-21) and p. 28 (lines 22-23) (Mohammed Algethami). See also France written statement, para. 18.

1 honoured and improved if the world is to keep within the Paris Agreement
2 temperature goal.

3

4 But this is all a matter of painstaking detailed negotiations within the forum dedicated
5 to them, and the implementation of what is agreed in that forum. ITLOS cannot
6 accept an invitation, no matter how understandable its motivation, effectively to
7 trump the treaties and the forum dedicated specifically to climate change on the
8 basis of the very general obligations found in UNCLOS.

9

10 What the Tribunal can and should recognize is that it is through States' collective
11 efforts to implement their commitments and enhance their ambition in the climate
12 change treaty framework that we will resolve the global challenge presented for the
13 marine environment by climate change and ocean acidification.

14

15 On that note, Mr President, I invite you to call upon Ms Sander to address the most
16 important aspect of these proceedings, which is the duty of cooperation. I thank you
17 for your attention.

18

19 **THE PRESIDENT:** Thank you, Mr Juratowitch, for your statement. I now invite
20 Ms Sander to make her statement. You have the floor, Madam.

21

22 **MS SANDER:** Mr President, members of the Tribunal, good morning. It is an honour
23 to appear before you.

24

25 Before diving into the specifics of the duty of cooperation under Part XII, I consider a
26 broader question: why is the United Kingdom focusing on this duty? In short:
27 because of its importance to Part XII of UNCLOS and because of its importance to
28 the specific context of this case, as reflected in its prominence in the submissions in
29 these proceedings.¹⁴⁰

30

31 It is well-trodden ground that in many respects UNCLOS is a framework convention
32 that, at various junctures, provides for the development of more detailed regulation
33 and guidance by States. To ensure the effectiveness of many of its terms, States
34 Parties must cooperate to establish the necessary legal rules and practices on
35 specific issues, and Part XII is no exception to this.

36

37 Of course, there are certain specific individual obligations on States set out in
38 Part XII,¹⁴¹ but the United Kingdom agrees with COSIS that cooperation is a "core

¹⁴⁰ See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 9 (line 10) – p. 14 (line 14) (Blake); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 4 (lines 1-6) (Donaghue); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 25 (lines 18-22) (Mohammed Algethami); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 2 (lines 6-9) (Herrera); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 12 (lines 11-21) (Paparinskis); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 28 (lines 12-17) (Sands); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 7 (lines 40-44) - p. 8 (lines 1-16) (Hallum); China Oral Submissions, ITLOS/PV.23/C31/10, p. 26 (lines 10-21) (Ma); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 32 (lines 22-42) (Jalloh); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (lines 13-25) (Yee); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 22 (lines 28-32) (Bouquet); African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 15 (lines 39-47) - p. 16 (lines 1-2) (Raju).

¹⁴¹ See COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 13 (lines 34-40) (Blake).

1 normative thread”,¹⁴² and with the African Union that it is a “cornerstone principle”.¹⁴³
2 Indeed, numerous references have been made in these proceedings to the
3 Tribunal’s description in *Mox Plant* of the duty as “a fundamental principle”.¹⁴⁴
4
5 But it is the particular significance of the duty to cooperate under UNCLOS in the
6 specific context of this case – and its critical role in realizing the obligations under
7 articles 192 and 194(1) – that the Tribunal is invited to expressly recognize and
8 elucidate.
9
10 As Mr Juratowitch foreshadowed, cooperation leading to effective collective action is
11 key to addressing the acute challenges of climate change impacts on the marine
12 environment. That is a view reflected in the submissions of Argentina,¹⁴⁵ Australia,¹⁴⁶
13 Brazil,¹⁴⁷ Canada,¹⁴⁸ Chile,¹⁴⁹ Comoros,¹⁵⁰ Djibouti,¹⁵¹ the European Union,¹⁵²
14 Guatemala,¹⁵³ India,¹⁵⁴ Mauritius,¹⁵⁵ New Zealand,¹⁵⁶ Portugal,¹⁵⁷ Sierra Leone,¹⁵⁸
15 Singapore,¹⁵⁹ and Timor-Leste,¹⁶⁰ as well as COSIS¹⁶¹ and the African Union.¹⁶² The
16 United Kingdom adds its voice to that chorus and considers it important to do so.
17

¹⁴² COSIS written statement, para. 316.

¹⁴³ African Union written statement, para. 263; Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 12 (lines 26-29) (Connolly).

¹⁴⁴ *MOX Plant (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 82 cited as follows: COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 14 (lines 10-12) (Blake); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 14 (lines 35-38) (Parlett); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 2 (lines 6-9) (Herrera); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 8 (lines 5-8) (Hallum); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 28 (lines 15-17) (Sands); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 25 (lines 20-22) (Mohammed Algethami); Djibouti Oral Submissions, ITLOS/PV.23/C31/7, p. 31 (lines 8-9) (Yusuf); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 12 (lines 11-13, fn 18) (Paparinskis); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 19 (lines 40-43, fn 76) (Hwang); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 33 (lines 7-11) (Jalloh); European Union, ITLOS/PV.23/C31/14, p. 34 (lines 6-7) (Bouquet); Mozambique Oral Submissions, ITLOS/PV.23/C31/11 p. 19 (lines 33-35) (Loewenstein); Philippines Oral Submissions, ITLOS/PV.23/C31/12, p. 14 (lines 32-35) (Sorreta).

¹⁴⁵ Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 8 (lines 31-33) (Herrera).

¹⁴⁶ Australia written statement, para. 59; Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 15 (lines 34-37) (Parlett).

¹⁴⁷ Brazil written statement, para. 14.

¹⁴⁸ Canada written statement, para. 10.

¹⁴⁹ Chile written statement, para. 81.

¹⁵⁰ Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 12 (lines 26-29) (Connolly).

¹⁵¹ Djibouti Oral Submissions, ITLOS/PV.23/C31/7, p. 31 (lines 15-20) (Yusuf).

¹⁵² European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 22 (lines 28-32) (Bouquet).

¹⁵³ Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 12 (lines 38-42) (Neumann).

¹⁵⁴ India Oral Submissions, ITLOS/PV.23/C31/8, p. 20 (lines 9-10) (Rangrejji).

¹⁵⁵ Mauritius written statement, para. 76.

¹⁵⁶ New Zealand written statement, para. 59.

¹⁵⁷ Portugal Oral Submissions, ITLOS/PV.23/C31/7, p. 18 (lines 33-36) (Teles).

¹⁵⁸ Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 32 (lines 22-24) (Jalloh).

¹⁵⁹ Singapore written statement, para. 42.

¹⁶⁰ Timor-Leste Oral Submissions, ITLOS/PV.23/C31/14, p. 20 (lines 20-23) (Sthoeger).

¹⁶¹ COSIS Oral Submissions, ITLOS/PV.23/C31/4, pp. 9 (lines 15-22) (Blake).

¹⁶² African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 15 (lines 43-44) (Raju).

1 However, to adopt the words of Judge Paik from his Separate Opinion in the *SRFC*
2 advisory proceedings, “simply emphasizing the obligation of cooperation ... would
3 hardly be sufficient”.¹⁶³
4

5 Rather, the question for ITLOS is: what is the specific content of the obligation of
6 cooperation in the present context? It is the United Kingdom’s response to that
7 question to which I now turn. Happily, there is a large degree of consensus among
8 participants in these proceedings in this regard, and so my task primarily involves
9 identifying points of common ground.
10

11 The key relevant obligation in Part XII is article 197, addressing the formulation and
12 elaboration of international rules, standards, and recommended practices and
13 procedures. The Tribunal will be familiar with its plain terms, and so I highlight three
14 key elements of that provision that it is understood are not controversial.
15

16 First, flexibility as to format: whilst cooperation must be global, and can also be
17 regional as appropriate, cooperation may be bilateral or multilateral –
18

19 **THE PRESIDENT:** I am sorry to interrupt. There seems to be no interpretation at the
20 moment, so can you bear with us for a second and see if we can resolve that.
21

22 **MS SANDER:** Of course, Mr President. I am in your hands.
23

24 **THE PRESIDENT:** Thank you very much. Thank you.
25

26 (Pause)
27

28 **THE PRESIDENT:** Thank you, Ms Sander, please proceed.
29

30 **MS SANDER:** If I may backtrack just to locate it in my submissions?
31

32 **THE PRESIDENT:** Yes.
33

34 **MS SANDER:** Article 197, I am highlighting three key elements of that provision that
35 is understood and not controversial. First, flexibility as to format: whilst cooperation
36 must be global and can also be regional as appropriate, cooperation may be bilateral
37 or multilateral.
38

39 Second, flexibility as to forum: multilateral cooperation may take place through
40 competent international organizations, be they established under the auspices of
41 UNCLOS, or outside of it.
42

43 Third, flexibility as to objective, to a degree. The purpose of international cooperation
44 is law and policy-making. Its result may have the status of a legally binding treaty, or
45 “soft law instruments” or a recommended practice or procedure, but those laws and
46 policies must be consistent with UNCLOS and have the protection and preservation
47 of the marine environment as their aim.
48

¹⁶³ Separate Opinion of Judge Paik in the *SRFC* Advisory Opinion, p. 102, para. 34.

1 Beyond these textual features, the duty of international cooperation in article 197 has
2 three facets:

3
4 First, it is an obligation of conduct, rather than result. Article 197, on its plain terms,
5 does not oblige States Parties to reach an agreed position, and it is recalled that
6 COSIS emphasized the due diligence nature of cooperative action under Part XII.¹⁶⁴
7

8 Second, it is a continuing obligation, as others have noted.¹⁶⁵ Depending on the
9 circumstances, article 197 may require an ongoing dialogue¹⁶⁶ or may require a
10 subject to be reassessed or revisited at a later date.

11
12 Third, it is an obligation which requires States Parties to engage with one another in
13 good faith.¹⁶⁷ As the ICJ has recognized, this reflects the “trust and confidence
14 inherent in international co-operation”.¹⁶⁸ The ICJ’s observation that parties must
15 engage “with a genuine intention to achieve a positive result”¹⁶⁹ is equally apt in the
16 context of cooperation under article 197.

17
18 Further, the United Kingdom considers that, consistent with the position set out by
19 New Zealand in its written statement¹⁷⁰ and indicated by Sierra Leone in its oral
20 submissions,¹⁷¹ what States are required to do by the duty to cooperate – to engage
21 in good faith – should be assessed in a proportional manner relative to the degree of
22 risk at issue. This is consistent with the observation in the *Activities in the Area*
23 *Advisory Opinion* that “the standard of due diligence has to be more severe for riskier
24 activities”.¹⁷²
25

26 Of course, the content of article 197 informs and is informed by its surrounding
27 provisions. Those provisions have been categorized in different ways during these
28 proceedings.¹⁷³ I will address those provisions in two categories: those relating to
29 law and policy-making; and those going beyond law and policy-making.

30
31 Turning to the first category, the general obligation in article 197 addressing law and
32 policy-making is reinforced by three further provisions that apply in this context:

33
34 First, article 212(3) requires States Parties to endeavour to establish “global and
35 regional rules, standards and recommended practices and procedures to prevent,

¹⁶⁴ COSIS written statement, paras. 319-320 and 327; cf International Union for the Conservation of Nature Oral Submissions, ITLOS/PV.23/C31/16, p. 35 (lines 14-17) (Payne).

¹⁶⁵ New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 38) (Skerten); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 12 (line 25) (Yee).

¹⁶⁶ New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p.12 (lines 1-3) (Skerten).

¹⁶⁷ E.g.: COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 9 (line 42-43) (Blake); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 41) - p.12 (lines 1-3) (Skerten); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (line 15) (Yee).

¹⁶⁸ *Pulp Mills* para. 145, citing *Nuclear Tests Case, Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49.

¹⁶⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, para. 87.

¹⁷⁰ New Zealand written statement, para. 62.

¹⁷¹ Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p.32 (lines 22-24) (“The gravity of the effects of climate change justifies the highest levels of cooperation among all”).

¹⁷² *Activities in the Area, Advisory Opinion*, para. 117.

¹⁷³ E.g., COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 10 (lines 1-4) (Blake).

1 reduce and control” pollution from or through the atmosphere, and article 207(4)
2 echoes that wording.

3
4 Next, as Mr Juratowitch mentioned, article 194(1) obliges States Parties to cooperate
5 in two ways. It requires measures to be taken “jointly” where “appropriate”, thus
6 contemplating individual and joint measures being taken concurrently. Article 194(1)
7 also obliges States to “endeavour to harmonize their policies” relating to those
8 measures, with article 207(3) echoing this language.

9
10 Finally, article 201 specifically focuses on the development of scientific criteria
11 relevant to the global and regional legal frameworks developed pursuant to
12 articles 197 and 212(3).

13
14 I turn to the second category of obligations going beyond law and policy-making, and
15 it is here perhaps that one gets a bit closer to answering the plea to pin down
16 specifically the content of the cooperation duty. These obligations also serve as
17 useful concrete examples of how best available science is relevant to informing
18 aspects of cooperation under UNCLOS.¹⁷⁴

19
20 Most relevantly, States Parties are obliged to cooperate on the following:

21
22 the undertaking of scientific research and exchange of information and data (I refer
23 to article 200);

24
25 the provision of scientific and technical assistance to developing States (I refer to
26 articles 202 and 203);

27
28 the monitoring of the risks or effects of pollution, including the effects of any activities
29 which they permit or engage in (I refer to both paragraphs in article 204);

30
31 finally, the communication of reports pursuant to that monitoring as well as to after
32 the assessment of planned activities under a State’s jurisdiction or control where a
33 State has reasonable grounds to believe that those activities may cause substantial
34 pollution of, or significant and harmful changes to, the marine environment (I refer to
35 articles 205 and 206).

36
37 I pause here with two observations on article 206.

38
39 First, the United Kingdom agrees that the existence of “reasonable grounds” for the
40 purposes of article 206 provides for an objective assessment of State conduct.¹⁷⁵

41
42 Second, the United Kingdom highlights that there is a threshold for the application of
43 article 206 of “substantial pollution of” or “significant and harmful changes to” the
44 marine environment.¹⁷⁶ That threshold is clearly not to be equated to a threshold of

¹⁷⁴ United Kingdom written statement, para. 89(c); COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 33 (lines 26-29) (Amirfar).

¹⁷⁵ Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 37 lines 26-27 (Wordsworth).

¹⁷⁶ Cf Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 27 (lines 41-44) - p. 28 (lines 6-9) (Sands).

1 “more than minor or transitory”, as was indicated in certain submissions,¹⁷⁷ and that
2 distinction is reflected in the plain terms of article 30 of the BBNJ Agreement.¹⁷⁸

3
4 Mapping the various provisions to the present context, and taking into account the
5 submissions made over the last two weeks, the United Kingdom’s position is that
6 States Parties to UNCLOS have a continuing obligation to engage with one another
7 in good faith in at least five different ways.

8
9 First, States Parties must cooperate by undertaking scientific research on climate
10 change and ocean acidification. States Parties’ good faith participation in the IPCC
11 process is key in this regard.

12
13 Second, States Parties must cooperate in monitoring the risks or effects of climate
14 change and ocean acidification on the marine environment, including through the
15 IPCC. They must also monitor the effects of activities that they permit or engage in.
16 The objective of this surveillance links to the assessment obligation under
17 article 206.

18
19 Third, States Parties must cooperate in the exchange of reports, information and
20 data produced pursuant to articles 200 and 205, with this aspect of transparency of
21 critical importance to the effective functioning of the protections in Part XII in the
22 present context.

23
24 Fourth, States Parties must cooperate by providing technical, scientific and other
25 assistance to developing States, either bilaterally, or through international
26 organizations, such as the Conference of the Parties of the UNFCCC. The United
27 Kingdom recognizes the particularly vulnerable position of small island States, as
28 reflected in its Small Island Developing States Strategy.¹⁷⁹ The United Kingdom has
29 noted the expert report of Dr Maharaj highlighting that States require assistance in
30 building capacity to address chronic data gaps.¹⁸⁰ As recognized by COSIS,
31 “different forms of international assistance, financial and non-financial” is required
32 “as is appropriate in each case”.¹⁸¹

33
34 Finally, States Parties must cooperate by participating in discussions with three
35 aims:

36
37 (a) to formulate and elaborate rules, standards and recommended practices and
38 procedures consistent with UNCLOS to protect and preserve the marine
39 environment from the threat of climate change and ocean acidification;

40

¹⁷⁷ Cf International Union for the Conservation of Nature written statement, paras. 153 and 161; Belize written statement, para. 80f.

¹⁷⁸ Agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

¹⁷⁹ United Kingdom written statement, para. 5.

¹⁸⁰ COSIS Annex 5, paras. 8-12; Sierra Leone written statement, para. 88; Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 22 (lines 43-45) (Sorreta).

¹⁸¹ COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 13 (lines 11-15) (Blake).

1 (b) to establish appropriate scientific criteria for the formation and elaboration of the
2 subset of those instruments specifically addressing the prevention, reduction and
3 control of climate change and ocean acidification, as forms of pollution;

4
5 (c) to devise specific and effective measures to prevent further harm to the marine
6 environment and to mitigate existing harm where possible.

7
8 The United Kingdom makes two further observations with respect to those
9 discussions. The first observation is that it recognizes, as have other States,¹⁸² that
10 the principal relevant fora for those discussions are those established pursuant to the
11 UNFCCC framework and also specialist bodies that address sector or pollutant-
12 specific emissions, such as the IMO, ICAO and the Montreal Protocol's Meeting of
13 the Parties.

14
15 In its written statement, the United Kingdom made express reference to the relevant
16 COP under each of the UNFCCC, the Kyoto Protocol and the Paris Agreement,
17 which operate as the supreme decision-making bodies of those treaties. The United
18 Kingdom takes this opportunity to confirm two points of agreement.

19
20 The first concerns Singapore's written statement that highlighted, as regards the
21 establishment of appropriate scientific criteria, the discussions of the Subsidiary
22 Body for Scientific and Technological Advice (the SBSTA).¹⁸³ That body, one of just
23 two permanent subsidiary bodies established under the UNFCCC, supports the work
24 of the relevant COP through the provision of timely information and advice in
25 scientific and technological matters. The SBSTA is, of course, informed by the work
26 of the IPCC, with that body, or the COP more broadly, sometimes requesting specific
27 scientific information, analysis or reporting from the IPCC.

28
29 This illustrates an important reality that, central to discussions under the auspices of
30 the UNFCCC is scientific and technical expertise; it is not just lawyers and diplomats
31 gathered around the table but is a process underpinned by serious expert input and
32 dialogue.

33
34 The second point of agreement is with the position set out by the EU and Norway
35 that the Ocean and Climate Change Dialogue is a relevant forum in the present
36 context.¹⁸⁴ Mandated at COP25 in 2019, this is an example of how, pursuant to the
37 UNFCCC framework, discussions are held as to effective measures to prevent and
38 mitigate harm to the *marine environment* specifically. The SBSTA Chair has also
39 been mandated to strengthen ocean-based action.¹⁸⁵ These serve as examples of
40 the "augmenting" of the existing UNFCCC framework with respect to the marine
41 environment, as urged by the African Union.¹⁸⁶

¹⁸² Australia written statement, para. 61; Canada written statement, paras. 48-52. See also Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (line 21) (Yee).

¹⁸³ Singapore written statement, para. 48.

¹⁸⁴ EU written statement, para. 63; Norway written statement, para. 2.4.

¹⁸⁵ Decision 1/CP.26 (Glasgow Climate Pact), para. 61.

¹⁸⁶ African Union written statement, para. 267; Comoros Oral Submissions, ITLOS/PV.23/C31/16 p. 12 (lines 36-38) (Connolly).

1 Furthermore, the United Kingdom highlights that in addition to COP, there is a range
2 of bodies and events which are regularly convened, and which serve as
3 complementary fora for cooperation on climate change. Examples include the
4 Petersberg Climate Dialogue, the Ministerial on Climate Action and the Climate
5 Ambition Summit. Looking ahead, the United Kingdom agrees that there will be also
6 cooperative work upon the BBNJ Agreement coming into force.¹⁸⁷

7
8 The United Kingdom's second observation with respect to discussions is to
9 emphasize that States Parties' participation in any discussions must be
10 meaningful,¹⁸⁸ and that this is an aspect that is a serious one.¹⁸⁹ As the Tribunal
11 recognized in a different context in the *SRFC* advisory proceedings, this means
12 "substantial effort should be made by all States concerned, with a view to adopting
13 effective measures".¹⁹⁰ This is a requirement of obvious direct and immediate
14 significance in the present context.

15
16 The United Kingdom acknowledges the immense challenges with respect to the
17 progress of UNFCCC processes. But as recognized by so many in these
18 proceedings, key to addressing climate change impacts on the marine environment
19 is enhancing cooperation, not eschewing it. The United Kingdom agrees with France
20 and other States that the BBNJ Agreement is a timely example of the value of
21 international cooperation in oceans governance.¹⁹¹

22
23 In conclusion on the matter of international cooperation, the United Kingdom invites
24 the Tribunal: first, to confirm the paramount importance of that duty in the context of
25 climate change and ocean acidification; and, second, to give it appropriately precise
26 and practical content in the present context by recognizing the five incidents of the
27 duty I have just outlined.

28
29 Mr President, members of the Tribunal, the United Kingdom reiterates its recognition
30 of the severe impact of anthropogenic climate change and ocean acidification on the
31 marine environment, and that UNCLOS obliges States Parties to take certain
32 affirmative steps to protect and preserve the marine environment from that impact.¹⁹²

33
34 The United Kingdom has sought to assist the Tribunal in its task of addressing the
35 broad questions presented by COSIS by identifying the relevant specific obligations
36 under Part XII and elaborating on their precise content, in particular teasing out the
37 key contested issues and, significantly, the substantial common ground that has
38 emerged over the past two weeks.

39
40 Mr President, members of the Tribunal, that brings the submissions of the United
41 Kingdom to a close. I thank you for your attention.

¹⁸⁷ Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (lines 21-23) (Yee).

¹⁸⁸ New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 41) – p.12 (lines 1-3) (Skerten).

¹⁸⁹ United Kingdom written statement, para. 84.

¹⁹⁰ *SRFC* Advisory Opinion, para. 210; also cited Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p.33 (lines 13-15).

¹⁹¹ Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 1 (lines 42-45) (Clarke); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 13 (lines 1-9) (Skerten); International Union for the Conservation of Nature Oral Submissions, ITLOS/PV.23/C31/16, p 35 (lines 17-20) (Payne); European Union Oral Submissions, ITLOS/PV.23/C31/14 p. 38 (lines. 22-25) (Jalloh).

¹⁹² United Kingdom written statement, paras. 4 and 8.

1 **THE PRESIDENT:** Thank you, Ms Sander, for your statement. You may step down.

2

3 This concludes the oral presentations of today and also brings us to the end of the
4 oral proceedings in Case No. 31.

5

6 I wish to seize this opportunity to thank all delegations who have addressed the
7 Tribunal for the high quality of their statements made in the course of these 10 days.
8 In addition, the Tribunal would also like to convey its appreciation to all delegations
9 for the great professionalism and courtesy shown during the hearing. I also thank
10 the 34 States Parties and 9 organizations participating in the written proceedings.

11

12 The Registrar will now address the questions in relation to transcripts.

13

14 **THE REGISTRAR:** Mr President, pursuant to article 86(4) of the Rules of the
15 Tribunal, representatives who have participated in the hearing may, under the
16 supervision of the Tribunal, make corrections to the transcript of their oral
17 statements, but in no case may such correction affect the meaning and scope
18 thereof. The corrections relate solely to the statements in the original language used
19 during the hearing. The corrections should be submitted to the Registry as soon as
20 possible and, in any event, by Wednesday, 4 October 2023 at 5 p.m. Hamburg time
21 at the latest.

22

23 Thank you, Mr President.

24

25 **THE PRESIDENT:** Thank you, Madam Registrar. The Tribunal will now withdraw to
26 deliberate on the case. The advisory opinion will be read on a date to be notified to
27 all participants.

28

29 In accordance with the usual practice, I request the participants to kindly remain at
30 the disposal of the Tribunal in order to provide any further assistance and information
31 that it may need in its deliberation prior to the delivery of its advisory opinion.

32

33 I thank you in advance. The hearing is now closed.

34

35 **THE CLERK OF THE TRIBUNAL:** All rise.

36

37

(The hearing closed)