

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
(CASE NO. 31)

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

WRITTEN STATEMENT OF AUSTRALIA

16 JUNE 2023

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CHAPTER 1

INTRODUCTION

I. The request for an advisory opinion

1. On 12 December 2022, the International Tribunal for the Law of the Sea (“the Tribunal”) received a request from the Commission of Small Island States on Climate Change and International Law (“COSIS”) to render an advisory opinion on the following questions:

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

- (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
- (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

2. On 16 December 2022, the Tribunal invited State Parties to the United Nations Convention on the Law of the Sea (“UNCLOS”, or “the Convention”) ¹ and certain intergovernmental organisations to present written statements on the questions submitted to the Tribunal for an advisory opinion and fixed 16 May 2023 as the date by which written statements may be presented to the Tribunal.² On 15 February 2023, the Tribunal extended the timeframe for presentation of written statements to 16 June 2023.³

3. Australia, as a State Party to UNCLOS, wishes to avail itself of the opportunity afforded by the Tribunal to make a written statement on the questions submitted to the Tribunal for an advisory opinion.

4. This statement is submitted without prejudice to Australia’s position on the advisory jurisdiction of the Tribunal⁴ and on the Tribunal’s discretion, in appropriate cases, to decline to render an advisory opinion.

¹ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (“UNCLOS”).

² Order 2022/4.

³ Order 2023/1.

⁴ See “Written Statement of Australia”, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* [2013] International Tribunal for the Law of the Sea (ITLOS) Written Proceedings First Round 281, [6]-[39].

II. Preliminary remarks

5. For over 40 years, UNCLOS has provided a comprehensive legal framework within which all activities in the oceans and seas must be carried out. It has proven to be an effective and comprehensive set of rules for maritime activities, even as new challenges and technologies have emerged. The competent international organisations under UNCLOS have played a critical role in ensuring the successful application of these rules in practice.

6. Australia recognises the importance of taking urgent action to address climate change. It understands vulnerability to the impacts of climate change, not least because parts of Australia are very vulnerable to extreme bushfires and floods. Australia is resolutely committed to achieving the goals of the Paris Agreement,⁵ including keeping within reach the goal of limiting global warming to 1.5°C. Consistently with that commitment, Australia is taking ambitious action to reduce emissions and decarbonize its economy, improve the resilience of our communities and natural environments to the impacts of climate change and prepare them to adapt to its impacts, and cooperate internationally to accelerate climate action.

- (a) In June 2022, Australia updated its Paris Agreement Nationally Determined Contribution to strengthen its emission reduction targets for 2030 to 43 per cent below 2005 levels, and to reaffirm its net zero by 2050 target. This is supported by a suite of new policies across the economy.
- (b) In September 2022, the Australian Government passed the Climate Change Act 2022, enshrining these targets in legislation and providing policy and investment certainty.

7. Australia is also taking concerted action to adapt to climate impacts and to build resilience and disaster readiness in its communities, such as by undertaking a National Climate Risk Assessment and developing a National Adaptation Plan, to better understand the risks and impacts to Australia from climate change and to adapt to those risks.

8. To enhance the health and resilience of its ocean ecosystems, Australia has expanded management of its Marine Protected Area networks from 37 per cent to 45 per cent of its waters, and has committed to a total investment of almost AUD \$1,200 million by 2030 in the Great Barrier Reef protection program.

9. Internationally, Australia is working to support an orderly transition to net-zero by 2050 and to unlock green trade and investment opportunities in its region, while ensuring energy security, reliability and access. Australia is supporting global efforts to enhance adaptation and resilience, particularly in the most climate vulnerable countries across the Indo-Pacific region. This includes supporting countries to reduce the risk of, prepare for, and respond to climate-related disasters, extreme weather events and slow onset climate events.

10. Australia is committed to meeting its climate finance commitments, as communicated under the Paris Agreement, to increase climate resilience, mitigation and adaptation. Australia

⁵ Paris Agreement opened for signature 22 April 2016, 3156 UNTS (entered into force 4 November 2016) (“Paris Agreement”).

has doubled its climate finance commitment to two thousand million dollars (AU) (AUD \$2,000 million) over 2020-2025 and has committed at least seven hundred million dollars (AU) (AUD \$700 million) of this to support countries in the Pacific region to build climate resilience and transition their economies.

11. Australia is seeking outcomes which progress international cooperation and collaboration to avert, minimize and address loss and damage arising from the adverse impacts of climate change. Australia welcomed the decision at the United Nations Framework Convention on Climate Change (“UNFCCC”)⁶ Conference of Parties in 2022 (COP27) to establish new arrangements, including a fund, for assisting developing countries that are particularly vulnerable to the adverse effects of climate change.⁷ Australia is making an active contribution to this process through its membership of the UNFCCC’s Transitional Committee, which will provide recommendations at COP28 in November 2023 on operationalisation of the funding arrangements for loss and damage.

12. Australia acknowledges the longstanding leadership of small island States, in particular Pacific island States, on global responses to climate change. Australia recognises that the request by COSIS for the Tribunal to render an advisory opinion is a part of these leadership initiatives.

13. Australia understands that addressing climate change is central to the security and wellbeing of small island States, and recognises the importance of sustainably managing oceans and addressing biodiversity loss. For that reason:

- (a) Australia has committed to protecting and conserving 30 per cent of land and 30 per cent of oceans by 2030 (“30 by 30”) under the Kunming-Montreal Global Biodiversity Framework, and through its membership of the UK-led Global Ocean Alliance and the International Steering Committee of the High Ambition Coalition for Nature and People.
- (b) Australia is working with countries in the Indo-Pacific to address the issue of marine plastic pollution. It welcomed the adoption of the resolution at UN Environment Assembly 5.2 in 2022 to end plastic pollution through a new global legally binding agreement.
- (c) Australia leads several international partnerships relevant to the protection of the marine environment, including the International Partnership for Blue Carbon, and is a founding member of the International Coral Reef Initiative. It is also a member of the High Level Panel for a Sustainable Ocean Economy.

⁶ United Nations Framework Convention on Climate Change, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) (“UNFCCC”).

⁷ Sharm el-Sheikh Climate Change Conference, *Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, including a Focus on Addressing Loss and Damage*, UNFCCC Decision -/CP.27 -/CMA.4 (advance unedited version, 20 November 2022) [2] (“UNFCCC Decision: Funding Arrangements for Responding to Loss and Damage”).

14. Australia's submission of this statement reflects its ongoing commitment to addressing the grave challenges posed by climate change. The statement is intended to assist the Tribunal in its consideration of the questions posed by COSIS.

15. Australia's statement proceeds as follows:

- (a) Chapter 2 sets out the scope of the questions referred to the Tribunal.
- (b) Chapter 3 examines the specific obligations of State Parties to UNCLOS in respect of the protection and preservation of the marine environment, and the prevention, reduction and control of marine pollution, as they are relevant to the questions referred to the Tribunal. It also explains that State Parties will comply with those specific obligations by meeting the standards to which States have committed in the UNFCCC and the Paris Agreement.

CHAPTER 2

THE SCOPE OF THE QUESTIONS BEFORE THE TRIBUNAL

16. Should the Tribunal find that it has jurisdiction to give advisory opinions, that jurisdiction is confined to answering the specific questions upon which its opinion has been sought. The terms of those questions define the limits of the Tribunal's jurisdiction and competence. As the International Court of Justice has explained, a question referred for an advisory opinion can be departed from only in "exceptional circumstances": for example, where the question is not properly framed as a question of law.⁸ Conversely, where a question is specific and clearly formulated, there is no basis for answering any question other than the question posed.⁹

17. In this proceeding, the questions put to the Tribunal are clear and specific, and are addressed to "the specific obligations of State Parties to UNCLOS" in respect of protection and preservation of the marine environment. Those obligations arise principally and specifically under Part XII of UNCLOS, the relevant provisions of which are addressed in detail in Chapter 3 immediately below.

18. The questions put to the Tribunal do not involve issues of liability, responsibility, or dispute resolution. Nor do they invite the Tribunal to consider any legal consequences arising from the specific obligations of States. The questions posed may be contrasted, in this respect, to questions referring to the "extent" to which a "State... shall be held liable" for certain acts or omissions.¹⁰

19. Given the terms of the questions that have been put to the Tribunal, it has no jurisdiction to provide its opinion on issues of liability, responsibility, or dispute resolution. That follows simply because any advisory jurisdiction that the Tribunal may have plainly does not extend to answering questions that the Tribunal has not been asked.

⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 129 [135], referring to *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 18 [15]. See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 89 [35]; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 423 [50] ("*Kosovo Advisory Opinion*").

⁹ *Kosovo Advisory Opinion* (n 8) 423 [50]-[51].

¹⁰ See for example *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* Case No 21, 2 April 2015, ITLOS Reports 2015 6 [2] ("*SRFC*").

CHAPTER 3

THE OBLIGATIONS OF STATE PARTIES TO PROTECT AND PRESERVE THE MARINE ENVIRONMENT, AND TO PREVENT, REDUCE AND CONTROL POLLUTION OF THE MARINE ENVIRONMENT

20. This Chapter addresses the substance of the questions posed to the Tribunal. It first outlines the function and purpose of UNCLOS as a framework agreement, which allows for the development of the law of the sea over time through distinct international agreements, rules and standards (**Section I**). It then addresses the threshold question whether anthropogenic greenhouse gas emissions fall within the definition of “pollution of the marine environment” under Article 1(1)(4) of UNCLOS. It concludes such emissions are capable of falling within that definition (**Section II**). The submission then addresses the way in which Part XII intersects with the UNFCCC and the Paris Agreement (**Section III**). It then examines the substantive provisions of Part XII of UNCLOS concerning protection and preservation of the marine environment, starting with the general obligation under Article 192 (**Section IV**), before turning to the provisions which address measures to prevent, reduce and control pollution of the marine environment under Article 194, Section 5 (notably Articles 207 and 212), Section 6 (notably Articles 213 and 222) (**Section V**), and the obligation to cooperate under Article 197 (**Section VI**).

I. UNCLOS as a framework agreement

21. UNCLOS is a framework agreement, governing the rights and obligations of State Parties, and regulating interaction and cooperation among States in relation to the seas and oceans.

22. As a framework agreement, UNCLOS in many instances leaves the development of specific rules and standards to competent international organisations. In doing so, UNCLOS provides a basis for the law of the sea to develop over time without the need to amend the Convention itself. In this respect, UNCLOS has been referred to as the “constitution for the oceans”.¹¹ This has enabled UNCLOS to continue to be fit-for-purpose as distinct challenges have arisen over time, including in respect of protection and preservation of the marine environment.

23. A fundamental purpose of UNCLOS is the establishment of a legal order for the seas and oceans which would promote, among other things, the protection and preservation of the marine environment.¹² Part XII of UNCLOS, which is entitled “Protection and Preservation of the Marine Environment”, contains the provisions of UNCLOS most relevant to understanding State Parties’ obligations in respect of the marine environment. Accordingly, Australia’s

¹¹ Tommy T. B. Koh, “A Constitution for the Oceans” (Speech, Third United Nations Conference on the Law of the Sea, 11 December 1982) <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>.

¹² UNCLOS (n 1) preamble: “Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”.

statement focuses on the obligations contained within Part XII, although this is without prejudice to the interpretation of any other provisions of UNCLOS.

II. Anthropogenic greenhouse gas emissions as “pollution of the marine environment” under Article 1(1)(4) of UNCLOS

24. A threshold issue raised by the question before the Tribunal is whether anthropogenic greenhouse gas (“GHG”) emissions fall within the definition of “pollution of the marine environment” under Article 1(1)(4) of UNCLOS. This is relevant because Part XII of UNCLOS (including, in particular, Article 194(1)) imposes specific obligations on State Parties to prevent, reduce and control pollution of the marine environment.

25. The term “greenhouse gases” is not used or defined in UNCLOS, although it is defined in other international agreements, including the UNFCCC.¹³ It may readily be understood as referring to gases in the atmosphere, such as carbon dioxide (“CO₂”), methane and nitrous oxide, that can absorb infrared radiation, trapping heat in the atmosphere.¹⁴

26. The question before the Tribunal concerns a subset of GHG emissions, namely, anthropogenic GHG emissions. The ordinary meaning of “anthropogenic” is resulting from or produced by human activities.¹⁵ It follows that “anthropogenic emissions” may be understood as emissions of GHGs caused by human activities. These activities include the burning of fossil fuels, deforestation, land use and land-use changes, livestock production, fertilisation, waste management, and industrial processes.¹⁶ Observed increases in GHG concentrations since around 1750 are “unequivocally” caused by GHG emissions from human activities.¹⁷

27. Article 1(1)(4) of UNCLOS defines “pollution of the marine environment” as follows:

the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

¹³ UNFCCC (n 6) Article 1(5) defines “Greenhouse gases” as “those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation”.

¹⁴ Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6)* (2023) Annex I Glossary, 9 <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_Annex-I.pdf>.

¹⁵ *Ibid* Annex I, 4.

¹⁶ IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018) 543 <https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf> (“IPCC 2018 Report”).

¹⁷ IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)* (2023) Longer Report, 6 <https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf> (“IPCC 2023 Longer Report”).

28. GHG, including CO₂, are “substances” within the meaning of Article 1(1)(4). That follows because the word “substance” in this context relevantly means matter of a definite chemical composition, as a compound or element.¹⁸

29. Anthropogenic GHG emissions are a product of human activities. Substances such as CO₂ are introduced into the atmosphere, and may result in damage to the marine environment.¹⁹ Irrespective of whether the damage to the marine environment resulting from introduction of these substances is regarded as direct or indirect, it will fall within the definition in Article 1(1)(4) if it results or is likely to result in deleterious effects of the kind referred to in that provision.²⁰ “Deleterious”, in this context, means causing physical harm or damage to a person or thing; detrimental to life or health; harmful or noxious.²¹

30. In light of the scientific evidence of the harmful or deleterious effects that may result from anthropogenic GHG emissions on, *inter alia*, the marine environment,²² Australia concludes that anthropogenic GHG emissions are capable of constituting “pollution of the marine environment” within the meaning of Article 1(1)(4) of UNCLOS. It follows that those provisions of UNCLOS that concern measures to prevent, reduce and control pollution of the marine environment may be relevant in ascertaining State Parties’ obligations in respect of anthropogenic GHG emissions.

III. The UNFCCC and the Paris Agreement

31. Consistent with the character of UNCLOS as a framework convention, Australia submits that the obligations of State Parties, as described in the questions to the Tribunal and as provided for under Part XII of UNCLOS, will be satisfied if State Parties meet the obligations to which States have committed under the UNFCCC and the Paris Agreement.²³ That is because the UNFCCC and the Paris Agreement reflect the internationally accepted standard of conduct agreed by States to prevent, reduce and control GHG emissions in order to protect and preserve the environment, including the marine environment. In order to maintain coherence between the overarching framework in Part XII of UNCLOS, and the UNFCCC and the Paris Agreement, it is important that they be considered together and interpreted consistently.

32. The diffuse causes and impacts (both temporal and geographic) of GHG emissions means that their prevention, reduction and control necessarily require collective action.²⁴ The international community has elected to pursue this collective action through and under the

¹⁸ *Oxford English Dictionary* (online at 16 May 2023) “substance” (def 8c).

¹⁹ IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019) 58-67 <<https://ipcc.ch/srocc/>>.

²⁰ The list of deleterious effects in Article 1(1)(4) is non-exhaustive, as indicated by the use of the language “such deleterious effects as ...”.

²¹ *Oxford English Dictionary* (online at 16 May 2023) “deleterious” (def 1).

²² IPCC 2023 Longer Report (n 17) 11, 15, 42.

²³ Alan Boyle, “Litigating Climate Change under Part XII of the LOSC” (2019) 34 *International Journal of Marine and Coastal Law* 458, 468.

²⁴ See for example, Tim Stephens, “Warming Waters and Souring Seas: Climate Change and Ocean Acidification” in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds.), *The Oxford Handbook on the Law of the Sea* (Oxford University Press, 2015) 777; Nilufer Oral, “Ocean Acidification: Falling Between the Legal Cracks of UNCLOS and the UNFCCC?” (2018) 45(9) *Ecology Law Quarterly* 9.

auspices of the UNFCCC and the Paris Agreement. Those conventions are widely endorsed by the international community, with 198 State Parties and 195 State Parties respectively.²⁵

33. The ultimate objective of the UNFCCC, which is set out in Article 2, is the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.²⁶ The “climate system” is defined in Article 1(3) of the UNFCCC as meaning “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.” This broad definition, which makes specific reference to the hydrosphere, underscores that the marine environment is squarely within the “climate system” to which the UNFCCC is directed.

34. Further, pursuant to Article 2(1)(a) of the Paris Agreement, States have agreed to strengthen the global response to the threat of climate change, including by:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.²⁷

35. Provisions of the Paris Agreement support the reduction of national and collective emissions in order to achieve the long-term temperature goals set out in Article 2(1)(a). To this end, State Parties to the Paris Agreement aim to “reach global peaking of [GHG] emissions as soon as possible” and to “undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of [GHGs] in the second half of this century”.²⁸

36. Article 4(2) of the Paris Agreement requires that each State Party prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. It also requires State Parties to pursue domestic mitigation measures with the aim of achieving the objectives of such contributions. Further, Article 4(3) requires that each successive NDC reflect a State Party’s “highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”²⁹ The first global stocktake of collective progress under the Paris Agreement is due this year.³⁰ The outcome of that stocktake “shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support ... as well as in enhancing international cooperation for climate action.”³¹ The Paris Agreement further provides that developed country

²⁵ UNFCCC, *United Nations Treaty Collection* (Web Page, 1 June 2023) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en>. Paris Agreement, *United Nations Treaty Collection* (Web Page, 01 June 2023) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

²⁶ UNFCCC (n 6) Article 2.

²⁷ Paris Agreement (n 5) Article 2(1)(a).

²⁸ Ibid Article 4(1).

²⁹ Ibid Article 4(3).

³⁰ Ibid Article 14(2).

³¹ Ibid Article 14(3).

Parties shall provide financial resources to assist developing country Parties with respect to mitigation and adaptation efforts for existing obligations under the UNFCCC.³²

37. Effective implementation of the Paris Agreement is supported by “an enhanced transparency framework for action and support”.³³ The purpose of this framework is “to provide a clear understanding of climate change action in light of the objective of the [UNFCCC]”, including tracking progress towards achieving Parties’ individual NDCs, and Parties’ adaptation actions.³⁴ It also provides clarity on support provided and received by relevant individual Parties in the context of climate change actions under the Agreement, and a full overview (to the extent possible) of aggregate financial support provided.³⁵ Parties to the Paris Agreement are also required to provide information necessary for clarity, transparency and understanding when communicating their NDCs,³⁶ and to promote similar principles when accounting for anthropogenic emissions and removals corresponding to their NDCs.³⁷

38. Finally, through the UNFCCC and the Paris Agreement, States have recognised the need for measures to address the “adverse effects of climate change”³⁸ for “low-lying and other small island countries, countries with low-lying coastal [areas]... or areas liable to floods, drought and desertification”³⁹ that are “particularly vulnerable” to such effects.⁴⁰

39. In light of the detailed provisions summarized above, Australia submits that the UNFCCC and the Paris Agreement reflect the accepted standard of conduct to prevent, reduce and control damage by GHG emissions to the environment, and further that this standard accounts for States that are particularly vulnerable to the effects of those activities. Unlike Part XII of UNCLOS, which was not drafted with the threat posed by GHG emissions to the environment in mind,⁴¹ GHG emissions are the specific focus of the UNFCCC and the Paris Agreement. That being so, these two instruments reflect the specific standards and commitments which the international community, after careful consideration, has agreed in order to address the challenges posed by climate change. Those agreements are therefore properly seen as “an evolutionary element in defining the content of Articles 192, 194, 207 and 212 of [UNCLOS] in the same way that the London Dumping Convention and the MARPOL Convention also provide evolutionary content for Articles 210 and 211”.⁴²

³² Ibid Article 9(1).

³³ Ibid Articles 13(1) and 13(7)(a). Article 13(7)(a) requires all State Parties to regularly provide a national inventory report on anthropogenic GHG emissions by sources and removals.

³⁴ Ibid Article 13(5).

³⁵ Ibid Article 13(6).

³⁶ Ibid Article 4(8).

³⁷ Ibid Article 4(13).

³⁸ Note that “adverse effects of climate change” is defined under Article 1(1) of the UNFCCC to mean “...changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.”

³⁹ UNFCCC (n 6) preambular paragraph 18; Paris Agreement (n 5) preambular paragraph 5.

⁴⁰ UNFCCC (n 6) Article 3(2).

⁴¹ Stephens (n 24) 777.

⁴² Boyle (n 24) 480.

40. In these circumstances, Australia submits that the Tribunal should answer the questions it is asked by stating that the specific obligations of State Parties to UNCLOS with respect to GHG emissions are those that have been agreed in the UNFCCC and the Paris Agreement. The specific obligations in those treaties, which are directed to the particular case of anthropogenic GHG emissions, give content to the more general provisions of Part XII. For that reason, if States party to the UNFCCC and the Paris Agreement meet their commitments under those two treaties, they will also meet their obligations under Part XII that are the subject of the questions referred to the Tribunal.⁴³

41. Textually, the above conclusion is accommodated within the language of Part XII by recognizing that the UNFCCC and the Paris Agreement reflect the agreement of the international community as to the “necessary measures to prevent, reduce and control” GHG emissions that pollute the marine environment and “to harmonize their policies in this connection” (Article 194(1)) and that they also set out the “internationally agreed rules” that State Parties must take into account when they “adopt laws and regulations to prevent, reduce and control pollution of the marine environment” (Articles 207(1) and 212(1)).

IV. The general obligation to protect and preserve the marine environment under Article 192 of UNCLOS

42. Article 192 of UNCLOS, which is entitled “General obligation”, underpins the overarching legal framework established by Part XII for the protection of the marine environment.⁴⁴ It provides that “States have the obligation to protect and preserve the marine environment.”

43. Although cast in general terms, Article 192 imposes a positive obligation on State Parties to take active measures to protect and preserve the marine environment, as well as (by logical implication) a negative obligation not to degrade the marine environment.⁴⁵ The obligation to “protect” entails defending or guarding against future damage, while the obligation to “preserve” entails maintenance or improvement of the present quality and condition of the environment.⁴⁶

44. The content of the duty on State Parties that is imposed by Article 192 is informed by other provisions of Part XII of UNCLOS and by other applicable rules of international law.⁴⁷

⁴³ Ibid 471-472; Stephens (n 24) 783.

⁴⁴ See for example *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain) (Provisional Measures)* Order of 23 December 2010, ITLOS Reports 2008-2010 70 [76]; see also *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire) (Provisional Measures)* Order of 25 April 2015, ITLOS Reports 2015 160 [69].

⁴⁵ *South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China) (Award on Merit)* Permanent Court of Arbitration Case No 2013-19, 12 July 2016 373 [941] (“*South China Sea Arbitration*”). See also Detlef Czybulka, “Article 192 – General Obligation” in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (Bloomsbury Publishing, 2017) 1277, 1286 [24].

⁴⁶ *South China Sea Arbitration* (n 45) 373 [941]; Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982, Volume IV: A Commentary* (Martinus Nijhoff Publishers, 1991) 11.

⁴⁷ See for example *South China Sea Arbitration* (n 45) 373 [941]. See also Boyle (n 23) 464; Nordquist (n 42) 43, which provides: “It is clear from the Convention as a whole (and not merely from Part XII) that the obligation of article 192 and with it the right of Article 193 is always subject to the specific rights and duties laid down in the Convention.”

Numerous provisions of UNCLOS⁴⁸ recognise the desirability of States cooperating to develop rules and standards beyond those directly specified in the Convention, thereby emphasizing the nature of UNCLOS as a framework agreement.⁴⁹ Most relevantly for present purposes, Article 197 obliges States to cooperate to formulate and elaborate “international rules, standards and recommended practices and procedures ... for the protection and preservation of the marine environment”. This reflects the fact that the drafters of UNCLOS understood that the general obligation was to be given content by other, more detailed, provisions, rules and standards. Article 192 is “the binding element or organic link between the general treaty [UNCLOS] and [those] particular treaties or national measures dealing with individual aspects of marine pollution.”⁵⁰

V. Obligations to take measures to prevent, reduce and control pollution of the marine environment under Article 194 and Sections 2 to 7 of Part XII of UNCLOS

45. Article 194 of UNCLOS outlines the obligations of State Parties to take measures necessary to prevent, reduce and control pollution of the marine environment. These measures are then themselves elaborated in Sections 2 to 7 of Part XII of UNCLOS. Thus, Article 194 is intended to “link ... the two statements of general principle contained in articles 192 and 193 to the formal rules of law appearing in the subsequent articles of Part XII.”⁵¹ It anchors the obligation to protect and preserve the marine environment to more concrete requirements. More specifically, Article 194 is to be read together with, and given content by, the applicable provisions of Section 5 (addressing international rules and national legislation to prevent, reduce and control pollution of the marine environment) and Section 6 (on enforcement of laws and regulations adopted in accordance with Section 5).

46. It is clear from the text of Article 194 that it was not drafted with a view to addressing pollution in the nature of anthropogenic GHG emissions. Rather, Article 194 appears to have been formulated, at least in part, by reference to a conventional case of transboundary pollution. The causes and impacts (both temporal and geographic) of GHG emissions are, of course, more diffuse. Care must therefore be taken in transposing principles intended to apply to circumstances of environmental harm as they were understood at the time of drafting to the more complex situation of GHG emissions. That is particularly true in light of the UNFCCC and the Paris Agreement having set out the internationally agreed standards concerning GHG emissions, being standards that reflect what the international community has agreed is “necessary” to prevent, reduce and control damage to the environment from GHG emissions.⁵² The result, so far as the questions referred to the Tribunal are concerned, is that States can comply with their obligations under Article 194, and Sections 5 and 6 of Part XII, by implementing the measures required by the UNFCCC and the Paris Agreement.⁵³

⁴⁸ For example, UNCLOS (n 1) Articles 197, 207(4), 208(5), 210(4), 211(1), 212(3), 235(3) and 271.

⁴⁹ See Nordquist (n 46) 21.

⁵⁰ Nordquist (n 46) 37.

⁵¹ Nordquist (n 46) 53. See also *South China Sea Arbitration* (n 45) 373 [941] – 376 [944], describing the content of the general obligation in Article 192 as “further detailed in subsequent provisions of Part XII, including Article 194.”

⁵² Boyle (n 23) 466-467.

⁵³ *Ibid.*

47. Sections 5 and 6 of Part XII set out specific obligations in respect of the sources of pollution of the marine environment identified in Article 194(3). Depending on the specific factual circumstances, pollution of the marine environment from anthropogenic GHG emissions may constitute either pollution from land-based sources (in which case it is addressed in Articles 207 and 213) or pollution from or through the atmosphere (in which case it is addressed in Articles 212 and 222). Different views have been expressed as to the potential application of these provisions to the particular context of GHG emissions.⁵⁴ It is unsurprising that there is some ambiguity on this point, given that environmental impacts from GHG emissions were not considered when UNCLOS was drafted,⁵⁵ and taking into account the diffuse and complex causes of GHG emissions. Australia considers that GHG emissions may fall within either category, depending on the particular factual circumstances. For completeness, Australia has addressed both sets of provisions below, although as is apparent the obligations that they impose are very similar.

48. Articles 207(1) and 212(1) respectively establish duties to adopt laws and regulations at the national level to prevent, reduce and control pollution of the marine environment from land-based sources, or from or through the atmosphere. In doing so, States must “take into account” internationally agreed rules, standards and recommended practices and procedures. However, in contrast with Articles 208 to 211,⁵⁶ which provide that national laws and regulations “shall be no less effective than” or “at least have the same effect as” international rules and standards, the obligation imposed by Articles 207(1) and 212(1) is limited to one to “take into account” internationally agreed rules and standards.⁵⁷ That language permits State Parties to adopt national measures that derogate from international rules or standards concerning land based and atmospheric pollution of the marine environment without contravening Articles 207(1) and 212(1), provided that in doing so they take those rules or standards into account in good faith.⁵⁸ That said, however, if a State is independently bound by reason of being a party to a separate international agreement to abide by particular internationally agreed rules and standards, those obligations would be unaffected by the discretion accorded to States under Articles 207(1) and 212(1) of UNCLOS.

49. Separately from the obligation to adopt *national* laws and regulations that arises under Articles 207(1) and 212(1), Articles 207(4) and 212(3) require State Parties, acting especially through competent international organisations or diplomatic conference, to endeavour to establish *global and regional* rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere.

⁵⁴ See for example Frank Wacht, “Article 207 – Pollution from land-based sources” in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (Bloomsbury Publishing, 2017) 1378, 1383 [7] – [8], takes the view that Article 207 does not cover land-based pollution that is transmitted through the atmosphere, since this would be covered by Article 212. Boyle takes the view that the scope of Article 207 has expanded to include pollution from “point or diffuse inputs from all sources on land”; Boyle (n 23) 464.

⁵⁵ It is widely acknowledged that climate change was not in the mind of the drafters when UNCLOS was negotiated. See for example Boyle (n 23) 462.

⁵⁶ These provisions concern pollution from dumping, seabed activities and ships respectively.

⁵⁷ See Wacht (n 54) 1384 [9] and Nordquist (n 46) 127. The *Virginia Commentary* observes the phrase “taking into account internationally agreed” rules “is the weakest of the qualifications used to indicate the obligations of States in respect of internationally agreed measures”: Nordquist (n 46) 132.

⁵⁸ Wacht (n 54) 1384-1385 [9]. As to the good faith requirement, see UNCLOS (n 1) Article 300; Vienna Convention on the Law of Treaties, opened for signature 23 May 1968, 1155 UNTS 331 (entered into force 27 January 1980) Article 26 (“VCLT”).

50. Consistently with that obligation, States have agreed measures in the UNFCCC and the Paris Agreement that are particularly relevant to Articles 207 and 212. The UNFCCC and the Paris Agreement reflect the consensus of the vast majority of States (and State Parties to UNCLOS) as to the approach to be taken to respond to climate change. They establish standards to prevent, reduce and control pollution of the marine environment, including in respect of GHG emissions. For example, as noted in paragraph 33 above, Article 2 of the UNFCCC identifies the stabilization of GHG concentrations in the atmosphere at a level that would prevent “dangerous anthropogenic interference with the climate system” as the ultimate objective of the UNFCCC and any related legal instrument adopted by the Conference of the Parties.⁵⁹ Building upon the UNFCCC, the Paris Agreement requires State Parties to prepare, communicate and maintain a NDC to achieve the objective of the Paris Agreement to hold the increase in the global average temperature to below 2°C above pre-industrial levels and pursue best efforts to achieve 1.5°C above pre-industrial levels.⁶⁰ In pursuit of this long-term temperature goal, State Parties’ NDCs generally include mitigation measures to limit GHG emissions.⁶¹ NDCs represent the ongoing efforts of State Parties comprehensively to address climate change caused by anthropogenic GHG emissions.

51. The UNFCCC and the Paris Agreement, as the primary agreements entered into by States to address climate change, are internationally agreed rules and standards of the kind contemplated by Articles 207(4) and 212(3) of UNCLOS. It is these standards that States must “take into account” under Articles 207(1) and 212(1) of UNCLOS when adopting national laws and regulations to prevent, reduce and control marine pollution from GHG emissions.

52. To the extent that GHG emissions fall within Article 207 (but not Article 212, which contains no equivalent), State Parties are required to endeavour to harmonize their policies at the appropriate regional level (Article 207(3)).⁶² In the context of GHG emissions, which have global effects, Australia considers that the “appropriate regional level” is necessarily global, and that the UNFCCC and the Paris Agreement provide the appropriate mechanism.

53. Again to the extent that GHG emissions fall within Article 207 (but not Article 212), the laws, regulations, measure and practices that State Parties are required to adopt or take by the other paragraphs of Article 207 must be designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances into the marine environment (Article 207(5)). Two points are important as to the scope of Article 207(5). First, because it applies to laws or regulations referred to in Article 207(1), it applies only to such laws as States decide to adopt after “taking into account” international agreed rules and standards. Second, a range of factors will be relevant to what constitutes “the fullest extent possible” in particular circumstances.⁶³ In the context of GHG emissions, what is “possible” depends on the complex interplay of considerations that underpin the agreements reached in the UNFCCC and the Paris Agreement. For that reason, State Parties will comply with their obligations under Article 207(5) if they adopt laws and regulations, take other measures, and establish global and

⁵⁹ As noted in paragraph 33 above, UNFCCC (n 6) Article 1(3) provides that “climate system” means “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions”, and therefore encompasses the marine environment.

⁶⁰ Paris Agreement (n 5) Article 2(1)(a).

⁶¹ Ibid Article 4(2).

⁶² This entails a requirement for States to use its best efforts: see Wacht (n 54) 1386 [12].

⁶³ Wacht (n 54) 1390 [20].

regional rules, standards and recommended practices and procedures that are consistent with the UNFCCC and the Paris Agreement.

54. Section 6 of Part XII of UNCLOS addresses enforcement, including of laws and regulations adopted in accordance with Section 5. For obligations to prevent, reduce and control land-based and atmospheric pollution under Articles 207 and 212, the relevant enforcement provisions are contained in Articles 213 and 222. These provide that States shall enforce national laws and regulations adopted in accordance with Articles 207(1) and 212(1), and that they shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources (Article 213) and from or through the atmosphere (Article 222). Articles 213 and 222 preserve a degree of flexibility for State Parties by not prescribing the particular means or precise content for such enforcement. What legal, regulatory and other measures are necessary for enforcement ultimately depends on the obligation in question. In this respect, each State Party to UNCLOS must perform obligations assumed both under the Convention and other treaties in force and binding upon it, in good faith.⁶⁴ The specific obligations assumed by State Parties under other international agreements relevant to the protection of the marine environment should also be performed consistently with the general principles and objectives of UNCLOS.⁶⁵

55. Accordingly, Australia submits that the requirements of Articles 213 and 222 would be satisfied where States can show they have enforced their relevant national laws and regulations and adopted measures to enforce, in good faith, applicable international rules and standards. So far as the questions referred to the Tribunal are concerned, the relevant international rules and standards are the rules and standards agreed under the UNFCCC and the Paris Agreement, for the reasons set out above.

VI. Cooperation under Article 197 of UNCLOS

56. Article 197 of UNCLOS provides:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

57. The origin of this provision is the general duty of cooperation in respect of the environment, which has been recognised as a fundamental principle of international environmental law.⁶⁶ It reflects the central importance of cooperation in pursuit of shared

⁶⁴ UNCLOS (n 1) Article 300; VCLT (n 58) Article 26.

⁶⁵ UNCLOS (n 1) Article 237(2).

⁶⁶ For example, see *MOX Plant (Ireland v. United Kingdom) (Provisional Measures)* Order of 3 December 2001, ITLOS Reports 2001, 110 [82], in which the Tribunal stated that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.

environmental goals: in the case of Article 197, the protection and preservation of the marine environment.

58. Article 197 is an obligation of conduct, rather than an obligation of result. It requires genuine and meaningful efforts, in good faith.⁶⁷ However, it does not prescribe any particular forum or method for State Parties' cooperative efforts. State Parties can choose to cooperate directly (bilaterally or otherwise), or through competent international organisations.⁶⁸ The crux of the requirement is that cooperation should be directed to protection of the marine environment.

59. The obligation to cooperate is of particular importance for efforts to address anthropogenic GHG emissions. Given the diffuse causes and impacts (both temporal and geographic) of GHG emissions, only cooperation on a global scale can adequately address the shared challenges they present.

60. As already noted, under the auspices of the UNFCCC and the Paris Agreement, States are taking long-term, detailed and meaningful steps to address a range of issues associated with GHG emissions and climate change impacts. These cooperative efforts include the negotiation of rules, standards, practices and procedures to progress, amongst other goals:

- (a) climate change mitigation,⁶⁹
- (b) climate change adaptation,⁷⁰ and
- (c) climate technology development and transfer (which are utilized in pursuit of climate mitigation and climate adaptation).⁷¹

⁶⁷ See for example Neil Craik, "The Duty to Cooperate in International Environmental Law: Constraining State Discretion Through Due Respect" (2020) 30(1) *Yearbook of International Environmental Law*, 22, 24, who argues that "cooperation by its very nature does not dictate any particular outcome, but a purely procedural understanding of cooperation runs the risk of consultation becoming mere lip service". See also *SRFC* (n 10) 60 [210], noting: "The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary".

⁶⁸ There are a range of international organisations which have, to varying extents, a mandate for the protection and preservation of the environment (including, where relevant, the marine environment), including the International Maritime Organization, the International Civil Aviation Organization, United Nations Environment Programme and the Food and Agriculture Organization.

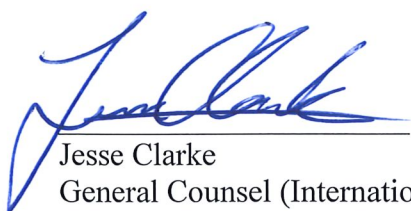
⁶⁹ See for example Paris Agreement (n 5) Article 4(2) as discussed above at paragraph 36.

⁷⁰ See for example Paris Agreement (n 5) Article 7, which established a global goal on adaptation, and the recently launched work programme to achieve the Global Goal on Adaptation, which was launched in 2021 at COP 26: Sharm el-Sheikh Climate Change Conference, *Glasgow-Sharm el-Sheikh work programme on the global goal on adaptation referred to in decision 7/CMA.3*, UNFCCC Draft Decision -/CMA.4 (19 November 2022); UNFCCC Decision: Funding Arrangements for Responding to Loss and Damage (n 7) [33] – [43].

⁷¹ See for example Paris Agreement (n 5) Article 10, and in particular Articles 10(1)-10(4) which outline the importance of technology development and transfer and establish a technology mechanism and technology framework to promote and facilitate technology development and transfer in pursuit of the goals of the Agreement. Through this framework and mechanism, guidance and recommendations are developed to enhance climate technology efforts and provide assistance to developing countries.

61. Australia considers that the steps taken through the UNFCCC and the Paris Agreement, as well as in other fora, meet States' obligations under Article 197 of UNCLOS in respect of anthropogenic GHG emissions. In addition, a range of cooperative efforts have taken place and are continuing to take place through other fora which address sector-specific GHG emissions,⁷² and other aspects of GHG emissions and climate change are also being addressed through other intergovernmental forums.⁷³

Respectfully submitted,



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⁷² A range of cooperative efforts (which are themselves consistent with Article 197) are occurring through other forums which address sector-specific GHG emissions, including the International Maritime Organization and the International Civil Aviation Organization.

⁷³ See for example discussions in the G20, including the G20 Bali Leaders' Declaration which resolved "to pursue efforts to limit the temperature increase to 1.5°C": G20, *G20 Bali Leaders' Declaration*, 15-16 November 2022, <https://www.g20.org/content/dam/gtwenty/gtwenty_new/about_g20/previous-summit-documents/2022-bali/G20%20Bali%20Leaders%27%20Declaration,%2015-16%20November%202022.pdf> 5 [13].