

International Tribunal for the Law of the Sea

**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)
Case No. 31**

Written Statement of the Republic of Korea

16 June 2023

I. Introduction

1. On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (the “Commission”) requested the International Tribunal for the Law of the Sea (the “Tribunal”) to give an advisory opinion on the following:

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. By its Order of 16 December 2022, the Tribunal invited the States Parties to the United Nations Convention on the Law of the Sea (the “Convention” or “UNCLOS”) to present written statements on the questions submitted to the Tribunal. The time-limit for the presentation of such written statements was extended by the Tribunal, in its Order dated 15 February 2023, from 16 May 2023 to 16 June 2023.
3. The present Written Statement is submitted for the purpose of assisting the Tribunal in examining the matter brought before it. It is the hope of the Republic of Korea that the Tribunal will be able to contribute to the endeavors of the international community to respond to climate change and its adverse effects on the marine environment. Climate change is one of the most critical challenges faced by humanity. It is also the single greatest threat to the livelihoods, security and wellbeing of the peoples of many Small Island States and low-lying States. The Republic of Korea appreciates the Commission’s efforts to promote a substantive discussion on this important matter by initiating these advisory proceedings.

4. The present Written Statement does not seek to put forward the Republic of Korea's views on every issue relating to climate change and the marine environment. Its purpose is rather to present some main elements that should be addressed in responding to the request. The Republic of Korea emphasizes that this Statement does not affect its position on questions of international law not specifically addressed herein.
5. The remainder of this Written Statement is organized as follows: Section II provides general observations concerning the protection and preservation of the marine environment in regard to the impacts of climate change; Section III addresses various specific obligations under the Convention in relation to climate change; and Section IV concludes with a summary of the Written Statement.

II. Part XII of the Convention and climate change: general observations

6. The Convention does not expressly refer to climate change. This can be explained by the fact that the issue had not yet drawn the attention of the international community at the time when the Convention was negotiated and adopted: the United Nations Framework Convention on Climate Change (UNFCCC), the first treaty to address climate change, was only adopted a decade later. For their part, the UNFCCC and subsequent climate change agreements have generally not paid particular attention to the marine environment. UNCLOS and the UN climate change regime have evolved independently. It is obvious, however, that the Convention is very relevant to climate change.
7. Indeed, scientific data demonstrates that climate change has a significant and far-reaching impact on the marine environment.¹ In particular, greenhouse gases emitted into the atmosphere cause ocean warming, ocean acidification, and sea-level rise. Considering the close interconnection between climate change and the marine environment, Part XII of the Convention, which is dedicated to the protection and preservation of the marine

¹ See generally Intergovernmental Panel on Climate Change, *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019).

environment, provides a framework within which to address the issue of climate change through obligations related to the protection and preservation of the oceans.

8. Part XII of the Convention imposes on the States Parties to the Convention various obligations relating to the protection and preservation of the marine environment. Central to these in the present context is the obligation laid down in Article 192 (entitled ‘General obligation’), “to protect and preserve the marine environment”. Article 194 expands on this general obligation by requiring that States Parties “shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities”. The measures referred to in Article 194 are to “deal with all sources of pollution of the marine environment” and include “those designed to minimize to the fullest possible extent” the release of “toxic, harmful or noxious substances ... from land-based sources, from or through the atmosphere or by dumping”.
9. Articles 192 and 194 are both located in Section 1 of Part XII of the Convention, entitled ‘General provisions’. The questions put to the Tribunal in the present proceedings follow closely the language of Article 194 and Article 192, respectively. This formulation of the questions may be intended to ensure the comprehensiveness of the reply to be given by the Tribunal. The Republic of Korea considers it convenient to respond herein to the two questions together so as to best assist the Tribunal.
10. The central provisions of Part XII, including Articles 192 and 194, entail an obligation of due diligence. This is an obligation of conduct “to deploy adequate means” and “to exercise best possible efforts, to do the utmost”, albeit not an obligation to ensure a certain result.² In the context of environmental protection, the due diligence obligation requires a State to “use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another

² *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 110; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 40, para. 129.

State”.³ It requires “not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement”.⁴ This obligation of due diligence has been regarded as “part of the corpus of international law relating to the environment”.⁵ Due diligence is moreover a “variable concept” which may “change over time”, including “in relation to the risks involved”.⁶ Therefore, the concept of due diligence is to be understood in light of the continuing development of international law and the relevant circumstances that rules of international law intend to address.

11. Part XII further provides for an obligation to cooperate, bilaterally or otherwise, which the Tribunal has repeatedly described as a “fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.⁷

12. Another relevant provision of UNCLOS in the present context is Article 1, paragraph 1(4), which sets out a definition of “pollution of the marine environment.” This definition is of critical importance in relation to Part XII. Pollution of the marine environment is defined as the “introduction by man, directly or indirectly, of substances or energy into the marine environment ... which results or is likely to result in ... deleterious effects”. The expression “introduction by man, directly or indirectly, of substances or energy” may not have been intended at the time of its drafting to include the natural absorption by the oceans of anthropogenic greenhouse gases emitted into the atmosphere. This text, however, is to be interpreted to encompass deleterious effects resulting from greenhouse gas emissions, having regard to its terms and context as well as the object and purpose of the Convention.

13. While express mention is made in the request of specific obligations under Part XII, relevant specific obligations may also be found in other Parts of UNCLOS, such as those

³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 56, para. 101.

⁴ *Ibid.*, at p. 79, para. 197; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *supra* note 2, at p. 41, para. 131.

⁵ *Supra* note 3 (citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 242, para. 29).

⁶ *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 1, at p. 43, para. 117.

⁷ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 110, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 25, para. 92; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *supra* note 2, at p. 43, para. 140.

dealing with deep seabed mining (Part XI).

III. Specific Obligations under the Convention in relation to Climate Change

The scope of the obligation concerning mitigation

14. As already noted, Article 192 of the Convention lays down a “general obligation” to protect and preserve the marine environment. Considering the wide range of natural impacts of climate change on the oceans, this provision can be understood as stipulating a general obligation to protect and preserve the marine environment from deleterious effects that result or are likely to result from climate change.
15. Article 192 and Article 194 together give rise to a due diligence obligation of the States Parties to the Convention to take all measures necessary to prevent, reduce and control pollution of the marine environment from climate change using the best practicable means at their disposal. This includes measures to reduce or mitigate greenhouse gas emissions. Articles 192 and 194 can be said to require the States Parties to exercise best possible efforts to mitigate greenhouse gas emissions.
16. In this context, it is the Paris Agreement that may at present constitute the most important measure within the meaning of Article 194 of the Convention since it serves as a critical international instrument in the fight against climate crisis. Although it may be difficult to say that Articles 192 and 194 of the Convention create in themselves a legal obligation to implement any specific international agreement, it is without doubt that the Paris Agreement provides one of the most important standards in examining the general obligations of due diligence under the Convention in relation to climate change.
17. It is also to be noted that Articles 237 (Obligations under other conventions on the protection and preservation of the marine environment) and 311 (Relation to other conventions and international agreements) may be relevant in assessing the scope of relevant obligations in this regard.

Legislation, enforcement, and national strategy or plan

18. The provisions of Sections 2 to 6 of Part XII are directly and indirectly related to the protection and preservation of the marine environment from the deleterious effects that result or are likely to result from climate change. They provide for certain specific obligations of conduct regarding mitigation or adaptation as appropriate.
19. Among the provisions that are the most directly relevant to the issue of climate change are those in Sections 5 and 6 dealing with the specific obligations to adopt and enforce laws and regulations to prevent, reduce and control pollution of the marine environment: Article 207 (pollution from land-based sources), Article 212 (pollution from or through the atmosphere), Article 213 (enforcement with respect to pollution from land-based sources), and Article 222 (enforcement with respect to pollution from or through the atmosphere).
20. Where climate change impacts are identified as pollution from land-based sources or pollution from or through the atmosphere within the meaning of Sections 5 and 6 of Part XII, the provisions just mentioned lay down specific obligations to legislate and enforce, taking into account “internationally agreed rules, standards and recommended practices and procedures”. Such “internationally agreed rules, standards and recommended practices and procedures” may well be found in the agreements forming the UN climate change regime, including the Paris Agreement, each laying down its own structure and process.
21. In assessing laws and regulations within the meaning of the relevant provisions of Sections 5 and 6, regard should be had to whether such laws and regulations effectively address the interconnection between climate change and the marine environment, taking into account the different circumstances of each State and region. For example, if a law regulating the marine environment were to serve as an effective basis to respond to impacts of climate change, it would need to clearly define greenhouse gases as a statutory pollutant by its own terms or by reference to other applicable laws or regulations. It may also be said that a comprehensive law designed to address climate change should encompass matters related to the marine environment. The law would also need to provide for specific means to implement reduction and adaptation obligations as well as the procedures to be followed by the State. Furthermore, as the marine environment is understood to include living

resources and marine life, and “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”,⁸ the adoption of laws and regulations dealing with the impacts of climate change on the marine ecosystem and living resources could also be necessary.

22. In addition to the legislation and enforcement obligations expressly provided for in Sections 5 and 6 of Part XII, it may be suggested that, as a specific obligation arising from the relevant provisions, a State Party to UNCLOS is required to manage, implement and monitor the overall efforts to protect and preserve the marine environment, including the prevention, reduction and control of marine pollution in relation to climate change, as an integral part of a national strategy or plan to address climate change. This obligation can be met by the adoption of various programmes or action plans, either in a single instrument or through a multitude of inter-related policy announcements, including those produced in the process of implementing obligations under the Paris Agreement, whether or not they are officially designated as a strategy or a plan. Ideally, there would be one integrated basic strategy for dealing with climate change encompassing the overall marine environment.

23. The protection and preservation of the marine environment needs to be considered in a wider context of greenhouse gas mitigation and adaptation to the climate crisis. A short-term or partial approach unconnected to a comprehensive response to climate change will not suffice. Therefore, in order to implement effectively obligations under the Convention to protect and preserve the marine environment in relation to climate change, it is necessary that a State put in place measures that by design are to be reviewed, renewed, reinforced, and improved, as part of a comprehensive strategy or plan. A strategy or plan of this sort may include a range of approaches including, for instance, promotion of awareness of climate change impacts on the marine environment, reinforcement of the potential of the oceans to act as a carbon sink, protection of marine ecology, and mitigation programs in the maritime and fisheries sectors. The strategy or plan should also be informed by the ongoing accumulation of scientific data and knowledge.

⁸ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 70; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, supra* note 2, at p. 61, para. 216.

Other relevant specific obligations under UNCLOS

24. This subsection addresses some, but by no means all, of the other relevant specific obligations under UNCLOS.
25. Central to Part XII of the Convention is the obligation in Article 197 to cooperate for the protection and preservation of the marine environment on a global or regional basis, as appropriate, “in formulating and elaborating international rules, standards and recommended practices and procedures consistent with [the] Convention.” This points to the importance of negotiation among States. In the context of protecting and preserving the marine environment from deleterious effects that result or are likely to result from climate change, the Paris Agreement currently provides such rules and standards for the parties thereto. It can be suggested that the States Parties to the Convention have an obligation in accordance with Article 197 to continue to cooperate in exploring the need for formulating and elaborating additional rules, standards, and recommended practices and procedures consistent with the Convention concerning this matter. This would be consistent with the monitoring process established by the Paris Agreement.
26. Another obligation of great significance laid down in Section 2 of Part XII is that enshrined in Article 198, on notification of imminent or actual damage. Accordingly, when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it has immediately to notify other States it deems likely to be affected by such damage, as well as the competent international organizations.
27. Article 200 is also relevant to climate change, since it provides for cooperation in promoting studies, undertaking research programmes, and the exchange of information and data. Article 201 requires States to cooperate in establishing scientific criteria.
28. Article 202 in Section 3 of Part XII of the Convention, which sets out obligations concerning scientific and technical assistance to developing States, is likewise an important element in the protection and preservation of the marine environment from deleterious effects that result or are likely to result from climate change. This is of critical importance

for those countries that are specially affected by sea-level rise and other serious impacts of climate change. The same may be said of Section 4 of Part XII, which deals with monitoring and environmental assessment.

IV. Conclusions

29. UNCLOS is of great relevance to the global efforts to respond to the climate crisis in that it contains important obligations for the States Parties to protect and preserve the marine environment and provides general guidance in this respect. It seems, however, that there is a certain limit to the specificity of the Convention in dealing with all the serious matters related to climate change. Articles 192 and 194 of the Convention provide for general due diligence obligations to exercise best possible efforts, including those of mitigation of greenhouse gas emissions. Considering the centrality of the Paris Agreement for the global efforts to reduce greenhouse gas emissions, it represents a significant measure within the meaning of Article 194.
30. The Convention establishes specific obligations, in accordance with Articles 207, 212, 213, and 222, to adopt and enforce laws and regulations 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. In this respect, the Paris Agreement may be regarded as specifying “internationally agreed rules and standards” to be taken into account in the adoption and enforcement of such laws and regulations. There are additional important specific obligations under the Convention that are relevant in the present context, including those on international cooperation and the provision of assistance to developing States, particularly Small Island States and low-lying States which are specially affected, as stipulated in Sections 2 and 3 of Part XII respectively.
31. The gravity of climate change and its devastating impacts on the marine environment cannot be overstated. It is for the international community of States to continue constructive dialogues to fill gaps in protection and preservation of the marine environment from climate change. In giving an advisory opinion, the Tribunal will be able to make a significant

contribution to international law by clarifying the scope and limits of the *lex lata* and thereby informing the international community of where and how it should focus its concerted efforts, including in pursuing the progressive development of the law through negotiation.

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