

Columbia Law School

**Scholarship Archive**

---

Sabin Center for Climate Change Law

Research Centers & Programs

---

10-2023

## **ITLOS Advisory Opinion on Climate Change: Summary of Briefs and Statements Submitted to the Tribunal**

Maria Antonia Tigre

Korey Silverman-Roati

Follow this and additional works at: [https://scholarship.law.columbia.edu/sabin\\_climate\\_change](https://scholarship.law.columbia.edu/sabin_climate_change)



Part of the [Environmental Law Commons](#), [International Law Commons](#), and the [Litigation Commons](#)

---

# **ITLOS ADVISORY OPINION ON CLIMATE CHANGE:**

## **SUMMARY OF BRIEFS AND STATEMENTS SUBMITTED TO THE TRIBUNAL**

---

**Edited by Maria Antonia Tigre and Korey Silverman-Roati**

**Authors: Ahmed Mohammed Abdelsalam, Sabah Ahmed, Maria Jose Alarcon, Irene Antonopoulos, Jorge Alejandro Carrillo Bañuelos, Valeria Berros, Juan Sebastián Castellanos, Asteropi Chatzinikola-Iliopoulos, Moumita Das Gupta, Antoine De Spiegeleir, Fernand Guevara Mekongo Mballa, Millie John-Pierre, Isabella Kiechle, Jan-Baptist Lemaire, Sol Meckievi, Milagros Mutsios-Ramsay, Yumeno Grace Nishikawa, Natalia Urzola, Ademola Oluborode Jegede, Zunaida Moosa Wadiwala**

**October 2023**

**ABOUT THE SABIN CENTER FOR CLIMATE CHANGE LAW, COLUMBIA LAW SCHOOL**

The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Climate School and with a wide range of governmental, non-governmental and academic organizations.

Visit us at <https://climate.law.columbia.edu/>

Read our blog at [blogs.law.columbia.edu/climatechange](https://blogs.law.columbia.edu/climatechange)

@SabinCenter

© 2023 Sabin Center for Climate Change Law, Columbia Law School

*Disclaimer: This paper is the responsibility of The Sabin Center for Climate Change Law alone, and does not reflect the views of Columbia Law School or Columbia University. This paper is an academic study provided for informational purposes only and does not constitute legal advice. Transmission of the information is not intended to create, and the receipt does not constitute, an attorney-client relationship between sender and receiver. No party should act or rely on any information contained in this White Paper without first seeking the advice of an attorney.*

# **ITLOS ADVISORY OPINION ON CLIMATE CHANGE: SUMMARY OF BRIEFS AND STATEMENTS SUBMITTED TO THE TRIBUNAL**

**Edited by Maria Antonia Tigre**

**Authors: Ahmed Mohammed Abdelsalam, Sabah Ahmed, Maria Jose Alarcon, Irene Antonopoulos, Jorge Alejandro Carrillo Bañuelos, María Valeria Berros, Juan Sebastián Castellanos, Asteropi Chatzinikola-Iliopoulos, Moumita Das Gupta, Antoine De Spiegeleir, Fernand Guevara Mekongo Mballa, Millie John-Pierre, Isabella Kiechle, Jan-Baptist Lemaire, Sol Meckievi, Milagros Mutsios-Ramsay, Yumeno Grace Nishikawa, Natalia Urzola, Ademola Oluborode Jegede, Zunaida Moosa Wadiwala**

**October 2023**

Sabin Center for Climate Change Law  
Columbia Law School  
435 West 116th Street New York, NY 10027  
+1 (212) 854-3287  
[columbiaclimate@gmail.com](mailto:columbiaclimate@gmail.com)  
<https://climate.law.columbia.edu/>  
@SabinCenter

## **ABOUT THE AUTHORS:**

**Ahmed Mohammed Abdelsalam** is an Attorney at National Social Insurance Authority of Egypt, a Law Lecturer and Technical Office Member at the Justice Academy for Legal and Economic Studies.

**Sabah Ahmed** is an LLB student at University College London.

**Maria Jose Alarcon** is an Associate Professor of Law at Universidad de los Hemisferios. She regularly acts on behalf of States and international organizations before international courts and tribunals.

**Irene Antonopoulos** is a Senior Lecturer in Law at Royal Holloway, University of London.

**Jorge Alejandro Carrillo Bañuelos** is a climate change and human rights advisor at the Mexican Supreme Court of Justice.

**María Valeria Berros** is an Associate Professor of Law at Universidad Nacional del Litoral and a researcher at the National Scientific and Technical Research Council in Argentina.

**Juan Sebastián Castellanos** is a climate change and environmental lawyer with a postgraduate degree in energy and environmental law. Currently in-house counsel for voluntary carbon markets and climate change.

**Asteropi Chatzinikola-Iliopoulos** is a Ph.D. researcher at the Cardiff School of Law and Politics.

**Moumita Das Gupta** is an Advocate affiliated with the Supreme Court of Bangladesh and a Research Fellow of the Centre for Climate Justice - Bangladesh (CCJ-B).

**Antoine De Spiegeleir** is a Ph.D. researcher in the Department of Law of the European University Institute.

**Ademola Oluborode Jegede** is a Professor of Law and Interim Director of the Ismail Mahomed Centre for Human and Peoples' Rights, University of Venda, South Africa.

**Millie John-Pierre** is a BA (Hons) Law and Psychology graduate of the University of Strathclyde.

**Isabella Kiechle** is a lawyer and trainee at ClientEarth.

**Jan-Baptist Lemaire** is a researcher and teaching fellow in the Faculty of Law and Criminology of KU Leuven, Belgium, and a Ph.D. fellow at the Research Foundation Flanders.

**Fernand Guevara Mekongo Mballa** is a Ph.D. candidate in international law at the Catholic University of Central Africa.

**Sol Meckievi** is a Ph.D. candidate at the Centre for Environment, Energy and Natural Resource Governance at the University of Cambridge.

**Milagros Mutsios-Ramsay** is a Lawyer at the Inter-American Court of Human Rights, and a Robina International Human Right Fellow from Yale Law School.

**Yumeno Grace Nishikawa** is a Researcher at the Department of Transboundary Legal Studies, Faculty of Law, University of Groningen.

**Maria Antonia Tigre** is the Director of Global Climate Litigation at the Sabin Center for Climate Change Law at Columbia Law School.

**Natalia Urzola** is an S.JD. Candidate at Elisabeth Haub School of Law at Pace University and Chief Coordinating Officer at the Global Network for Human Rights and the Environment.

**Zunaida Moosa Wadiwala** is an Attorney, Conveyancer & Notary admitted to the High Court of South Africa and an Associate Lecturer at the University of the Witwatersrand, School of Law, Johannesburg.

#### **ACKNOWLEDGMENTS:**

This summary was written by a group of scholars who are part of the Sabin Center's Peer Review Network of Climate Litigation, led by Dr. Maria Antonia Tigre. The Sabin Center is extremely grateful to the rapporteurs of the Peer Review Network of Climate Litigation for their efforts to increase and improve climate litigation data and knowledge. The authors would like to thank Sergio Tellez Noguez and Ashwin Murthy for editorial assistance.

# TABLE OF CONTENTS

<b>1. INTRODUCTION</b>	<b>7</b>
<b>2. SUMMARIES OF WRITTEN STATEMENTS OF STATE PARTIES TO THE CONVENTION</b>	<b>12</b>
Democratic Republic of the Congo	12
Poland	13
New Zealand	14
Japan	15
Norway	16
Germany	17
Italy	19
China	21
European Union	23
Mozambique	25
Australia	27
Mauritius	28
Indonesia	30
Latvia	31
Singapore	32
Republic of Korea	34
Egypt	36
Brazil	37
France	39
Chile	40
Bangladesh	43
Nauru	44
Belize	46
Portugal	48
Canada	50
Guatemala	52
United Kingdom	54
The Netherlands	56
Sierra Leone	59
Djibouti	63
<b>3. INTERGOVERNMENTAL ORGANIZATIONS INVITED TO SUBMIT WRITTEN STATEMENTS PURSUANT TO ARTICLES 138, ¶3, AND 133, ¶3, OF THE RULES OF THE TRIBUNAL</b>	<b>65</b>

United Nations	65
International Union for the Conservation of Nature (IUCN)	66
International Maritime Organization (IMO)	68
Commission of Small Island States on Climate Change and International Law (COSIS)	70
Pacific Community (SPC)	72
United Nations Environment Programme (UNEP)	74
African Union	76
International Seabed Authority (ISA)	78
<b>4. STATEMENTS RECEIVED AFTER THE EXPIRY OF THE TIME LIMIT FIXED BY ORDER 2023/1 OF 15 FEBRUARY 2023</b>	<b>81</b>
Rwanda	81
Food and Agricultural Organization of the United Nations (FAO)	82
Viet Nam	84
India	85
<b>5. STATEMENTS NOT SUBMITTED PURSUANT TO ARTICLES 138, ¶3, AND 133, ¶3, OF THE RULES OF THE TRIBUNAL (NOT PART OF THE CASE FILE)</b>	<b>87</b>
United Nations Special Rapporteurs on Human Rights & Climate Change, Toxics & Human Rights and Human Rights & the Environment	87
High Seas Alliance	89
ClientEarth	90
Opportunity Green	92
Advisory Committee on Protection of the Sea (ACOPS)	95
World Wide Fund for Nature (WWF)	97
Our Children’s Trust and Oxfam International	100
Observatory for Marine and Coastal Governance	102
One Ocean Hub	103



# 1. INTRODUCTION

In recent years, international and regional tribunals have taken up the issues of climate change and its consequences for small island States. Pacific and Caribbean small island States, in particular, have been actively advocating for a judicial response to this concern. In December 2022, a new international organization, the Commission of Small Island States (COSIS or Commission), made a formal request for an advisory opinion on climate change and international law to the International Tribunal for the Law of the Sea (ITLOS). This request marked the first time specific issues related to sea-level rise and climate change had been formally addressed before an international tribunal in the context of maritime law.

This report provides a summary of the briefs and statements submitted to the International Tribunal for the Law of the Sea (ITLOS) in response to the Co-Chairs of COSIS' request for an advisory opinion on climate change-related legal questions (see the case and documents [here](#)). The request, submitted on December 12, 2022, addresses critical issues concerning the legal obligations of State Parties to the United Nations Convention on the Law of the Sea (UNCLOS) regarding the prevention, reduction, and control of marine environmental pollution arising from climate change and the protection and preservation of the marine environment in the face of climate change impacts.

## **The COSIS Agreement**

The COSIS Agreement was established in 2021 during the 26th Conference of the Parties (COP26) of the United Nations Framework Convention on Climate Change (UNFCCC). Antigua and Barbuda and Tuvalu were the initial founding parties to this agreement, which later expanded to six members, including Niue, Palau, St. Lucia, and Vanuatu. The agreement focuses on the interests of small island States in the context of climate change and international law. COSIS's membership is limited to members of the Alliance of Small Island States (AOSIS), and it is empowered to assist small island States in shaping, implementing, and advancing international law rules pertaining to climate change.

One distinctive feature of the COSIS Agreement is its authorization for the Commission to request ITLOS advisory opinions “on any legal question within the scope” of UNCLOS. Following a COSIS meeting in August 2022, COSIS made an official request for an ITLOS advisory opinion on December 12, 2022.

## **Legal Questions in the Advisory Opinion Request**

The COSIS advisory opinion request centers on the specific UNCLOS obligations of State Parties, particularly those outlined in Part XII of UNCLOS, which addresses the protection and preservation of the marine environment. The advisory opinion request includes two substantive questions. Both questions ask the Tribunal to consider the “obligations of State Parties” to UNCLOS. Notably, the request does not reference the responsibility of State Parties under the

Convention for past international wrongs but instead focuses solely on existing UNCLOS obligations.

The questions ask the Tribunal to address State obligations to prevent, reduce, and control pollution of the marine environment and to protect and preserve the marine environment in the context of climate change. Both cite Part XII of UNCLOS, titled “Protection and Preservation of the Marine Environment,” which contains UNCLOS’s most comprehensive provisions pertaining to marine environmental protection and preservation. Although Part XII of UNCLOS is aimed at preventing harm to the marine environment, it includes obligations on parties to prevent pollution from both ocean-based and land-based sources. The land-based obligations are found in UNCLOS Articles 194, 207, and 213. As such, the potential scope of the advisory opinion could include State obligations to reduce land-based pollution in order to prevent harm to the marine environment.

The questions are broad in scope, asking the court to address climate change impacts such as ocean warming, sea-level rise, and ocean acidification. These issues were not actively considered during the negotiation of UNCLOS, which underscores the need for clarity regarding current State obligations.

## **At Issue**

The central issue before the ITLOS is whether State Parties to UNCLOS have specific obligations regarding the prevention, reduction, and control of marine environmental pollution stemming from climate change, as well as the protection and preservation of the marine environment concerning climate change impacts. This inquiry carries profound implications for the future of international environmental law and climate governance.

## **Statements and Briefs**

ITLOS accepted the COSIS’ request and provided a deadline of June 16, 2023 to submit briefs and statements. In ITLOS proceedings, the admission of *amici curiae*, or friends of the court, is crucial for enhancing the quality of ITLOS’ decisions and providing the court with reliable scientific data. A notable distinction exists between third-party intervention and *amicus curiae* involvement. Third parties intervene in proceedings to safeguard their own interests or those of their nationals, as is the case when States intervene on behalf of diplomatic or flag State protection or when they stand in for their nationals under secondary procedural rules. Thus, according to Article 31(1) of the ITLOS Statute, entities eligible for intervention under this status are those with “an interest of a legal nature which may be affected by the decision in the dispute.”

Conversely, *amici curiae* participate in proceedings to champion interests that transcend their own to promote the proper administration of justice. They do not claim a personal stake or subjective right in the discussed matter, and, as a result, *amici curiae* cannot assert claims, influence the course of proceedings, present or cross-examine witnesses, or offer general evidence. ITLOS exercises broad discretion on whether to invite or allow *amici curiae* to participate in

proceedings, unless a treaty-based rule explicitly grants this right. When ITLOS does invite or allow *amici curiae* to present their perspectives, they do so based on the *amici curiae*'s presumed expertise in the facts, underlying issues, or applicable law of the dispute, even though they are not parties to the case.

Thirty-four States and nine intergovernmental organizations submitted written statements as per ITLOS rules. Additionally, ten more groups submitted statements. These are not part of the case file but were included by ITLOS on the advisory opinion's website. These States and intergovernmental organizations seized an opportunity to express their perspectives, contributing to a rich tapestry of legal arguments and policy considerations. The legal arguments put forward in these briefs are summarized here, following the category division and order presented on ITLOS' [website](#).

## Hearings

In an order issued on June 30, 2023, Judge Albert Hoffman, the President of the Tribunal, announced that the opening hearing of the case would take place on September 11, 2023. At this hearing, State Parties to the Convention, COSIS, and other intergovernmental organizations had the opportunity to make oral statements. Comments made during the hearings, whenever additional to the written comments, are briefly highlighted here as well.

## Main Arguments

While States and civil society organizations have put forward a variety of arguments in their briefs and statements, they mostly relate to three pivotal aspects of international maritime law: (i) ITLOS' jurisdiction and ability to issue an advisory opinion on climate change, (ii) the definition of marine pollution under UNCLOS, and (iii) the responsibilities of States in the context of climate change under the UNCLOS.

### (i) Jurisdiction

On the matter of jurisdiction, many submissions address the issue of whether ITLOS possesses advisory jurisdiction. Most submissions advocate that ITLOS has the authority and discretion to issue an advisory opinion based on Article 21 of the ITLOS Statute and some others challenge this authority. Those advocating for jurisdiction argue that COSIS' submission has met all of the prerequisites for establishing advisory jurisdiction outlined by ITLOS in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*. The ones challenging this authority contend that ITLOS does not have advisory jurisdiction because neither Article 21 nor Article 288 explicitly mentions advisory opinions, and therefore, the Tribunal lacks the authority to provide advisory opinions. Some States argue that advisory jurisdiction should be limited to disputes concerning the interpretation or application of UNCLOS and disputes related to international agreements linked to UNCLOS, thus excluding advisory proceedings.

## **(ii) Definition of Marine Pollution**

A key discussion in many of the submissions is whether greenhouse gas (GHG) emissions fall within the definition of marine pollution in UNCLOS. The vast majority of submissions assert that GHG emissions should be considered as “pollution of the marine environment” under UNCLOS, highlighting the potential harm GHG emissions cause to the oceans, including through ocean acidification, the addition of heat, deoxygenation, and other effects. A small number of submissions argue that GHG emissions should not be classified as marine pollution under UNCLOS, emphasizing the need to honor the UNFCCC regime for addressing climate change instead.

## **(iii) Responsibilities of States**

Finally, the submissions differ in their views on the allocation of State responsibility amidst the climate crisis. Some States emphasize that all States have a responsibility to take action to mitigate climate change, including ending GHG emissions from their territories. Others argue that industrialized countries should bear a greater burden and stress the importance of interpreting UNCLOS in a manner consistent with the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC). Many submissions argue that UNCLOS should be interpreted in a way that systemically integrates obligations outlined in the UNFCCC and the Paris Agreement. Some submissions contend that UNCLOS does not impose specific obligations on States to address climate change exclusively, and that such obligations should instead be addressed in the UNFCCC and the Paris Agreement.

## **Note**

This summary has been compiled by rapporteurs of the Sabin Center’s Peer Review Network of Climate Change Litigation, aiming to facilitate knowledge sharing and engagement with the proceedings before ITLOS. For the sake of clarity and readability, sentences from the original briefs have sometimes been directly incorporated into the summary, ensuring it stands as a cohesive and comprehensive document while respecting the substance and intent of the submissions. Please refer to the original submissions for a comprehensive view of the arguments presented to the ITLOS.

## 2. SUMMARIES OF WRITTEN STATEMENTS OF STATE PARTIES TO THE CONVENTION

### Democratic Republic of the Congo

**Country/Organization:** [Democratic Republic of the Congo \(DRC\)](#)

**Date of Submission:** 13 June 2023

**Oral Statement:** Yes, [scheduled](#) and held on 21 September 2023, 10 a.m. – 1:30 p.m.

#### Environmental Science

The DRC acknowledges that climate change is a fact established by science and caused by anthropogenic GHG emissions originating from a small group of States. The GHG emissions causing global warming need to be reviewed to establish their origins, the impact on the marine environment, and the damage to human beings and biodiversity. It is vital that mitigation, adaptation, and relief measures are taken.

#### Rules and Methods of Interpreting UNCLOS

The DRC proposes a twofold approach combining the systemic interpretation method, whereby UNCLOS is interpreted considering international climate change law, human rights, and the principle of effectiveness. For the systemic interpretation of UNCLOS, Article 31, ¶ 3(c) of the Vienna Convention and Article 293 of UNCLOS apply. International climate change laws, like the UNFCCC and the Paris Agreement, have been ratified by all UNCLOS parties. These agreements recognize the science of climate change and the need for precautionary actions. Climate change also poses a threat to human rights, making international human rights law applicable.

#### The Obligation to Protect and Preserve the Marine Environment Under Article 192 UNCLOS

Article 192 of UNCLOS establishes a general obligation to the Tribunal to protect and preserve the marine environment. An obligation of due diligence has been recognized by the International Court of Justice (ICJ) in *Pulp Mills*. Article 192 covers the “marine environment,” and Principle 2 of the Rio Declaration on Environment and Development extends it beyond the limits of national jurisdiction. Article 192 applies to climate change and measures for the present and the future. The practical obligations imposed by Article 192 are:

- State Parties must end GHG emissions from their territory and areas under their jurisdiction and also contribute to ending discharges of plastics and similar substances into the sea.
- States must give the protection and preservation of the marine environment in relation to climate change the highest priority in their national and international action.
- The urgency must be reflected in action by all competent State organs to ensure effectiveness.
- Article 194, ¶2 provides that States have an international obligation to extend their actions to all occurrences, actions, or omissions under their jurisdiction or control, including maritime and air transport wherever it may be located.

- Industrialized countries must bear the greatest burden in this respect, following the principle of CBDR-RC.

### **Responsibility of States for Failure to Act with Diligence in Prevention, Reduction, Control, and Preservation of the Marine Environment**

UNCLOS provides responsibility of a State for the breach of its obligations of conduct incurred from the instant that the State fails to act in the face of a proven risk, and not only from the time when the event to be avoided (the damage) occurs. The work of the Intergovernmental Panel on Climate Change (IPCC) shows that climate change is already causing damage to the marine environment. States are jointly and severally responsible, and industrialized States must stop the breaching of their obligations in terms of Part XII UNCLOS. Article 235 stipulates that States have an obligation to create and ensure effective remedies to provide adequate and effective relief.

\*\*\*

## **Poland**

**Country:** Poland

**Date of Submission:** 16 June 2023

**Oral Statement:** No

Poland indicates that the question posed by the Commission concerns obligations stemming from the Convention. Article 192 holds a fundamental character, obliging State Parties in Part XII to protect and preserve the marine environment, whereas Article 194 further develops the general principle enshrined in Article 192. However, Poland is of the opinion that the question asked by the Commission does not preclude the Tribunal from considering other relevant provisions of the Convention. It is also possible that the Tribunal may understand that these two provisions do not exhaust the intent of the addressed question.

Article 237, read in conjunction with the Vienna Convention, allows the Tribunal to conclude that the Convention may act as an umbrella instrument for other legal acts upholding or complementing its own provisions. Consequently, the Tribunal may take into account other relevant rules of international law with the aim of giving a comprehensive answer to the questions posed. These rules may either inform the substantive obligations of States or provide interpretive context for how the Convention should be understood. At the same time, given the scope of the Tribunal's jurisdiction and the potential breadth and horizontal aspects of questions posed to it, care should be taken to provide fit-for-purpose answers.

\*\*\*

## **New Zealand**

**Country:** [New Zealand](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** Yes, scheduled for 15 September 2023, 3 – 6 p.m

### **Jurisdiction**

This is the second occasion the Tribunal has been asked to provide an advisory opinion under Article 21 of the Statute of the Tribunal and Article 138(1) of the Rules of the Tribunal. The principle of “competence de la compétence” dictates that the Tribunal has the authority to settle any questions regarding its jurisdiction to provide an advisory opinion. The Convention allows the Seabed Disputes Chamber to issue advisory opinions but does not make specific provisions for the Tribunal to do so. The Tribunal’s Order of 16 December 2022, which entered the request for an advisory opinion into the list of cases, was based on Articles 21 and 27 of the Statute and Articles 130, 131, 133, and 138 of the Rules. Article 21 of the Statute states that the Tribunal’s jurisdiction includes all disputes and applications submitted to it in line with the Convention and any other agreement that grants jurisdiction to the Tribunal. The COSIS Agreement is an international agreement related to the purposes of the Convention that specifically allows for the submission to the Tribunal of a request for an advisory opinion. The request has been sent to the Tribunal by the Commission, which is authorized under the COSIS Agreement to make such a request. The questions in the request are legal questions, and even if they have political aspects, they are fundamentally legal in nature.

### **Admissibility**

The Tribunal’s ability to provide an advisory opinion under Article 138(1) of its Rules is discretionary. In the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC) advisory opinion, the Tribunal noted that a request for an advisory opinion should not be refused unless there are “compelling reasons.”

### **Prevention, Reduction, and Control of Pollution of the Marine Environment**

The Tribunal was posed with questions regarding the obligations of State Parties under the UNCLOS to address marine pollution resulting from climate change effects. Anthropogenic GHG emissions, both direct and indirect, introduce substances and energy into the marine environment. These emissions have harmful effects on the marine environment. UNCLOS imposes clear obligations on State Parties to prevent, reduce, and control marine pollution. States must prevent potential sources of marine pollution. States are required to exercise due diligence to prevent pollution of the marine environment. States must cooperate on a global scale to address marine pollution. States have specific obligations to address marine pollution resulting from the accumulation of anthropogenic GHG emissions.

### **Protection and Preservation of the Marine Environment Concerning Climate Change Impacts and Ocean Acidification**

The Tribunal was posed with a question regarding the obligations of State Parties under UNCLOS to protect and preserve the marine environment in the context of climate change impacts and ocean

acidification. Article 192 of UNCLOS mandates that “States have the obligation to protect and preserve the marine environment.” The broad obligation to protect and preserve the marine environment encompasses more specific duties, such as preventing, reducing, and controlling pollution. States should take preventive measures when there’s a risk to the marine environment, even if there’s no conclusive scientific proof linking the actions to the harm. States must work together, especially when dealing with marine environmental issues that cross boundaries.

## **Conclusion**

- The Tribunal has the jurisdiction to provide an advisory opinion in response to the request submitted by the Commission.
- New Zealand is not aware of any compelling reason for the Tribunal to decline to give an advisory opinion. The significance of the questions posed to members of the Commission and other small island developing States, along with the collective interest of State Parties to the Convention in marine environment protection, are factors supporting the issuance of an advisory opinion.
- The global accumulation of anthropogenic GHG emissions is considered pollution of the marine environment as per the Convention's definition.
- States have duties under the Convention, in line with the principle of prevention, to individually or jointly take measures to prevent, reduce, and control marine environment pollution caused by the accumulation of anthropogenic GHG emissions.
- The Convention mandates States to cooperate in formulating and elaborating international rules, standards, and recommended practices to address marine environment pollution resulting from the accumulation of anthropogenic GHG emissions.

\*\*\*

## **Japan**

**Country:** [Japan](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** No

### **Clarification regarding the obligation to explicitly address climate change**

Although Article 192 and 1.1(4) of UNCLOS define and set out general obligations to “protect and preserve the marine environment,” there is no provision conferring obligations to address climate change exclusively. Provisions specifying such obligations can be found in the UNFCCC, Paris Agreement, and the IMO's statements concerning GHG emissions from ships. There is a lack of clarity surrounding how these provisions relate to UNCLOS. As such, parties to UNCLOS who are not party to the UNFCCC or the Paris Agreement require clarification on whether provisions explicitly addressing a State obligation to target climate change are considered relevant rules of international law under Article 31.3(C) of the Vienna Convention. If such provisions are rules of international law, Japan requests an examination of how far such obligations should be considered.



\*\*\*

## Norway

**Country/Organization:** [Norway](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** Yes ([scheduled](#) for Monday, 18 September 2023, 10am -1pm)

### **How Norway is Complying with UNCLOS**

From the beginning of the submission, Norway lays down a firm personal commitment to UNCLOS, noting how it is an “acute responsibility” for the international community to abide by the framework. Within this, they recognize the impact climate change has on the marine environment and how ocean protection can help reduce this impact. The State considers how UNCLOS helps govern actions to meet the climate change goal under the Paris Agreement and UNFCCC. These actions include laying down jurisdictional maritime zones and considering how ocean resources can be utilized and protected. Norway gladly accepts the new treaty by UNCLOS and mentions its part in the Biodiversity of Areas Beyond National Jurisdiction (BBNJ) negotiations. It believes both these avenues provide effective tools, rules, and procedures to better preserve marine areas outside jurisdictions. Moreover, it enables a “crucial step” towards conserving 30% of the ocean by 2030. Norway and 13 other countries established the High-Level Panel for a Sustainable Ocean Economy in 2018. The State notes how its commitment to sustainable management of 100% of the oceans under its jurisdiction by 2025 correlates with these broader climate change targets.

### **Answer to Questions (a) and (b) of the Advisory Opinion Request**

The general obligation under Article 192 of UNCLOS Part XII is the duty to “protect and preserve the marine environment.” To fulfill this duty, there must be individual and joint efforts by States “in accordance with their capabilities” when taking “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source” (Article 194(1)(5)). This includes protecting marine threatened environments. Part XII sets out requirements for State dialogue when a) formulating international rules to achieve obligations, b) providing technical assistance to developing States, c) monitoring the effects of activities they allow and control, d) aligning national and international legislation and, e) laying out enforcement rules for States regarding pollution (Part XII section 2-6). The aim is to achieve a coherent, collective approach to the sustainable governance and management of the oceans. Due to UNCLOS’ broad interpretation, it must be read considering States’ obligations to UNFCCC and the Paris Agreement. Furthermore, it must be read in an everyday context to ensure achievability in ocean preservation. This best State practice should be read in conjunction with international organizations such as the regional sea conventions, regional fisheries management organizations, the International Maritime Organization, and the International Seabed Authority.

## **Parallels Between the ICJ’s Advisory Opinion and the COSIS’ Advisory Opinion**

Norway considers there to be an overlap between the advisory opinion sought at the ICJ through the UNGA Resolution 77/276 and the current advisory opinion sought by the Tribunal. The ICJ was asked to evaluate the current obligation by State Parties under international law, which would help prevent the effects of climate change for current and future generations. This included UNCLOS under international law. Norway wants to confirm the purpose of the advisory opinion to hone in on broad questions that COSIS asked. To this end, Norway is willing to supply more evidence, explore further questions, and reflect on anything further the Tribunal considers. Norway believes discussion around the legal obligations of States’ role in addressing climate change is essential and will only serve to clarify the broad legal frameworks.

## **Comments from the Oral Statements**

Within the oral proceedings, Norway commented that ITLOS must decide whether it has jurisdiction to give an advisory opinion and, if so, whether it should give an opinion (Article 138 of UNCLOS). As COSIS’ questions are broad, Norway hopes the Tribunal will use its discretion to frame the questions to give practical guidance to States.

Under existing customary law, UNCLOS should be interpreted with the standards set in the Vienna Convention. The UNFCCC and, specifically, the Paris Agreement are vital instruments that should be used when furthering the primary obligations of States. UNCLOS is one of the most significant conventions of the 21st century; it is carefully balanced and based on compromise. As a result, it should be preserved. UNCLOS is a framework convention; the terms are general, meaning treaty interpretation should be used, but also that climate change and its impacts should come under its reach. This is reflected in the general obligations of Articles 192 and 194, which have a standard of due diligence as shown in the SFRC proceedings. In addition, UNCLOS should be interpreted with human rights laws, such as the elementary considerations of humanity.

\*\*\*

## **Germany**

**Country/Organization:** [Germany](#)

**Date of Submission:** 14 June 2023

**Note:** With respect to the substance of the questions submitted, Germany refers to the written statement submitted by the European Commission on behalf of the European Union.

**Oral Statement:** [Yes](#), Wednesday, 13 September, between 10 a.m. and 1 p.m.

## **General Basis of the Tribunal’s Advisory Jurisdiction**

The Tribunal held in its 2015 Advisory Opinion that Article 21 of Annex VI of the Convention is the implicit basis for its advisory jurisdiction as a full court. The term “matters” in Article 21 covers not only contentious cases but also advisory proceedings. Such matters must be “specifically provided for in any other agreement which confers jurisdiction on the tribunal.”

Article 21 forms the substantive legal basis of the Tribunal’s advisory jurisdiction. Additionally, Article 138 of the Rules of the Tribunal must be satisfied before such jurisdiction can be exercised. The Tribunal is therefore entitled to exercise advisory jurisdiction if (1) the COSIS Agreement is an international agreement related to the purposes of the Convention, (2) the COSIS Agreement is an agreement conferring advisory jurisdiction on the Tribunal, (3) the request concerns matters expressly provided for in the COSIS Agreement, (4) the questions submitted to the Tribunal are of a legal nature, and (5) the request of COSIS has been transmitted to the Tribunal by a body authorized by or in accordance with the COSIS Agreement.

### **Compatibility with Article 21 of the Statute**

The request is compatible with Article 21 of the Statute. The COSIS Agreement is an agreement in terms of Article 21 as it is an international treaty concluded between States. The agreement also (implicitly) confers advisory jurisdiction on the Tribunal, as it authorizes the Commission to request advisory opinions from ITLOS. The questions in this case are sufficiently connected to the agreement, particularly evidenced by the preamble and the definition of the Commission’s mandate and activities. Both questions and agreement concern the relationship between the regime for the protection and preservation of the marine environment and the climate change regime.

### **Compatibility with Article 138 of the Rules**

The request meets the requirements for advisory jurisdiction under Article 138 of the Rules. The Tribunal will need to interpret the relevant provisions of Part XII of the Convention to answer the legal questions presented, which specifically ask for the obligations of State Parties. The COSIS Agreement is related to the Convention's purposes, but the “related to” element under Article 138 requires that the agreement be sufficiently related. While the COSIS Agreement is partly related to the Convention's purposes, it does not need to be entirely and exclusively related. However, the agreement cannot expand the Tribunal's advisory jurisdiction to international instruments outside the Convention's scope. Since the questions refer to specific obligations of Contracting Parties under Part XII of the Convention, the COSIS Agreement is sufficiently related. The request was transmitted by an authorized body, as COSIS is a permanent international organization with legal personality authorized to request advisory opinions from the Tribunal.

### **Admissibility**

According to the 2015 advisory opinion, a request should not be refused except for compelling reasons. There is no compelling reason why the present request should be refused, and the Tribunal should not exercise its discretionary power to refuse it. “Compelling reasons” invoked during the 2015 advisory opinion proceedings include i) vague, general, and unclear nature of the questions, ii) *lex ferenda* nature of the answer sought, iii) rights and obligations of third States affected. None of these compelling reasons apply in this instance.

### **Applicable Law**

The applicable law (according to Articles 23 and 293 of the Statute and Articles 130 and 138 of the Rules) is the Convention in general and its Part XII in particular. That does not mean that the Tribunal is prohibited from considering other international agreements like the UNFCCC or the Paris Agreement. These should be referred to for purposes of interpretation, according to the Vienna Convention on the Law of Treaties (VCLT). External instruments referred to in *renvoi* clauses of the Convention become part of the applicable law. Regarding Part XII, the scope of applicable law extends to all international legal rules on protecting and conserving the marine environment and rules that shape the specific source of pollution governed by the relevant *renvoi* provisions.

#### **Additional points from the Oral Statement:**

- The French and Spanish versions of Article 21 support the finding in the 2015 advisory opinion that the term “matters” covers more than just disputes, as these also use broader terminology.
- The precautionary principle, as reflected notably in the Rio Declaration on Environment and Development, is an important cornerstone for interpreting Part XII.
- Highlighted some parts of the EU’s written statement:
  - Article 192 of UNCLOS contains a legal due diligence obligation of dual nature (positive and negative obligations) with a broad character, obliging States to take measures to protect and preserve the marine environment from any kind of harm, including from harm caused by climate change. Both current and future impacts are covered.
  - Article 194 of UNCLOS lays down further obligations for States on prevention, reduction, and control of pollution of the marine environment. GHG emissions should be considered as falling within the definition of “pollution of the marine environment.” Ocean acidification resulting from GHG emissions introduced into the marine environment should be considered as a deleterious effect for the purpose of the definition of “pollution of the marine environment” under UNCLOS.

\*\*\*

## **Italy**

**Country/Organization:** [Italy](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** Yes, Monday, 25 September, 10 a.m. to 1.30 p.m.

#### **Jurisdiction of the Tribunal**

The Tribunal established its advisory jurisdiction in its 2015 advisory opinion. ITLOS based its jurisdiction on Article 21 of the Statute of the International Tribunal for the Law of the Sea and the “other agreement” provision in that article (“enabling *renvoi* clause”). According to the Tribunal, an “other agreement” can confer jurisdiction on the Tribunal to issue advisory opinions.

Additionally, the Tribunal recognized that Art. 138 of the Rules of the Tribunal only furnishes prerequisites that need to be satisfied before giving an advisory opinion.

While Art. 138 of the Rules does not confer advisory jurisdiction, the Conference of the Parties to UNCLOS approved the Rules without objection. As such, the then-State Parties implicitly approved the exercise of advisory jurisdiction. Furthermore, at the Meeting of the Parties after the 2015 advisory opinion, only one delegation suggested that the Tribunal should have declined to have jurisdiction. In addition, the recent draft agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (“BBNJ”) allows the Conference of the Parties to request an advisory opinion.

The Tribunal could also claim jurisdiction in the present case as the request complies with the prerequisites in Art. 138 of the Rules. The COSIS Agreement explicitly provides for advisory jurisdiction of the Tribunal in Article 2, ¶2, and the co-chairs of COSIS filed a request for an opinion on behalf of the Commission.

The request for an advisory opinion concerns the interpretation of UNCLOS rather than the COSIS Agreement, but that should not preclude the Tribunal from answering the questions. In its 2015 advisory opinion, the Tribunal stated that it could rule on legal issues with a “sufficient connection” to the purposes and principles of the agreement. The Tribunal thus did not seem to confine its jurisdiction to questions related to international agreements conferring jurisdiction. This case can be an appropriate opportunity to further clarify the requirement of “sufficient connection,” particularly concerning the degree of connection required.

### **Article 237 of UNCLOS and Interpretative Criterion of Systemic Integration**

Article 237 of UNCLOS contains a “treaty coordination clause” establishing a double relationship of compatibility regarding the provisions of Part XII of UNCLOS and certain special agreements, including treaties relating to the protection and preservation of the marine environment: the provisions of Part XII are without prejudice to those special agreements, but they have to be applied consistently with UNCLOS. Art. 237 differs from Art. 30, par. 2 of the Vienna Convention on the Law of Treaties (VCLT) because Art. 237 of UNCLOS does not state that those special agreements always prevail over the provisions of Part XII of UNCLOS. Rather, Article 237 regulates the modalities of applying those treaties – they must be “concluded in furtherance of the general principles set forth” in UNCLOS. The effect flowing from the “without prejudice” clause is that the specific obligations in those special agreements can be implemented “in a manner consistent with the general principles and objective of the Convention” (Article 237, ¶2).

The meaning of “without prejudice” can be understood using the interpretive method of systemic integration of Article 31, par. 3 (c) of the VCLT. The article enables the coordination of the provisions of Part XII and the obligations in the special agreements of Article 237 without favoring one rule over the other. This interpretive method can also be found in Article 293 UNCLOS, which

provides for the possibility of recourse to other rules of international law. This provision does not extend the jurisdiction of UNCLOS tribunals but allows them to apply other rules of international law not incompatible with UNCLOS.

ITLOS and other arbitral tribunals constituted under Annex VII have extensively used the systemic integration method. The Seabed Dispute Chamber applied a “precautionary approach” in its Advisory Opinion of 2011, referring to the systemic integration method and noting “a trend towards making this approach part of customary international law.”

The Annex VII Arbitral Tribunal in the *South China Sea Arbitration* stated that Article 293, ¶1 of UNCLOS and Article 31, ¶31 of the VCLT enable it to take into account the Convention on Biological Diversity of 1992 to interpret the UNCLOS provision at stake. For example, the Arbitral Tribunal relied on that Convention to determine the meaning of the term “ecosystem” in Article 194, ¶5 of UNCLOS.

The International Law Commission has also endorsed the method of systemic integration concerning its Draft Guidelines on the Protection of Atmosphere. The Commission expressed the view that (relevant) rules of international law should be interpreted to give rise to a single set of compatible obligations.

In conclusion, Italy states that the method of systemic integration would assist COSIS Member States and all other State Parties to UNCLOS to identify their obligations under both UNCLOS and other agreements correctly.

\*\*\*

## **China**

**Country:** China

**Date of Submission:** 15 June 15 2023

**Oral Statement:** Yes. 15 September 2023

### **Jurisdiction**

Regarding question (a), The Commission’s request concerns the question of whether the Tribunal has advisory jurisdiction and the relationship between climate change and oceans. China considers that the Tribunal does not have advisory competence. Neither Article 288 of UNCLOS nor Article 21 of the Statute provides the legal basis for the advisory competence of the full Tribunal. Regarding Article 288, China considers that this provision relates only to disputes concerning the interpretation or application of UNCLOS and disputes concerning the interpretation or application of an international agreement related to the purposes of UNCLOS. Advisory proceedings are those to provide advisory opinions for certain bodies on legal questions. They do not deal with disputes, nor do they entail binding decisions. Moreover, China interprets Article 21 to exclude the

competence of providing “advisory opinions.” When said article refers to “matters in any other agreement,” that does not include “advisory opinions.” Concluding otherwise is inconsistent with the customary international law rules of interpretation (Article 31(1) of the Vienna Convention).

China states that the Tribunal cannot establish advisory jurisdiction based on “implied powers”. UNCLOS, along with its Statute, does not provide provisions granting advisory jurisdiction to the Tribunal. Therefore, the Tribunal cannot establish advisory jurisdiction through “implied powers.” Said powers in international judicial bodies do not cover “advisory jurisdiction.” On that note, China indicates that the ICJ has defined “implied powers” as those that are not explicitly stated in an organization’s constitutive instrument but are necessary for fulfilling its duties. These powers are subsidiary and should support the organization’s primary jurisdiction, not expand it. China concludes that UNCLOS, including the Statute, only confers advisory competence on the Seabed Disputes Chamber of the Tribunal, but not on the full Tribunal. Therefore, the Chinese Government indicates that the full Tribunal has no competence to entertain a request for advisory opinion.

The opinion presented in the written statement aligns with the stance articulated by the Government of China during the oral hearings. The representative of China underscored their respect for the Tribunal’s role in interpreting and applying UNCLOS in maritime dispute settlement. China emphasized climate change as a pressing global issue affecting human survival and fair access to the climate system, particularly expressing an understanding of the challenges faced by developing nations in managing climate change. However, concerning the Tribunal’s jurisdiction, the Chinese representative reiterated that the Tribunal lacked advisory competence as per UNCLOS. China elaborated on the legal aspects linked to the request for an advisory opinion, emphasizing the paramount importance of international climate change law and the complementary role of UNCLOS in safeguarding the marine environment from climate change impacts. China contested the classification of GHG emissions as “pollution of the marine environment” under UNCLOS, stressing the necessity to honor the UNFCCC regime. Lastly, China opposed the application of UNCLOS responsibilities and liability system to tackle GHG emissions and reaffirmed China’s willingness to collaborate on climate change and environmental protection while upholding the UNFCCC regime. Finally, China called upon the Tribunal to interpret and apply UNCLOS and the UNFCCC regime in good faith, avoiding fragmentation of international law.

### **China's Response to Climate Change**

Although China challenges the competence of the Tribunal to provide an advisory opinion, it addresses its position on climate change. Thus, the Government of China asserts that the multilateral consensus under the UNFCCC must be firmly upheld, alongside the Kyoto Protocol and Paris Agreement. Moreover, China emphasizes that the principle of CBDR is the cornerstone of global governance on climate change and must always serve as the guiding principle for addressing climate change. China believes that international cooperation on climate change should

be promoted in an effective manner; and that the synergy between climate governance and ocean governance should be comprehensively enhanced. Finally, China describes domestic actions that it has taken to address climate change, including legislative, judicial, and policy measures to comprehensively tackle climate change in an effort to fulfill its commitments under the UNFCCC.

\*\*\*

## European Union

**Country/Organization:** [European Union](#)

**Date of Submission:** 15 June 2023

**Notes:** The European Union is [a party](#) to UNCLOS alongside its member States; hence, its submission is included in the case file.

**Oral Statement:** Yes (20 September 2023, 10 am-1 pm)

### Applicable Law

The law applicable to the questions referred to ITLOS stems from three sources: (i) UNCLOS; (ii) other applicable rules of international law, such as the UNFCCC and the Paris Agreement; and (iii) the Vienna Convention. The interconnectedness of these materials is reflected in the openness of Part XII of UNCLOS on the protection and preservation of the marine environment.

### Answer to Question (b) of the Advisory Opinion Request

Article 192 of UNCLOS obligates States to protect and preserve the marine environment. This constitutes the primary and general obligation of Part XII of UNCLOS, which the subsequent provisions further develop and detail. This is an obligation of conduct and not of result, as clarified by the Tribunal in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*. State parties must thus take all necessary measures to achieve the objective of protection and preservation of the marine environment. This provision entails a positive duty of protection and a negative obligation not to degrade the environment, as expounded in the *South China Sea Arbitration*.

Reaching beyond the issue of pollution, Article 192 also applies and is particularly important in relation to threats posed by the effects of climate change. It essentially requires States to enhance the adaptation capacities of marine ecosystems vis-à-vis those effects. This is confirmed by the absence, in this provision, of any clause qualifying the type of harm against which the protection and preservation of the marine environment must be ensured. Thus, Article 192 also covers the prevention of future harm in accordance with a standard of due diligence informed by international law, and notably the principle of prevention of environmental harm, which has the status of customary international law according to the ICJ in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, and the Paris Agreement, which reflects the most relevant expression of States' understanding of their legal obligations in respect of climate change. Other provisions of Part XII



of UNCLOS, the Convention on Biodiversity, and the BBNJ Agreement are also relevant to interpreting these obligations.

### **Answer to Question (a) of the Advisory Opinion Request**

While further developing the general principle enshrined in Article 192 and translating it into more concrete obligations for State Parties, the obligation under Article 194 is still very broad and open-ended in scope. On the one hand, Article 194 explicitly applies to pollution of the marine environment from any source and can be interpreted as applying to both transboundary and non-transboundary pollution. On the other, it contains obligations of due diligence rather than of result, the content of which is highly general. This notably means that Article 194 does not introduce a total prohibition of pollution of the marine environment nor a requirement to immediately cease all pollution, including in the form of GHG emissions. Instead, it obliges States to take the necessary measures and use their best efforts to prevent, minimize, and gradually reduce GHG emissions, including by cooperating internationally and regionally, observing the precautionary principle and the requirement of good faith, carrying out EIAs when needed, and using the best available technology, while retaining a certain margin of discretion as to the precise measures to be taken.

GHG emissions should be considered as falling within the definition of “pollution of the marine environment.” Their deleterious effects when introduced in marine ecosystems are well documented in the scientific literature. Hence, the contracting parties’ obligations to “protect and preserve the marine environment” (Article 192 of UNCLOS) and to “prevent, reduce and control pollution of the marine environment” (Article 194 of UNCLOS) in relation to the deleterious effects that result or are likely to result from climate change should be held to include a general obligation (i) to protect the marine environment by preventing, reducing, and controlling the deleterious effects of GHG emissions and (ii) to take climate change mitigation measures. Because of their crucial relevance to the issues at stake, State Parties to UNCLOS that adopt legislation that disregards the Paris Agreement and other relevant sources of international law would not act in conformity with UNCLOS. At the same time, by referring to existing internationally agreed rules, UNCLOS does not impose on State Parties more stringent obligations than those already agreed in those rules.

### **How the European Union is Complying with Articles 192 and 194 and Articles 207, 212, 213, and 222 of UNCLOS**

The European Union’s written statement ends with a description of the different instruments it has adopted to comply with UNCLOS. The EU claims that, through its ambitious climate legislation and as an international cooperation leader in this field, it is complying with and adopting higher standards than those required under Articles 192, 194, 207, 212, 213, and 222 of UNCLOS.

\*\*\*

# Mozambique

**Country / Organization:** [Republic of Mozambique](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes (Monday, 18 September 2023; 10am -1 pm)

## **The legal basis for the exercise of jurisdiction**

The International Tribunal for the Law of the Sea (ITLOS) advisory jurisdiction stems from the combined reading of the Statute of the International Tribunal for the Law of the Sea (Statute) and the Rules of the Tribunal (Rules), with Article 2(2) of the Commission of Small Island States on Climate Change and International Law (COSIS) Statute. Regarding Article 21 of the Statute, ITLOS has jurisdiction over “all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” While there is no specific provision in the Statute on advisory jurisdiction, Article 138 of the Rules provides that ITLOS may “give an advisory opinion on a legal question if an international agreement related to the purposes of UNCLOS specifically provides for the submission to [ITLOS] of a request for such an opinion.” Also, Article 138(2) of the Rules provides that “[a] request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.” The legal basis for ITLOS to issue advisory opinions has been recognized by several authorities, including the Tribunal’s advisory opinion in the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC).

## **Answer to Question A of the Advisory Opinion Request**

The response to this question requires a holistic and good-faith interpretation and application of all the relevant provisions for dealing with the pollution of the marine environment. In the main, this is premised on the provision of Article 1(4) of UNCLOS dealing with the sustainable management of living resources, the protection of the marine environment from over-exploitation and depletion, as well as the promotion of regional and international cooperation, and other peaceful uses of the oceans. States are required to, individually and collectively, adopt measures to limit the increase in the global average temperature to well below 2°C above pre-industrial levels while aiming to limit such increase to 1.5°C above pre-industrial levels. Failure to take such measures to address global climate change has implications for the marine environment. This position results from the broad nature of Article 1(4) of UNCLOS that, arguably, includes GHG emissions in so far as they qualify as a source of “energy” or “substances” which has harmful impacts on the marine environment’s living resources and marine life. Accordingly, States have obligations to address marine pollution by taking “all measures necessary” within their capabilities and ensuring emission activities within their control do not cause extraterritorial damage. Also, the nature of these obligations demands the adoption and enforcement of relevant laws to limit their GHG emissions to address marine pollution. This is based on Articles 207 through 212 of

UNCLOS, which supplement the general obligations under Article 194 that require States to adopt specific laws and regulations to prevent, reduce, and control pollution of the marine environment.

### **Answer to question B of the Advisory Opinion Request**

Based on the provisions of instruments such as the Stockholm Declaration, Convention on Biodiversity, and UNCLOS, States have a general obligation and a corresponding right to “protect and preserve the marine environment.” The obligation to protect and preserve the marine environment is established principally in Article 192 of Part XII of UNCLOS. The obligations of States extend to taking all necessary measures to reduce GHG emissions and the protection and preservation of the marine environment from the impacts of climate change. This obligation is differentiated. Developed States are required to adopt comprehensive targets for reducing emissions across their entire economies and to aid developing countries in fulfilling their commitments while Developing States should mitigate emissions and gradually transition towards a carbon-free economy. Least developed nations, such as Mozambique, can formulate and share strategies, plans, and actions to promote low GHG emissions development, considering their peculiar circumstances. There is also an obligation and corresponding right to establish measures of adaptation and mitigation of climate change, which stems from the duty to protect and preserve the marine environment.

Article 197 of the Convention places an obligation of cooperation on States to ensure the protection and preservation of the marine environment from climate change impacts. This obligation entails the formulation of international rules and standards, including the standards of reporting on emission reduction targets set under the Paris Agreement. Further, the requirements under UNCLOS to conduct and report results of Environmental Impact Assessments (EIA) for activities that may cause significant and harmful changes to the marine environment apply to activities that may harm the marine environment through the emission of GHGs. Concerning sea level rise, Mozambique is sensitive to sea level rise and experiencing the negative effects of marine pollution caused by GHGs on its communities, ecosystems, fisheries, food security, and economy. While UNCLOS itself does not explicitly address the issue of sea level rise, the obligations of States to prevent, reduce, and control pollution set out in Part XII of UNCLOS have implications for ocean warming, affecting sea level rise.

\*\*\*

## **Australia**

**Country:** [Australia](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes

### **Defining “pollution” and its impact on State obligations to reduce emissions**

Clarification of whether anthropogenic GHG emissions qualify as “pollution of the marine environment” under Article 1(1)(4) of UNCLOS. If so, whether this requires States to take explicit action against GHG emissions under Article 194(1).

### **Streamlining obligations to mitigate climate change**

States do not need to go above their obligations under the UNFCCC and Paris Agreement to fulfill the provisions of Part XII of UNCLOS. This is because collective international action to lower GHG emissions and limit temperature rises is continuously recognized as a means to fight climate change throughout the UNFCCC and Paris Agreement. Accordingly, ITLOS should confirm that the UNFCCC and the Paris Agreement encompass the specific obligations of State Parties to UNCLOS concerning GHG emissions. ITLOS should recognize the generality of Article 192 of UNCLOS: “States have the obligation to protect and preserve the marine environment.” Accordingly, UNCLOS should be viewed as a “framework agreement” encouraging international cooperation to protect and preserve the marine environment, adapted to States’ individual circumstances.

### **Redefining “environmental harm” under Article 194 UNCLOS**

Article 194 encompasses the State obligation to prevent, reduce, and control pollution of the marine environment but was not drafted to account for pollution caused by anthropogenic GHG emissions. As the environmental harm caused by anthropogenic GHG emissions is more diffuse than that caused by transboundary pollution, States should use the UNFCCC and Paris Agreement’s requirements to comply with their obligation under Article 194. For example, the Paris Agreement requires State Parties to maintain a Nationally Determined Contribution (NDC) that supports the goal of holding global average temperature to below 2°C above pre-industrial levels – furthering a continuous effort to address climate change caused by anthropogenic GHG emissions.

### **Australia’s examples of using UNCLOS as a “framework” to address pollution**

- June 2022 – Australia revised its NDC under the Paris Agreement to 43% below 2005 levels and restated its net zero by 2050 target.
- September 2022 – Passing the Climate Change Act 2022 codified these commitments to emissions reduction and provided policy and investment certainty to achieve them.
- National Climate Risk Assessment and National Adaptation Plan – builds resilience and disaster readiness in communities.
- Increasing management of Marine Protected Areas from 37% to 45% and committed a total of AUD \$1,200 million to be invested in the Great Barrier Reef protection program by 2030.
- Further funding: AUD \$2 billion between 2020-2025 to be allocated to climate financing, and \$700 million allocated to support climate-resilient economies in the Pacific region.
- Membership in the UNFCCC’s Transitional Committee.
- “30 by 30” commitment and founder of the International Coral Reef Initiative.

\*\*\*

## **Mauritius**

**Country:** [The Republic of Mauritius \(“Mauritius”\)](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes, Friday, 15 September 2023, 10 a.m. -1 p.m.

### **Jurisdiction and Discretion**

Mauritius finds that the Request has met all prerequisites regarding jurisdiction. Mauritius also finds that ITLOS is well within its discretion to issue an advisory opinion.

### **Factual and Scientific Context**

The impacts of climate change as a threat to the marine environment are clearly established by scientific evidence presented by the IPCC. The concern for the protection of the marine environment and the action required to address the threat of climate change, particularly the reduction of GHG emissions, are shared by UNCLOS, the UNFCCC, and the Paris Agreement. Assessment of the impacts of climate change on the marine environment includes sea level rise and the shrinking cryosphere, already impacting human communities in close connection with coastal environments. A vulnerability assessment of the impacts on Mauritius reveals changes in precipitation and climate change-induced weather events. The submission outlines challenges faced by Mauritius and the action required to address the threat of climate change concerning the Paris Agreement, the IPCC findings, the 2022 UNEP Emission Gap Report, the 2019 UNEP Production Gap Report, and the 2021 International Energy Agency Report.

### **The Legal Framework (UNCLOS and Climate Change)**

The laws that ITLOS should apply are (i) the UNFCCC and the Paris Agreement as they lay down international law, (ii) UNCLOS including Part XII, and (iii) the Vienna Convention and the report of the Study Group of the International Law Commission (ILC).

The specific obligations of UNCLOS State Parties, including under Part XII as set out in the request, include:

- **Pollution:** Considering the available science on the harmful effects of GHG emissions on the climate, including the marine environment, GHG emissions fall within the definition of pollution under Article 1(1)(4) of UNCLOS. Article 194(1) of UNCLOS requires Parties to take necessary measures to prevent, reduce, and control pollution of the marine environment “from any source.”
- **Preventing, reducing, and controlling pollution:** The obligations under Part XII apply to all States irrespective of where the alleged harmful activities occur and to all maritime zones and beyond. Based on the applicable laws as outlined above, Parties to the Convention have the following specific obligations to prevent, reduce, and control GHG emissions that

are harmful to the marine environment: (1) Article 207(5) provides that laws, regulations and all measures and practices in relation to pollution from land-based sources shall also apply to the marine environment; (2) Article 212 UNCLOS requires States to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from or through the atmosphere, including to the air space.

- The obligation to have due regard to the rights and duties of one another: under Articles 56(2) and 58(3) of UNCLOS in connection with Articles 192 and 193, Parties must have due regard to the rights and duties of one another. This is relevant to any act or omission which undermines the protection of the marine environment in the context of climate change.
- The duty to cooperate as provided in Article 197 UNCLOS.
- The duty to act with due diligence.
- Impact Assessments: As provided in Articles 205 and 206 of UNCLOS and Article 13 of the Paris Agreement, and with reference to Advisory Opinion on Activities in the Area and ICJ findings.
- The duty to refrain from directing finance flows toward actions that are inconsistent with a low emissions pathway and/or climate-resilient development: Addressed in Part XII of UNCLOS and with reference to Article 194(2), 207 and 212.
- The duty to ensure that measures taken to reduce GHG emissions do not themselves cause pollution of the marine environment: Relevant in the context of ocean fertilization and the prohibitions adopted under the London Convention and the Convention on Biological Diversity. Parties to UNCLOS must take appropriate steps to protect and preserve the marine environment in light of the global adaptation goal set under the Paris Agreement.
- Loss and Damage: Each UNCLOS State Party is obliged to address loss and damage by reference to inter alia the existential threat to small island States, including Mauritius, the establishment of early warning systems, slow onset events, the effect on the quality of seawater, and social and economic impacts associated with climate change that cannot be avoided through mitigation or adaptation.
- State responsibility: As provided in the rules on State responsibility as laid down in the International Law Commission's Articles.

## **Conclusion**

Mauritius submits that ITLOS has jurisdiction and invites ITLOS to give an advisory opinion that offers full support to the interpretation and application of UNCLOS in a manner that prevents climate change, contributes to the mitigation of its consequences, and gives effect to the international climate regime (UNFCCC and Paris Agreement). In response to the request, Mauritius invites the Tribunal to declare the following specific obligations of UNCLOS State Parties to (i) prevent, reduce, and control pollution of the marine environment concerning the deleterious effects that result or are likely to result from climate change; and (ii) protect and preserve the marine environment in relation to climate change impacts, and sets out the steps the Parties shall take under Part XII as a matter of urgency to address the grave risk to the marine environment. The written statement concludes that the failure to comply with such obligations under UNCLOS may give rise to responsibility concerning (i) loss and damage specifically occasioned by such failure(s) and (ii) contribution to the impacts of climate change more generally,

including on the marine environment and in particular on those States most vulnerable to such impacts.

### **Comments from the Oral Statements:**

Mauritius explained the threat posed by climate change and that even if the 1.5-degree Paris Agreement target is met, it still would mean the destruction of 70%-90% of the world's coral reefs. The statement referred to Article 235 of UNCLOS, which holds States liable for breaches of their duties to protect and preserve the marine environment, and mandates that States shall provide recourse for prompt and adequate compensation for damage caused by their pollution.

\*\*\*

## **Indonesia**

**Country:** [Indonesia](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** Yes

### **UNCLOS is Only an “Overarching Legal Framework” for Protecting the Marine Environment**

As such, the lack of reference to “climate change” implies that States have no specific obligations to protect and preserve the marine environment from climate change impacts. Although UNCLOS encourages international cooperation to develop rules and standards to control pollution of the marine environment, there are no similar provisions related to collective action addressing the climate-ocean nexus. The definitions of “pollution” under Article 1 of UNCLOS as “introduced by man,” and “climate change” under the UNFCCC as “attributed to human activity,” are dissimilar insofar as UNCLOS directly attributes pollution to human activity and the UNFCCC does so indirectly. In tandem with Article 212 of UNCLOS, highlighting how States should adopt laws to reduce pollution of the marine environment via the atmosphere, there is a State obligation to ensure that airspace and vessels under State sovereignty do not directly increase pollution of the marine environment.

### **No Specific Obligation to Protect and Preserve the Marine Environment in Relation to Climate Change Impacts**

Although Part XII of UNCLOS does highlight the importance of the “no harm” principle and furthers cooperation in the efforts to prevent, reduce, and control pollution of the marine environment, such directions only emphasize a general obligation. This begs the question: what agreements regulate States’ specific obligations related to climate change?

### **The Role of Specific International Instruments**

- Article 2.2 Kyoto Protocol: sectoral focus on working through the International Civil Aviation Organization and International Maritime Organization to reduce GHG emissions not accounted for under the Montreal Protocol.
- Thus, States' specific obligations related to climate change are regulated under international instruments other than UNCLOS.
- This means that ITLOS' advisory opinion on UNCLOS has no binding character and is only applicable as further guidance to State activity concerning pollution of the marine environment.

\*\*\*

## Latvia

**Country/Organization:**

[Latvia](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes, sFriday, 15 September 2023. [Verbatim](#) and [video](#).

### Jurisdiction and Admissibility

Latvia considers the competence of the Tribunal to give an advisory opinion on questions raised by COSIS by examining three prerequisites: (i) an international agreement must specifically allow for the submission of a request for an advisory opinion to the tribunal and the agreement has to be related to the purpose of the Convention; (ii) the questions or request must be transmitted to the Tribunal by an authorized body and; (iii) the request has to framed as “a legal question.” Latvia considers all three prerequisites to be satisfied.

### Question (b)

Under the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* advisory opinion, the Tribunal agreed that Art. 192 of the Convention imposes an obligation of all States to protect and preserve the marine environment; however, Art. 192, does not specify the type of harm from which the marine environment must be protected and preserved. Latvia believes that State Parties must take measures to protect and preserve the marine environment from any harm including the impacts caused by anthropogenic GHG emissions.

### Question (a)

Art. 194 obligates the State Parties to “ensure” that activities of the States do not cause harm to the marine environment. The obligation to “ensure,” as remarked by the arbitral tribunal in the South China Sea award, is an obligation of conduct and requires “due diligence.”

The definition of Art. 1(1)(4) of pollution of the marine environment is an evolving one that should be read in connection with Article 31 (1) of the Vienna Convention and the ICJ statement in the *Costa Rica v. Nicaragua* case.



In this context and taking into account the scientific evidence that GHG emissions alter oceans' chemistry, leading, among other things, to acidification and deoxygenation, GHG emissions can be considered within the definition of "pollution of marine environment" of Article 1(1)(4). Latvia is of the opinion that Art. 194 should be interpreted to apply the "due diligence" obligation to prevent, reduce, and control pollution of the marine environment related to the deleterious effects of GHG emissions. Finally, Articles 207, 211, and 212 have also to be considered. The obligation of adopting national laws and regulations to protect the marine environment has to consider internationally agreed standards, rules, and recommended practices and procedures such as the Paris Agreement, UNFCCC, and relevant regulations adopted by the International Maritime Organisation.

\*\*\*

## Singapore

**Country/Organization:**

[Singapore](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes, Tuesday, 19 September 2023. [Verbatim](#) and [video](#)

### Jurisdiction

Singapore doesn't address the basis of the Tribunal's advisory jurisdiction in its submission, but it requests an elaboration on the principles and circumstances of the exercise of advisory jurisdiction by international courts and tribunals concerning the Tribunal's "discretionary power" to refuse to give an advisory opinion for "compelling reasons." Singapore seeks the identification of the compelling reasons and suggests different possibilities when it should apply: (i) when the question of the advisory opinion is related to a dispute between States; (ii) when there is poor and incomplete information and evidence for a judicial conclusion upon any disputed question and (iii) if the response of the request aims to create a new law. In this case, none of the different possibilities applies.

### Applicability of UNCLOS to Climate Change

Singapore expresses that it is clear that UNCLOS can apply to climate change and its impacts, mainly the provisions in Part XII. Article 1(4) defines "pollution of the marine environment" and has two limbs: (i) the act of pollution must involve the direct or indirect anthropogenic introduction of substances or energy into the marine environment, and (ii) the anthropogenic introduction that results or may result in deleterious effects of the marine environment. Two realities related to COSIS's question and the definition in Article 1(4) are ocean acidification and warming, backed up by scientific evidence from the Special Report on the Ocean and Cryosphere in a Changing Climate (SROCC) and the IPCC. Therefore, the generation of anthropogenic GHG emissions is related to the definition of Article 1(4), and the provisions of Part XII must be connected to climate change impacts.

**Question (a): States' obligations to prevent, reduce and control pollution of the marine environment in relation to climate change**

Article 194 specifies the general principles of Articles 192 and 193 into more particular obligations. Article 194 should be read as an obligation on States to take all measures necessary to prevent, reduce, and control anthropogenic GHG emissions that cause deleterious effects on the marine environment. Articles 194 (1) (prevent, reduce, and control pollution) and 194 (2) (do not cause transboundary damage by pollution) are framed as due diligence obligations where States have to take “all measures...necessary” to prevent, reduce, and control GHG emissions. The due diligence concept is variable and flexible but must take into consideration the (i) nature of the activity and its risk, so standards must be aligned with the risk of the activity; (ii) scientific knowledge for the evolution of the due diligence concept; (iii) CBDR of States, its individual capacities, capabilities, and constraints; (iv) application of the precautionary approach; and (v) internationally agreed rules of interpretation of treaties.

Due diligence obligations require States to take measures, within their capabilities, to address GHG emissions and adopt suitable rules adapted to the nature of the activity, the risk, and the precautionary approach. States are required to cooperate and participate, bona fide, in the formulation and elaboration of rules, standards, and practices for the prevention, reduction, and control of anthropogenic GHG emissions (Articles 194(1), 197, 207(4) and 212(3)).

Article 194(1) also stipulates that States must negotiate with other States in good faith to harmonize national measures on the prevention, reduction, and control of GHG emissions. Articles 200, 201, and 202 express that States are obligated to participate in platforms that promote studies, undertake programs of scientific research, and encourage the exchange of information and data about climate change and GHG emissions; be part of cooperation platforms for establishing appropriate scientific criteria for the formulation of rules, standard and recommended practices and; promote assistance programs to developing States for the prevention, reduction, and control of anthropogenic GHG emissions. Furthermore, ¶1 and 2 of Articles 207 and 212 stipulate the obligation to adopt laws and regulations for the prevention, reduction, and control of anthropogenic GHG emissions from land-based sources, taking into account internationally agreed rules, standards, and practices and taking measures to address those emissions.

Finally, under Articles 213 and 222, States must enforce the laws and regulations created and implement applicable international standards and rules, including Article 4 of the Paris Agreement, in the climate change context.

**Question (b) State obligations to protect and preserve the marine environment in relation to climate change impacts**

The obligations of due diligence and good faith in the different provisions for the prevention, reduction, and control of pollution of the marine environment must be extended to the obligation

to take the necessary measures for the protection and preservation of rare or fragile ecosystems and marine life affected by climate change as expressed in Article 191(5).

Additionally, Articles 194(1) and 197 require States to negotiate with other States the harmonization of national measures, the formulation and elaboration of international rules, standards, and recommended practices and procedures in line with UNCLOS for the protection and preservation of the marine environment related to climate change impacts, including adaptation measures.

Singapore considers the last two obligations are indicated in Article 198, where States have to notify others of the imminent danger or damage to the marine environment arising from the deleterious effects of GHG emissions, and in Article 202, where States must promote assistance to developing countries for the preservation of the marine environment from climate change impacts.

\*\*\*

## Republic of Korea

Country/Organization: Republic of Korea  
Date of Submission: 16 June 2023  
Oral Statement: Yes, Friday, 15 September 2023. [Verbatim](#) and [video](#)

### Answer to Questions (a) and (b) of the Advisory Opinion Request

UNCLOS does not make an express reference to climate change since it was drafted before climate change was relevant for the international community. At the same time, the climate change regime doesn't pay particular attention to the marine environment. Both UNCLOS and the UN climate change regime have evolved independently. Nonetheless, these are obviously related. Article 192 of UNCLOS stipulates a general obligation to protect and preserve the marine environment. Article 194 expands on that general obligation by requiring the States to take all measures to prevent, reduce, and control pollution of the marine environment from any source. Article 192 and Article 194 can be interpreted as an obligation for the State Parties to exercise the best possible efforts to mitigate GHG emissions. Both articles and other central provisions of Part XII entail an obligation of due diligence, which the ICJ defined in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* as an obligation for a State to avoid activities in its territory or any area under its jurisdiction that may cause significant damage to the environment of another State.

Furthermore, Part XII provides cooperation between the States, which is fundamental in preventing pollution of the marine environment. Another crucial provision is Article 1, ¶1(4) of the Convention, which defines "pollution of the marine environment" as: "*the introduction by man, directly or indirectly, of substances of energy.*" Even if it wasn't intended at the time, now the definition has to be interpreted to encompass the deleterious effects of GHG emitted by humans to

the oceans. In this sense, the Paris Agreement is the most important measure and standard to examine the due diligence obligation encompassed in the Convention related to climate change. Articles 237 and 311 can be relevant to the obligations on this topic.

### **Legislation, Enforcement, and National Strategy Plan**

Other provisions related, directly and indirectly, to the protection and preservation of the marine environment from the deleterious effects that result or may result from climate change are Sections 2 to 6 of Part XII. Specifically, sections 5 and 6 (Articles. 207, 212, 213, and 222) deal with the obligation to adopt and enforce laws and regulations to prevent, reduce, and control pollution of the marine environment, considering “internationally agreed rules, standards and recommended practices and procedures.” Laws and regulations should address the interconnection between the marine environment and climate change, taking into consideration each State and region’s particular circumstances.

Besides, within sections 5 and 6, it can be suggested that, as an obligation, a State Party must manage, implement, and monitor actions to protect and preserve the marine environment by adopting various programs or action plans connected with the obligations under the Paris Agreement, aiming for one strategy or plan that deals with climate change encompassing the marine environment. The plan or strategy must have a multipurpose approach (awareness of climate change impacts on the marine environment, reinforcement of the potential of the oceans as carbon sinks, mitigation programs in the maritime and fisheries sectors, and protection of the marine ecology) backed up by scientific data and knowledge.

### **Other relevant specific obligations under UNCLOS**

Other significant specific obligations are to cooperate on a global or regional basis for the protection and preservation of the marine environment (Art. 197); notification of imminent or actual damage (Art. 198); promotion of studies, research programs, and exchange of information data (Art.200); and scientific and technical assistance to developing States (Art. 202). Art. 202 is critical for countries that are especially affected by sea-level rise and other climate change impacts.

### **Conclusion**

UNCLOS is a relevant instrument for the global efforts to respond to the climate crisis since it contains important obligations for State Parties to protect and preserve the marine environment. However, it is limited and cannot deal with all critical matters related to climate change. The international community of States must continue the protection and preservation of the marine environment from climate change’s devastating impacts.

\*\*\*

## **Egypt**

**Country/Organization:** [Egypt](#) (Written Statement of the Arab Republic of Egypt)

**Date of Submission:** 16 June 2023

**Oral Statement:** No

### **General Background**

Egypt clarified that the written statement is “without prejudice” to the position of Egypt regarding the jurisdiction of the Tribunal. There is empirical scientific evidence regarding the devastating impacts of climate change. Different climatic phenomena are attributed through the scientific findings of the IPCC. Though UNCLOS was drafted at a time when climate change was not considered a serious threat, it comprises provisions regarding the protection and preservation of the marine environment. Relevant obligations of the member States of UNCLOS can be interpreted in the present context of climate change scenarios.

### **Legal Framework**

For the advisory opinion of ITLOS, applicable proceedings are determined by Article 293 of UNCLOS. Article 31(1) of the Vienna Convention provides guidance to interpret UNCLOS, which is recognized by the ICJ as customary international law. UNCLOS Article 1(1)(4) has defined the pollution of the marine environment, and Article 194(5) has provided a broader scope to interpret the concept of the marine environment, which is sufficient to accommodate both existing and new sources of marine pollution. Man-made carbon dioxide that enters the marine environment, either directly or indirectly, can cause acidification of the oceans and is classified as a marine pollutant. Additionally, human-made GHG emissions introduce heat into the oceans, which is also considered a form of pollution. This statement is meant to address the obligations of States under UNCLOS Part XII, the UNFCCC regime, and other multilateral agreements that align with UNCLOS.

### **Answer to the First Question**

Provisions of UNCLOS and other customary international law are “comprehensive” and include “all forms and sources of marine pollution.” Article 194 of UNCLOS requires State Parties to take all necessary measures to “prevent, reduce, and control pollution of the marine environment from any source.” Articles 207-212 obligate States to adopt and enforce laws and regulations to prevent, reduce, and control pollution of the marine environment. Articles 197-201 contain the duty of States to cooperate, notify, and exchange data and information, while Articles 202 and 203 require the provision of scientific and technical assistance to developing States. The UNFCCC regime and the Paris Agreement are directly relevant to the interpretation of UNCLOS Part XII, including when identifying the obligations that arise with respect to the adverse impacts of climate change on the marine environment.

Since “the largest share of historical and current global emissions of greenhouse gasses has originated in developed countries,” developed States, in particular, should take the lead in “modifying longer-term trends in anthropogenic emissions,” and this can happen “by undertaking economy-wide absolute emission reduction targets.”

### **Answer to the Second Question**

Climate change has direct deleterious effects on the marine environment. Article 192 of UNCLOS establishes a specific affirmative and overarching obligation on State Parties “to protect and preserve the marine environment.” The marine environment that States are required to protect and preserve includes biodiversity, particularly where species are threatened and ecosystems are fragile, which is further indicated by Article 194(5) of the Convention. States are under an obligation to comply with their due diligence obligations as indicated in our response to question (1) for the protection and preservation of the marine environment and also to take additional measures to protect and preserve the marine environment, such as establishing area-based management tools including marine protected areas.

### **Responsibility and Obligations**

Article 235 of UNCLOS provides that “States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.” States that violate their obligations must stop the wrongful act and provide compensation for any harm caused.

### **Conclusion**

To be able to conform with their obligation under UNCLOS to protect and preserve the marine environment from climate change (Article 192), States are required to effectively comply with the obligation to prevent, reduce, and control pollution of the marine environment in relation to climate change (subject of question 1). Additional measures may also be required, including establishing marine protected areas.

\*\*\*

## **Brazil**

**Country/Organization:** [Brazil](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** No

### **Jurisdiction**

The Tribunal does not have jurisdiction to issue an advisory opinion. The request presented by the Commission of Small Island States on Climate Change and International Law (COSIS) pretends to justify the jurisdiction of the ITLOS by invoking Article 21 of the Statute of the Tribunal and Article 138 of its Rules of Procedure. Similarly, in the *SRFC* Advisory Opinion, the Tribunal based its jurisdiction on the reference to “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” found in Article 21 of the Statute.

However, the phrase “all matters” is ambiguous and can lead to “opposite and equally plausible” interpretations. During the proceedings, participants debated whether the ITLOS had jurisdiction to issue an advisory opinion, considering the absence of explicit reference to such competence,

both in the Convention and in the Statute. UNCLOS explicitly gives authority to issue advisory opinions only to the Seabed Disputes Chamber. Brazil concurs with the view exposed by many States in the *SRFC* advisory proceedings, according to which the full Tribunal does not have jurisdiction to issue advisory opinions. It cannot be presumed that States have conferred on the Tribunal such an important function without any indication to that effect.

Lastly, even if the Tribunal decides to exercise jurisdiction in the present request, its scope must be restricted *ratione materiae* considering the requesting organization's scope of activities. In other words, the legal issues addressed in the merits should be strictly limited to those that fall within the scope of activities of COSIS. The advisory jurisdiction of the Tribunal should also be materially limited to legal issues related to the interpretation or application of UNCLOS and its implementing agreements.

### **Answer to Question (a) of the Advisory Opinion Request**

According to Article 194 of UNCLOS, States have an obligation to take "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." They shall also take measures to ensure that "activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment." This is essentially an obligation of conduct.

Article 194 informs the entire marine pollution regime and determines that States shall adopt measures "in accordance with their capabilities." This provision aligns with the principle of CBDR, one of the cornerstones of the climate change regime. The principles of this multilateral regime should guide the interpretation of UNCLOS under the principle of systemic integration contained in Article 31 (3)(c) of the Vienna Convention.

The prevention, reduction, and control of marine pollution depends on international cooperation. In this context, Article 197 of UNCLOS establishes a general duty to cooperate to protect and preserve the marine environment. Part XII of UNCLOS reinforces the importance of cooperation, considering that it recognizes the obligation to grant special treatment to developing States in allocating funds and technical assistance. Part XIII, dedicated to marine scientific research, and Part XIV, dealing with the transfer of marine technology, also contain provisions establishing the obligation to cooperate. This framework imposes obligations on developed countries regarding financing, capacity building, and transfer of knowledge and technology to developing States. The principle of CBDR reinforces these obligations.

### **Answer to Question (b) of the Advisory Opinion Request**

According to Article 192 of UNCLOS, States must protect and preserve the marine environment. This provision reflects customary international law and applies to all States, including those that are not Parties to UNCLOS. Furthermore, Article 192 applies to all maritime zones within and beyond state jurisdiction. It also requires States to adopt rules and measures in their domestic legal

systems to prevent activities under their jurisdiction and control from causing harm to the marine environment. The duties and obligations of States regarding the protection and preservation of the marine environment must be guided by the principle of CBDR.

\*\*\*

## France

**Country:** [France](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes, on 25 September 2023

### **Jurisdictional Foundations**

The written statement of France meticulously outlines the legal underpinnings that grant the Tribunal the authority to offer advisory opinions. It references specific provisions from the Tribunal's Statute and Rules. A historical context is provided, recalling an instance where France raised concerns about the clarity of the Tribunal's jurisdiction. This was later addressed in a subsequent advisory opinion, which clarified the Tribunal's advisory jurisdiction parameters. The statement emphasizes that the Tribunal's capacity to consider advisory opinions is contingent upon meeting certain conditions, including the request's alignment with an international agreement related to UNCLOS.

### **Evaluating the Response's Appropriateness**

The written statement of France delves into the broader ramifications of the Tribunal's advisory opinion, highlighting its potential influence on all UNCLOS parties. It underscores the Tribunal's obligation to consider the perspectives of all UNCLOS State Parties, especially those not directly involved in the initial request. The statement also touches upon the nuanced differences between the legal weight of an advisory opinion and a binding judgment. A notable point of discussion is the potential overlap with the ICJ, which has been approached with a similar request.

### **Legal Framework**

The written statement of France provides a comprehensive overview of the legal instruments that the Tribunal will rely upon. The primary focus is on the UNCLOS Convention, with a special emphasis on Part XII, which is dedicated to the preservation and protection of the marine environment. The statement also sheds light on references within UNCLOS to other international standards and conventions, notably highlighting the 1992 UNFCCC as a pertinent instrument.

### **Applicable Law**

The Tribunal's jurisdiction is limited to the Convention. The Tribunal's response should focus on those provisions of Part XII that identify specific obligations related to the deleterious effects of climate change and its impacts on the marine environment. Various articles in UNCLOS refer to different terminologies like "generally accepted international rules and standards" or



“recommended practices and procedures.” The scope of these external rules varies depending on the provision. For instance, Articles 207 and 212 require them to be taken “into account,” while Articles 210 and 211 specify that national laws “shall be no less effective” than global rules and standards. Most relevant external rules require compliance in a manner consistent with the general principles and objectives of the Convention. In addition to certain customary obligations related to prevention and due diligence, the UNFCCC is also considered relevant.

### **Jurisdiction of the Tribunal to rule on the request for an advisory opinion**

- The Commission initiated the request for an advisory opinion based on Article 21 of the Tribunal’s Statute and Article 138 of its Rules. These articles form the legal foundation for the Tribunal’s ability to provide an advisory opinion.
- Interpretation and Precedence: In a previous case (Case No. 21), France questioned the clarity of the Tribunal’s jurisdiction to provide an advisory opinion based on these articles. However, an advisory opinion issued by the Tribunal in 2015 clarified that these articles do indeed grant the Tribunal advisory jurisdiction.

### **Climate Change and Marine Environment**

The written statement of France paints a vivid picture of the challenges posed by climate change to marine environments. It delves into the responsibilities of States in mitigating the adverse effects of climate change on marine ecosystems. The pivotal role of international collaboration in addressing these challenges is underscored, emphasizing the collective responsibility of the global community.

\*\*\*

## **Chile**

**Country/Organization:** [Chile](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes (Thursday, 14 September 2023, 10 a.m.–1 p.m.)

### **Jurisdiction**

The legal basis for the advisory jurisdiction of the Tribunal is Article 21 of the Statute. In the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS observed that Article 21 and the “other agreement” conferring jurisdiction on the Tribunal are interconnected and constitute the legal basis of the Tribunal’s advisory jurisdiction. According to Article 138 of the Rules of the Tribunal, the request for an advisory opinion must comply with three elements: (a) the existence of an international agreement related to the purposes of the Convention, which specifically provides for the submission of an advisory opinion; (b) the request shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to request the Tribunal; and (c) a legal question.

In this case, Chile understands that the “other agreement” is the Agreement for establishing COSIS. This international agreement conferring jurisdiction to the Tribunal is concerned with interpreting UNCLOS in the context of the detrimental effects of climate change on the marine environment. The second requirement is also fulfilled, considering the Co-Chairs of the Commission submitted the request. Lastly, the legal status of the questions is clear from the fact that the answers might need to identify specific legal obligations of State Parties of UNCLOS. The fact that the opinion has been requested by some and not all State Parties is not a reason for the Tribunal to reject giving the opinion. The lack of consent by the rest of the Parties has no bearing on the power of the Tribunal to give advisory opinions.

### **Discretionary power**

Chile considers that the features of the advisory proceedings in the context of UNCLOS provide no basis for the Tribunal to reject exercising its advisory jurisdiction in this case.

### **Scientific evidence on which the Tribunal can rely**

In answering the request for an advisory opinion, the Tribunal must consider the underlying science on the detrimental effects of climate change on oceans. The Tribunal has at its disposal reliable scientific knowledge provided by the IPCC assessment reports, the World Ocean Assessment report, and other scientific studies validated by the scientific community working on a collaborative and global basis. The Tribunal can rely on the consensus reached by States and the international scientific community, and it does not need to ask for further evidence to give its advisory opinion.

### **Considerations regarding question (a) of the advisory opinion request**

Based on Articles 192, 194, 207, and 212 of UNCLOS, State Parties have specific obligations:

- States have a due diligence obligation to reduce GHG emissions to prevent, reduce, and control ocean warming, ocean acidification, and sea level rise.
- Considering that, to a great extent, ocean acidification results from carbon dioxide (CO<sub>2</sub>) being captured by oceans, States have a due diligence obligation to reduce CO<sub>2</sub> emissions.
- State Parties have an obligation to enact laws and regulations to reduce their GHG emissions.
- In adopting these laws and regulations, States shall consider internationally agreed rules, standards, and recommended practices and procedures. For this purpose, State Parties shall consider the UNFCCC, the Paris Agreement, and other pertinent international agreements. The laws and regulations adopted by State Parties to UNCLOS should lead to a progressive reduction in GHG emissions, reflecting “the highest possible ambition” and considering the principle of CBDR.
  - Articles 207 and 212 explicitly authorize States to consider rules, standards, practices, and procedures contained in other internationally agreed instruments. Furthermore, Article 31 (3)(c) of the Vienna Convention (VCLT) calls for the application of the principle of “systemic integration.”
- In adopting these laws and regulations, States shall also consider the availability of scientific knowledge as it progresses in time. Accordingly, these measures shall adequately respond to the environmental threats that science progressively demonstrates and explains.

- The impacts of climate change on the ocean were not yet known to States or the scientific community when the Convention was negotiated. However, based on Article 31 (3)(c) of the VCLT, the interpretation of UNCLOS may consider the evolution of the international legal system at the time of the interpretation. The Seabed Disputes Chamber of the Tribunal has already stated that due diligence is a standard that must adapt to the creation of new scientific and technical knowledge.
- State Parties have an obligation to cooperate in formulating and elaborating international rules, standards, and recommended practices and procedures for the reduction of GHG emissions.

These are obligations of due diligence.

### **Considerations regarding question (b) of the advisory opinion request**

In the light of the content of Articles 117, 123, 192, 193, 194, 197, 203, 204, and 237 of UNCLOS, Chile considers that State Parties have several specific obligations:

- The obligation to adopt measures for protecting and preserving the marine environment in the context of climate change impacts. For this purpose, States must adopt measures to protect and preserve the living resources existing in all maritime areas under coastal States' sovereign rights and jurisdiction.
- The obligation to adopt measures for the protection and preservation of living resources on the high seas.
- States Parties must adopt measures to protect and preserve rare or fragile ecosystems and the habitat of depleted, threatened, or endangered species and other forms of marine life.
- The obligation to consider the creation of Marine Protected Areas.
- The obligation to cooperate on a global or regional basis in formulating and elaborating rules, standards, and recommended practices and procedures for protecting the marine environment in the context of climate change.
- More broadly, States have an obligation to cooperate and coordinate to adopt measures to protect and preserve the marine environment in the context of climate change impacts. This includes the obligation to consider other international agreements, such as the Convention on Biological Diversity, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and the Antarctic Treaty, among others.
- The obligation to grant preference to developing States, in the context of international organizations, in the minimization of the deleterious effects of climate change.
- The obligation to cooperate in furthering scientific knowledge that enables States to adopt science-based measures for protecting and preserving the marine environment.

### **Oral statement**

Chile addresses four topics:

- First, the powers of the Tribunal to render advisory opinions and the absence of compelling reasons for the Tribunal to decline to respond to COSIS's request. Chile argues that COSIS requested an advisory opinion following the Statute and the Rules of the Tribunal. Moreover, according to Chile, all the prerequisites have been fulfilled in the present case.
- Second, the irrefutable scientific evidence regarding the extent and seriousness of the deleterious effects of climate change on the marine environment and how this evidence

should impact the assessment of the due diligence standard that States are expected to comply with in the context of UNCLOS. Chile highlights that small island States are particularly affected by these detrimental effects on the ocean.

- Third, the relationship between UNCLOS obligations, the more general obligation to protect and preserve the environment, and the obligations in the UNFCCC and the Paris Agreement.
- Lastly, the relevance of international human rights law for the interpretation of UNCLOS. Chile requests the Tribunal to consider international human rights law when responding to this request for an advisory opinion in light of Article 31 (3)(c) of the VCLT and Article 293 of UNCLOS.

\*\*\*

## Bangladesh

**Country:** People's Republic of [Bangladesh](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes, held on 13 September 2023, 3–6 pm slot (verbatim records available [here](#))

### Specific obligations under the Convention

Part XII of the Convention places specific obligations on State Parties to prevent, reduce, and control the GHG emissions that result in the deleterious effects of climate change and to protect and preserve the marine environment from those effects. GHG emissions constitute pollution of the marine environment as defined in Article 1(1)(4) of the Convention. Anthropogenic GHG emissions satisfy that definition because (i) they indirectly introduce heat into the marine environment and (ii) that introduction results or is at least likely to result in deleterious effects in Bangladesh and beyond.

State Parties must take all necessary measures to limit global average temperature rise to 1.5°C above pre-industrial levels under Article 194 of the UNCLOS. This is also consistent with the Convention's emphasis on scientific standards (i.e., Article 200). Accordingly, international rules and standards supplement scientific knowledge to determine the content of the due diligence obligation, consistent with explicit references to such rules and standards in Articles 197, 207(1), 211(2), and 213. Article 192 addresses the "protection" of the marine environment from future harm and its "preservation" in present condition. It thus implies both positive and negative obligations of due diligence.

### Comments from the Oral Statement:

- Major polluter countries do not have unlimited discretion with respect to activities that impact climate change.

- Bangladesh recognizes ITLOS' jurisdiction regarding this Advisory Opinion as a guardian of UNCLOS. The Tribunal has the authority and the ability to provide meaningful guidance on climate change.
- Based on the common but differentiated responsibilities and respective capabilities (CBDR-RC) principle, developed countries must ensure capacity building, technology transfer, and climate finance to shape a low-carbon and climate-resilient economy, which can be implemented through Article 202 of the UNCLOS.

\*\*\*

## Nauru

**Country/Organization:** Republic of [Nauru](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** Yes, held on 14 September 2023, 3 – 6 pm slot

### Jurisdiction of the Tribunal

The Tribunal has jurisdiction to give the advisory opinion requested. This is apparent from the provisions of its Statute, its Rules, and the COSIS Agreement. It is supported by interpretations of Article 16 and Article 21 of the Statute of ITLOS, Article 138 of the Rules, and Article 2(2) of the COSIS Agreement. Article 138(3) of the Rules provides the Tribunal with advisory jurisdiction in the present proceedings. The Tribunal shall “apply *mutatis mutandis* Articles 130 to 137” of the Rules. Article 23 of the Statute empowers the Tribunal to decide all disputes and applications in accordance with Article 293. The COSIS Agreement authorizes the Commission to request advisory opinions on any legal question within the scope of UNCLOS. There are several precedents and case law in support of the jurisdiction of the Tribunal regarding advisory proceedings. The principle of consent does not temper the Tribunal’s ability to exercise its jurisdiction, whether it be its primary or incidental jurisdiction.

### Answer to the First Question

Climate change has a devastating impact on the marine environment. The Preamble of UNCLOS provides that “the problems of ocean space are closely interrelated and need to be considered as a whole.” That is the spirit in which the obligations under UNCLOS to protect and preserve the marine environment concerning the impact of climate change must be understood. As the IPCC has evidenced, climate change has nothing short of devastating consequences on the marine environment. Part XII of the Convention lays down obligations on State Parties to take measures to prevent, reduce, and control pollution of the marine environment. As is apparent from its wording, Article 194 requires State Parties to take all necessary measures to prevent, reduce, and control GHG emissions. Similar and more specific obligations are set out in Articles 211, 217, 218, 220, and 222.

The Paris Agreement is a subsequent agreement between the Parties to UNCLOS regarding the interpretation of the Convention or the application of its provisions. Not every State Party to

UNCLOS is indeed a State Party to the Paris Agreement. That is not, however, necessary. What is necessary for there to be a subsequent agreement regarding the interpretation of the original treaty is the consent of the great majority of the treaty parties in the sense of Article 31(3) (a) of the Vienna Convention. The term in Article 2(1)(a) of the Paris Agreement of limiting the average global temperature to 1.5°C above pre-industrial levels is among the specific obligations of State Parties to UNCLOS.

### **Answer to the Second Question**

Under the title “General Obligation,” Article 192 provides that “States have the obligation to protect and preserve the marine environment.” It applies to all States, not only to State Parties to UNCLOS. The obligation is one of due diligence. Specific rules of international law applicable to the questions before the Tribunal, such as (inter alia) international human rights law, the corpus of international law relating to the environment, and other general international law, will, therefore, inform the content itself of the obligation laid down in Article 192. The same is the case with the specific obligation set out in Article 2(1) (a) of the Paris Agreement. Article 192 “applies to all maritime areas,” “both inside the national jurisdiction of States and beyond it.” This is in keeping with the Preamble of UNCLOS. The International Court has observed “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”

The principle of general international law is codified in Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Article 1, identically phrased in the two Covenants, provides for the right of self-determination. It is a group right rather than an individual right. As such, it is not subject to the jurisdictional limitations set out in Article 2 of the Covenants, which apply to the individual rights in Part II. The general international law informs the specific obligations of State Parties to UNCLOS in relation to human rights. Thus, all State Parties have an obligation to take such measures of protection and preservation of the marine environment so that no people are deprived of their means of subsistence. From this, too, it follows that limiting the average global temperature to 1.5°C above pre-industrial levels will, by necessity, be among the specific obligations of State Parties to UNCLOS to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.

### **Conclusion**

The Republic of Nauru invites ITLOS to hold that it has jurisdiction to (i) render the advisory opinion requested, (ii) exercise its discretion to render the advisory opinion requested, (iii) answer both of the questions taking account of Nauru’s contentions set out in the written statement.

### **Comments from the Oral Statements/Judge’s Questions:**

- Several Resolutions of the UN General Assembly have officially recognized the devastating impacts of climate change.
- The general terms of the UNCLOS are broad enough to cover climate change.
- International law does not sanction any absolute and rigid method of interpretation.

- The Tribunal can identify obligations and rights that the Convention does not cover.
- Law of the Sea is a research laboratory for international law.

\*\*\*

## **Belize**

**Country/Organization:** [Belize](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** 18 September 2023, 3 pm.

### **The exercise of the Tribunal’s jurisdiction to render the Advisory Opinion**

The Tribunal should — and indeed must — answer the questions asked, which could scarcely be of greater importance to all States and not just the Member States of COSIS. The questions fall well within the scope of the Tribunal’s judicial functions and, as follows from its prior jurisprudence, the consent of States outside COSIS is not required.

### **The scope of the questions**

Belize notes that the questions posed in the Request for an Advisory Opinion are not limited to the obligations under Part XII of UNCLOS: they concern the obligations of State Parties to UNCLOS “including under Part XII” of the Convention. While no doubt the principal focus of statements to the Tribunal and of the advisory opinion itself may be the obligations under Part XII, Belize considers that the Tribunal should exercise its discretion to ensure consideration is given to obligations outside Part XII. In this respect, Articles 2(3) and 56(2) may be particularly important.

### **Key definitions**

The first question posed in the Request for an Advisory Opinion focuses on State Parties’ obligations 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 providing an opinion on this question, the Tribunal must address the meaning of the term “pollution.” The introduction through the atmosphere of anthropogenic GHG emissions that result or are likely to result in deleterious effects on the marine environment, such as ocean acidification, is a form of “pollution” within the meaning of Article 1(1)(4) of the Convention. In addition, the “marine environment” also includes the atmosphere above the sea’s surface, which is breathed by marine life, such as marine mammals and ocean-dwelling seabirds.

### **Obligations under Part XII UNCLOS**

While Belize intends to develop its position on the response to the questions at the hearing and in any further written submissions, it considers that, in brief terms, the specific obligations of the State Parties to UNCLOS under Part XII are as follows.

As to sub-question (a):

- The obligations which are of particular importance (for the reasons outlined above) are those contained in Articles 194(1)–(3) and (5), 197, 200, 201, 204– 208, 212 and 222.
- As follows from the terms used in these provisions and the existential risks posed to the marine environment by anthropogenic GHG emissions.

States must *inter alia* exercise an enhanced and elevated due diligence in the performance of the obligations set out in the said provisions. In the absence of regulations adopted pursuant to Article 201, the necessary measures to be taken under Articles 194(1)–(3) and (5) and 212(2) should be assessed by reference to multiple factors, in particular by reference to:

- Application of the precautionary principle alongside identification and application of the best scientific means available;
- The need for measures to be effective;
- Reports such as those of the IPCC;
- Other obligations of States, including within the framework of the UNFCCC and
- As applicable, the results of relevant monitoring and environmental assessment.

In performing the obligations referred to above, monitoring, reporting, and environmental assessment (including in the form of Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs)) play a particularly important role.

As to sub-question (b):

- The same considerations apply through the application of Article 192, which underpins obligations as further detailed in the provisions noted above but also establishes independent and freestanding obligations to both protect and preserve the marine environment.
- In performing these obligations, monitoring, reporting, and environmental assessment (including in the form of SEAs) play a particularly important role.

Further, the State Parties are subject to obligations arising under customary international law, including those that may be applicable depending on the maritime zone at issue, including under Articles 2(3) and 56(2) of the Convention.

\*\*\*

## Portugal

**Country/Organization:** Portugal

**Date of Submission:** 15 June 2023

**Oral Statement:** [Given](#) on Thursday, September 14, 10 a.m.

### Key Arguments

The brief of the Portuguese Republic is primarily aimed at clarifying the obligations State Parties to UNCLOS have under the convention relating to the questions asked in the request for an



advisory opinion. The Portuguese Government also stresses the importance of considering the scientific evidence regarding the central role of oceans in addressing climate change.

### **Openness of UNCLOS to other international rules**

UNCLOS is generally recognized as a living treaty rather than a self-contained legal system. As such, UNCLOS must be interpreted in light of other international legal instruments, especially when it comes to areas of substantive law not clearly regulated by the Conventions, as is the case for climate change law. UNCLOS can integrate external sources of international law in three ways. First, by considering the legal regimes applicable between the parties. Second, when UNCLOS provisions include explicit rules of reference to other international norms. Third, when UNCLOS provisions are phrased in more general terms, their interpretation will evolve over time.

### **Relevant external instruments: UNFCCC, Paris Agreement, and OSPAR**

The external norms central to the application of the UNCLOS are the obligations in and objectives of the UN Framework Convention on Climate Change (“UNFCCC”), the Paris Agreement, and the Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR”).

The UNFCCC determines the general framework for addressing climate change and provides legal clarity by defining many concepts related to climate change. All legal instruments adopted by the Conference of the Parties to the UNFCCC must align with the UNFCCC’s ultimate objective of stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The UNFCCC further recognizes the importance of international cooperation and participation of the entire international community and the uneven distribution of the responsibility for climate change, specifically the CBDR of the Parties to tackle climate change.

While the UNFCCC did not contain measurable targets in terms of GHG emissions, the Kyoto Protocol, and especially the Paris Agreement introduced clear goals to tackle climate change. The Paris Agreement introduced a collective agreement to hold the increase in global average temperature since pre-industrial levels well below 2°C and individual obligations for the Parties to make efforts to limit the temperature increase to 1.5°C. The Paris Agreement also establishes that the Parties should take action to conserve and enhance sinks and reservoirs of GHGs.

The OSPAR Convention, finally, is a regional instrument covering the East-Atlantic. The strategy adopted by its Commission includes that State Parties apply the precautionary principle, the use of best available techniques and environmental practices, the principle of taking preventive action, and the principle that rectifying environmental damage at its source is a priority. The OSPAR Strategy also sets out strategic objectives its members should consider.

### **Obligations to preserve and protect the marine environment under UNCLOS**

Part XII of UNCLOS resembles an inverted pyramid, with Article 192 establishing the overarching obligations informing all provisions, Article 194 specifying the obligations to prevent, reduce, and control pollution of the marine environment, and Section 5 specifying the obligations for preventing, reducing, and controlling pollution of the marine environment based on the source.

The overarching provisions concerning the preservation and protection of the marine environment in UNCLOS are Articles 192 and 194. Article 192 contains positive obligations for the State Parties to protect the marine environment from future damage, preserve it in its current condition, and ensure compliance by vessels flying its flag. The article also contains the negative obligation not to degrade the marine environment further.

The question is whether Article 192 goes beyond the customary law principle of prevention of environmental harm. The answer to this question hinges again on the openness of UNCLOS to other rules of international law. The Paris Agreement, in particular, shrank the discretion of State Parties in addressing climate change, namely by introducing identifiable targets. The Parties no longer have to design policies and set priorities according to hypothetical scenarios, but rather, these should reflect the upper limits indicated by the Paris Agreement.

Article 194 contains much of the wording used in the request for an advisory opinion and obliges State Parties to prevent, reduce, and control pollution of the marine environment from all sources. Both this general obligation and the specific obligations in Article 194 must be read in combination with the UNFCCC, Paris Agreement, and OSPAR in mind. Especially the targets of the Paris Agreement and the strategic objectives of OSPAR reduce the State Parties' discretion in terms of preventing, reducing, and controlling pollution of the marine environment.

Articles 207 and 212 of UNCLOS address pollution of the marine environment by land-based and atmospheric sources specifically. Both include an explicit rule of reference to other international instruments. The relevance of the UNFCCC, Paris Agreement, and OSPAR thus derives from these rules directly. The effect is that the implementation and application of Articles 207 and 212 into national law cannot blatantly hinder or disregard the objectives of these external norms.

#### **Comments from the Oral Statements:**

The representative for Portugal noted that “Anthropocene GHG emissions clearly meet the definition of pollution of the marine environment under UNCLOS, as they result in the introduction of energy and substances into the marine environment, thus causing deleterious effects to the marine environment.” Portugal further firmly stressed their point that “the discretion that States Parties currently enjoy under articles 194, 207 and 212 of UNCLOS is [...] narrower and more demanding in light of the measurable targets enshrined in article 2(1) of the Paris Agreement.” Including that “States have already recognized this in the Declaration adopted in the Lisbon Oceans Conference in 2022 entitled ‘Our Ocean, Our Future, Our Responsibility’” (the Declaration is then quoted at length).

\*\*\*

# Canada

Country: [Canada](#)

Date of Submission: 16 June 2023

Oral Statement: No

## Canada's role on climate change

Before addressing the question possessed by the Tribunal, Canada acknowledged the role it has in addressing climate change as the world's largest heat sink and one of the most important carbon sinks. It also recognized that coastal States, and particularly Small-Islands Developing States, are especially impacted by climate change and that many Indigenous Peoples, including those in the Arctic (of Canada and Europe), exercise stewardship, management, and governance over their coastal lands and waters, and therefore share deep ties with ocean ecosystems.

## Jurisdiction of the Tribunal to provide an advisory opinion

Regarding States' obligation to protect and preserve the marine environment under Part XII of the Convention, Canada strongly advocates that the Tribunal should recognize the substantial role of GHGs, the primary driver of climate change, as a form of marine pollution within the Convention's purview. Supporting this stance, Canada highlights the historical records of Article 194(1), which originated from the Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP). GESAMP's intent was to ensure the flexibility of pollution control measures, considering the possibility of emerging pollutants not previously anticipated.

Furthermore, Canada firmly contends that it would be judicious for the Tribunal to articulate an opinion regarding the overarching obligation to safeguard and maintain the marine environment against the adverse impacts of climate change. Within the framework of Part XII, this obligation will encompass proactive measures to prevent, reduce, and control pollution of the marine environment from GHG emissions, as well as an obligation on all States, acting either individually or jointly, to abstain from actions that degrade the marine environment through emissions of this particular pollutant.

In addressing the interplay between pertinent international legal agreements and Part XII of the Convention, particularly the obligations of State Parties concerning specific forms of marine pollution, Canada offers a comprehensive analysis encompassing (i) the scope of Articles 237 and 311 of the Convention, (ii) Articles 207 and 212 of the Convention; and (iii) the relevant agreements related to climate change.

Regarding the scope of Articles 237 and 311, Canada elucidates that these provisions establish a symbiotic relationship between the obligations under Part XII and those stipulated in more specialized agreements. Canada firmly asserts that articles 237 and 311 empower the Tribunal to draw upon other international instruments (e.g., the International Climate Change regime) to comprehend the Convention's obligations in the context of climate change.

Canada concludes that Articles 207 and 212 of the Convention impose a duty on State Parties to undertake measures concerning specific forms of marine environmental pollution, duly considering other “rules of references” such as external international rules, standards, practices, and procedures that are interconnected with the Convention. In addition to those rules of reference, Canada asserts the relevance of the concept of evolutive interpretation, indicating its pertinence for the Tribunal in determining the applicability and manner in which climate-related agreements should inform the interpretation of obligations under Part XII.

Canada emphasizes the unequivocal duty of States to engage in cooperation under Part XII of the Convention. The foundation of this duty is firmly established in Article 197 of the Convention, with further affirmation and reinforcement from various international instruments. Notably, the UN General Assembly Resolution on Oceans and Law of the Sea, in conjunction with Articles 7-8 and 12 of the Paris Agreement, the UNFCCC, and the amendments of the International Convention for the Prevention of Pollution from Ships (MARPOL), articulates and underscores this cooperation obligation.

These instruments collectively outline a spectrum of cooperative actions, ranging from crucial efforts in climate change mitigation and adaptation, capacity-building, technology transfer, and communicating and maintaining nationally determined contributions towards reducing GHGs. Moreover, cooperation is actively fostered and facilitated through influential organizations such as the International Civil Aviation Organizations (ICAO), the International Maritime Organization (IMO), and the Least Developed Countries Expert Group, among others. In sum, applying a multilateral approach only reinforces the duty of State Parties to cooperate under Part XII.

Canada underscores that the essence of the obligation outlined in Part XII centers on the principle of due diligence. Due diligence consists of a thorough analysis that carefully assesses potential risks and endeavors to implement appropriate measures to mitigate those risks and the resultant harm. In the context of environmental liability, jurisprudence from the ICJ asserts that addressing these risks facing States requires mitigation to take place through the use of preventive measures and consideration for spillover effects on the environment of other States. Moreover, Article 192 suggests that this consideration extends to the entirety of the marine environment. Notwithstanding the breadth of this analysis, Canada asserts that States must be given the flexibility to take measures within their disposal and in accordance with their capabilities that align with their economic and universal interests.

Finally, Canada identifies that there also exists a tension between the broad jurisdictional reach of the Tribunal to address matters specifically provided for in other agreements that confer jurisdiction to the Tribunal and the restriction imposed on the Tribunal not to interpret the obligations provided for by other international agreements. In other words, while external international norms and agreements may inform the obligations of the Convention, the obligations themselves may not be an articulation of the measures thought to be imposed by other agreements.

\*\*\*

## Guatemala

**Country/Organization:** [Guatemala](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes ([Held on](#) Thursday, 14 September 2023, 3 p.m. -6 p.m.)

### Jurisdiction

Guatemala expressly acknowledges the Tribunal’s Advisory Opinion of 2 April 2015 in Case No. 21 - *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*. However, according to Guatemala, the Tribunal could benefit from the opportunity to revisit its reasoning and provide clearer guidance on the scope and limits of its advisory jurisdiction.

In the *SRFC* advisory opinion, the Tribunal determined the following prerequisites for the exercise of its advisory jurisdiction: (a) an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; (b) the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and (c) such an opinion may be given on “a legal question.”

The request for an advisory opinion submitted by the COSIS appears, *prima facie*, to fulfill these prerequisites: (a) the Agreement for the Establishment of the COSIS appears to be related to the purposes of UNCLOS and it incorporates an express authorization for the Commission to request advisory opinions from the Tribunal “on any legal question within the scope” of UNCLOS; (b) the request was transmitted to the Tribunal by the Co-Chairs of the Commission; and (c) the two questions that have been transmitted are framed in legal terms and are of a legal nature. Accordingly, Guatemala preliminarily contends that the Tribunal has jurisdiction to entertain the present request.

### Additional observations

The Tribunal should be cautious when analyzing the questions, particularly considering their broad and general nature. The advisory opinion should be a statement of the law and not a legislative exercise. Furthermore, the Tribunal should consider that a discrete number of States form COSIS and that the membership is limited to the Alliance of Small Island States. COSIS does not enjoy the universality or quasi-universality that organs and organizations authorized to request advisory opinions usually have.

The Tribunal must be careful in protecting the rights of third States who were not consulted when the questions were drafted or submitted to the Tribunal. This necessity is especially acute as concerns have been expressed about how the advisory jurisdiction of the Tribunal has been triggered in this case, particularly by an international agreement arguably concluded for the sole purpose of submitting the request for an advisory opinion at hand. The Tribunal should also consider the potential effect of this advisory opinion in encouraging further similar requests that may distort the object and purpose of the Tribunal.

## Oral statement

First, Guatemala reiterated the content of its written statement. For instance, it emphasized that the present request for an advisory opinion provides an opportunity to fill any gap left by the decision in Case No. 21 and provide States with unequivocal guidance for advisory proceedings. Second, Guatemala addressed the Tribunal's jurisdiction *ratione materiae*, the applicable law, and the relationship between UNCLOS and other rules of international law. Lastly, Guatemala provides observations on questions (a) and (b), with emphasis on two issues: the due diligence obligations in Part XII and the principle of CBDR.

The jurisdiction *ratione materiae* of the Tribunal is limited to UNCLOS. In a contentious case, the Tribunal may only find breaches of the Convention. Similarly, advisory opinions must focus on the interpretation of the Convention. However, this does not limit the authority of the Tribunal to interpret UNCLOS considering other rules of international law. These rules may derive from other treaties, customary international law, or general principles of law. This is justified by Article 293 of the Convention and the principle of systemic integration reflected in Article 31(3)(c) of the Vienna Convention. Articles 237 and 311 are also relevant in this context, as they further specify the relationship between UNCLOS and other instruments.

In this case, the UNFCCC and the Paris Agreement are among the most relevant instruments for interpreting Part XII and determining the content of States' obligations. The principles of prevention and CBDR can also provide guidance. Certain provisions of the Convention also refer to internationally recognized rules or standards for purposes of their interpretation and application. In this context, UNCLOS must be interpreted in an evolutive manner, considering the best available science to address the problems posed by climate change.

Regarding the questions, there are four arguments that Guatemala "does not find controversial." First, the definition of "pollution of the marine environment" in Article 1(1)(4) of the Convention covers GHG emissions. Accordingly, the obligations under Part XII may apply to GHG emissions from all sources which result, or are likely to result, in deleterious effects on the marine environment. Second, Article 194 of UNCLOS imposes an obligation to take all the necessary measures to prevent, reduce, and control anthropogenic GHG emissions. This article reflects the customary principle of prevention, also recognized by the UNFCCC. Third, Article 192 of the Convention imposes a broad due diligence obligation. It can be interpreted as an obligation to protect and preserve the marine environment from the adverse impacts of climate change. Fourth, Part XII of the Convention encompasses obligations of cooperation that are instrumental to fulfilling the obligations under Articles 192 and 194.

Lastly, Guatemala emphasizes that the burdens and costs of these obligations would not fall upon all States equally. The core duties under Part XII of UNCLOS are due diligence obligations, which must consider the position or situation of each State. The principle of CBDR also has a relevant role to play. The fulfillment of these obligations must consider the background of the countries, their capacities and responsibilities, and their right to develop.

\*\*\*

## United Kingdom

**Country/Organization:** [The United Kingdom](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes ([Held on](#) Monday, 25 September 2023, 10am - 1.30pm)

### **The jurisdiction and discretion held by ITLOS**

Firstly, to respond fully to the questions, it is important to discuss the jurisdiction and discretion held by ITLOS. Despite the UK asserting otherwise, relying on Article 21 of the ITLOS Statute, the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* proceedings found that ITLOS had jurisdiction to give an advisory opinion. Article 21 of the ITLOS statute “confers jurisdiction,” however, the UK argues that this was not explicitly done by Article 2(2) of the Commission of Small Island States on Climate Change and International Law Agreement, which allows an advisory opinion to be sought from ITLOS. Despite the recognition of similar wording in the SRFC proceedings, which alludes to the basis of the advisory jurisdiction in the current proceedings, ITLOS is invited to clarify its reasoning.

The majority of State Parties do not have removed organizations that can confer the power to request advisory opinions concerning obligations. This means that an advisory opinion given by ITLOS could have ramifications for the UNCLOS State Parties. Subsequently, when exercising discretion, it is important to consider parameters such as the importance of the good faith exercise of rights and jurisdiction by State Parties, requests relating to specific activities of the organization making the referral, the international agreement that allows requests for an advisory opinion, a request which concerns interpretation or application of UNCLOS, and the specificity of a request.

Moreover, under article 138(3) of the ITLOS Rules, a “precise statement of the question” is required for an advisory opinion, yet in these proceedings, the Commission’s questions are considered too broad. Maintaining specificity in questions posed and focussing on specific areas within the request will be beneficial in later advisory proceedings. ITLOS should stress the importance of this. To give constructive guidance to Part XII obligations in these proceedings ITLOS should a) look specifically at Part XII of UNCLOS and the definitional provisions related, and b) specifically look at anthropogenic climate change and ocean acidification under Part XII.

### **Answer to Question (a) of the Advisory Opinion Request**

Using the IPCC definitions of climate change and ocean acidification, the UK begins by determining whether they constitute “pollution of the marine environment” under article 1(1)(4) when they derive from anthropogenic GHG emissions in the atmosphere. Considering the three basic prerequisites of pollution of the marine environment under this article, they decide that it does.

Article 194 requires States to prevent, reduce, and control marine pollution. The article covers all sources of pollution, including GHG anthropogenic emissions. The article addresses not only what the specific obligations of pollution are, but also how States can address them. For instance, sections 1, 5, and 6 of Part XII further explore this in terms of measures that can be used. The UK points to sub-articles to show how States must harmonize policies and take both individual and joint measures to address GHG anthropogenic emissions globally. These include positive obligations such as preventative measures to ensure activities deriving from the State will not cause damage to other States (Article 194(2) of UNCLOS). To do this, States must adopt domestic laws, regulations, and other measures to ingrain rules and standards and initiate global frameworks that further promote the obligation (Articles 207 and 212 of UNCLOS).

If, contrary to the UK's opinion, climate change and ocean acidification caused by anthropogenic GHG emissions into the atmosphere is not "pollution of the environment" under Part XII of UNCLOS, Articles 192 and 194 would result in the same protection amongst the provisions that weren't related specifically to pollution.

### **Answer to Question (b) of the Advisory Opinion Request**

Article 192 of UNCLOS sets out the general obligation, specifying what States should do to protect and preserve the marine environment. To give purpose to the obligation, it must have specific content for it to be applicable, therefore, it is necessary to consider it alongside the principle of effectiveness and other relevant provisions of UNCLOS, such as Part XII. In addition, Article 192 interpretation can be found within related conventions such as UNFCCC, the Paris Agreement, and amongst norms of international law, jurisprudence, and commentary, see *South China Sea Arbitration* and *Virginia Commentary para 192.1*.

Expanding beyond the general obligation to "protect and preserve the marine environment" under Article 192, more articles are identified to guide the obligations of States. Article 194(5) is not limited to pollution but incurs the general obligation to protect ecosystems. In addition to expanding the functionality of the obligation through international organizations, which can help define and establish standards, the exchange of scientific research and programs is promoted (Articles 197, 200, 201). This is further enhanced by Article 206, which concerns the need to assess the effects of activities that may cause harm to the environment. Finally, to fully consider the obligations in the application of Part XII with concerns to climate change and ocean acidification, 5 legal principles must be engaged: 1) the due diligence standard, 2) the precautionary principle, 3) the duty of cooperation, 4) the concept of effectiveness, 5) the concept of best available science.

\*\*\*

## **The Netherlands**

Country/Organization: [the Netherlands](#)



**Date of Submission:** 16 June 2023

**Oral Statement:** Yes (Monday, 25 September 2023, 10 a.m.-1:30 p.m.)

### **The open and integrative character of UNCLOS**

UNCLOS is designed as a ‘living treaty’ with a ‘framework’ nature, and the drafters intended to ensure coordination and harmonization between UNCLOS and other relevant legal instruments and frameworks. This open and integrative character of UNCLOS should be the point of departure when considering the questions in the present Request. Firstly, Articles 192 and 194 are general provisions that are characterized by their broad formulations and due diligence nature. Secondly, Section 5 of Part XII includes various provisions that refer to external rules. Thirdly, Article 237 deals more generally with the relationship between Part XII of the Convention and external rules.

### **Articles 192 and 194**

As explained by the Arbitral Tribunal in the *South China Sea Arbitration* [para 941], Article 192 of the Convention is an essential component of the comprehensive approach in Part XII to the protection and preservation of the marine environment.

The general obligation of Article 192, which reflects customary international law in the view of the Netherlands, applies to all marine areas, both within and beyond national jurisdiction. The applicability of the duty to prevent, or at least mitigate, significant harm within national jurisdictions is reflected in the *Iron Rhine Arbitration*. As for the marine environment beyond national jurisdiction, the Arbitral Tribunal in the *South China Sea Arbitration* noted that the corpus of international law relating to the environment, which informs the content of Article 192, requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”

Moreover, the Arbitral Tribunal in the *South China Sea Arbitration* clarified that the general obligation enshrined in Article 192 of the Convention includes both positive and negative obligations. Article 192 entails the positive obligation to “take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.” It follows that the content of the general obligation of Article 192 is informed by the relevant, more specific, applicable corpus of international environmental law, including, but not limited to, the precautionary principle and the obligation to conduct environmental impact assessments.

Based on Article 194 (2), Parties are obliged to take all measures that are necessary to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other States and their environment. When pollution occurs, Parties need to ensure that such pollution does not spread beyond the areas where they exercise sovereign rights. Furthermore, the Netherlands submits that climate change, including through ocean warming and sea level rise, and ocean acidification resulting from GHG emissions, are drivers of the pollution of the marine environment because the deleterious effects of climate change and ocean acidification fall within

the ambit of “pollution to the marine environment” defined in Article 1 (4). Additionally, protecting and preserving the marine environment under Article 192 requires that the marine environment is made resilient against the deleterious effects of climate change and ocean acidification. Thus, the adoption of mitigation and adaptation are required.

### **Specific obligations as embedded in Part XII relating to sources of pollution**

Firstly, Article 194 (3)(a), in conjunction with Articles 207 and 213 of UNCLOS, requires Parties to prevent, reduce, and control pollution of the marine environment from land-based sources. Further, the OSPAR Convention and the Land-Based Sources (LBS) Protocol to the Cartagena Convention expand on this source of pollution and accordingly can be considered to contain external rules that further elaborate the provisions of UNCLOS. Secondly, Article 194 (3)(a), in conjunction with Articles 212 and 222, requires States to regulate pollution of the marine environment from or through the atmosphere. Those provisions are also applicable to air pollution produced by activities carried out within the territory of a State Party, as well as air pollution from, for example, ships and aircrafts of its nationality. The UNFCCC and the Paris Agreement are also relevant here.

Thirdly, Article 194 (3)(a), in conjunction with Articles 210 and 216, requires Parties to take other measures as may be necessary to prevent, reduce and control the pollution of the marine environment by dumping. Further, the London Convention and London Protocol provide a framework. Fourthly, on the basis of Article 194, (3)(b), in conjunction with Articles 211 and 221, pollution from vessels must be prevented, reduced, and controlled. MARPOL is an example of another relevant convention. Finally, pollution from seabed activities is addressed in Article 194 (3)(c), in conjunction with articles 208-209 and 214- 215. UNCLOS and the 1994 Agreement provide the general legal framework.

### **Relationship between UNCLOS and other relevant legal instruments, frameworks, and bodies**

In the view of the Netherlands, the relationship between UNCLOS and other legal instruments, frameworks, and bodies has its foundation in UNCLOS based on at least three means or mechanisms (i) through informing the content of its general obligation to protect and preserve the marine environment and to prevent, reduce, and control pollution as laid down in Articles 192 and 194, (ii) through the use of the so-called “rules of reference”, and (iii) through the mechanism for integration set out in Article 237. Through other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, Parties can establish rules, standards, practices, and procedures that contribute to the protection of the marine environment against the deleterious effects of climate change and ocean acidification. The international bodies that the Netherlands considers to be particularly relevant include the COP UNFCCC, IMO, ICAO, ISA, BBNJ Agreement, and, taking into account the regional context, the OSPAR Commission and the Conference of the Parties to the LBS Protocol to the Cartagena Convention.

On the basis of the open and integrative character of UNCLOS, the Netherlands would like to encourage the Tribunal to raise awareness of and provide guidance to these institutional frameworks so as to enable them, in the governance of human activities within their competence, to respect the obligations enshrined in UNCLOS related to the deleterious effects of climate change and ocean acidification on the marine environment.

\*\*\*

## Sierra Leone

**Country/Organization:** [The Republic of Sierra Leone \(“Sierra Leone”\)](#)

**Date of Submission:** 16 June 2013

**Oral Statement:** Yes, [Held on](#) 19 September 2023, 10 a.m. – 1 p.m.

### Jurisdiction

This section addresses first the legal basis for the advisory opinion and stipulates that jurisdiction of ITLOS is conferred in terms of Article 21 of the ITLOS Statute, which refers to “all matters,” which encompasses more than just disputes and includes advisory opinions. In this regard, reference is made to Articles 138(1) and 138(2) of the Rules and Practices of ITLOS, confirming that an advisory opinion may be given. The section sets out the prerequisites for the exercise of advisory jurisdiction, including the relevant provisions of the COSIS Agreement.

Secondly, this section addresses the exercise of advisory discretion, with reference to *inter alia* Article 138(1), the *SFRC Advisory Opinion*, and the practice of the ICJ. In conclusion, Sierra Leone submits that the Court has jurisdiction to give the Advisory Opinion requested by COSIS, that COSIS is a competent international organization to make the request under the Convention; and that in keeping with past precedent, it is both appropriate and prudent for the Tribunal to exercise its advisory jurisdiction over the questions contained in the COSIS Request.

### Answer to Question (a) of the Advisory Opinion Request

Sierra Leone identifies this question as being directed at State Parties’ obligations under Article 194 of the Convention to prevent, reduce, and control pollution of the marine environment. A dangerous increase in water temperature, ocean acidification and rising sea levels have been caused by the excessive levels of anthropogenic GHG emissions, over 90% of which are absorbed by the oceans. The human-induced GHG emissions on the marine environment are outlined and then the impacts of these on Sierra Leone, and particularly the fishing sector. The vulnerabilities on coastal ecosystems and coral reef locations, if the ocean continues to warm, are then expounded upon.

Article 194 of UNCLOS sets forth the general obligation to prevent, reduce, and control all forms of marine pollution from *any* source. In terms of Article 31 of the Vienna Convention, Article 194 of UNCLOS entails that pollution of the marine environment from any source includes from the

effects of climate change. Article 194(3) requires State Parties to “deal with all sources” of marine pollution and obliges them to take measures to minimize “to the release of toxic, harmful or noxious substances to the fullest extent. Articles 207, 211, and 212 refer to pollution from land-based sources, vessels, and from or through the atmosphere respectively. GHG emissions emanate the greatest extent of pollution from burning fossil fuels. The resulting pollution, regardless of whether it emanates from land-based sources, vessels, or the atmosphere, ends up in the oceans and thus falls within the definition of pollution of the marine environment. Thus, Sierra Leone submits that the ordinary meaning of Part XII requires States to prevent, reduce, and control marine pollution by, inter alia, taking measures to mitigate climate change. Further, the obligation of States to prevent, reduce, and control their GHG emissions pursuant to Article 194 and the related provisions in Part XII of the Convention is one of due diligence.

The rules regarding climate mitigation are found in international law, particularly the Paris Agreement, and apply between the State Parties to the Convention since all State Parties are also Parties to the Paris Agreement. The objective of the Paris Agreement, as set forth in Article 2(1)(a) thereof, requires States collectively to prevent, reduce, and control marine pollution from climate change-related sources and to limit the increase in global temperatures to well below 2°C above pre-industrial levels. This is consistent with the precautionary principle of international environmental law, which is an integral part of due diligence. This requires States to assess potential environmental impacts, and to conduct environmental impact assessments (“EIAs”), which are obligations that stem from both the Convention and customary international law.

The principle of CBDR, as recognized by the UNFCCC, the Paris Agreement, and Article 31(3)(c) of the Vienna Convention, is also relevant for reducing and controlling pollution to the marine environment. The convention recognizes the principle, requiring developing and developed States to adopt appropriate measures toward GHG emission reduction targets, resulting in the prevention, reduction, and control of pollution of the marine environment. These measures include preparing, maintaining, and achieving NDCs. Articles 198 and 199 of the convention place an obligation on States to cooperate.

### **Answer to Question (b) of the Advisory Opinion Request**

As discussed regarding pollution, the obligations and rights of States to protect and preserve the marine environment must be determined from a good faith interpretation of Article 192, according to Article 31(1) of the Vienna Convention. Furthermore, the same considerations in the interpretation of Article 194 apply to Article 192. Article 192 obliges States to protect and preserve the marine environment, including marine biodiversity, living resources, and marine life. International courts and tribunals have extended this duty to prevent future damage. Article 192 is broad and includes protection and preservation from the impacts of climate change and addressing ocean warming, sea level rise, and ocean acidification.

The obligation in Article 192 also pertains to due diligence to ensure the protection and preservation of the marine environment. States are obliged to act in accordance with the best

available scientific information as is found in the IPCC Sixth Report, which contains measures to mitigate and adapt to climate change impacts on the marine environment. This requires a high level of international cooperation and funding to developing States. The obligations under Article 192 are further informed by other provisions of Part XII and of international environmental law. Article 197 of the Convention obliges States to cooperate globally and regionally in the formulation of rules and practices for the protection and preservation of the marine environment. Article 31(3) (c) of the Vienna Convention provides for the application of international law, and this includes the Paris Agreement with its temperature objectives and other international principles such as the CBDR and the precautionary principle.

Thus, the obligation to protect the marine environment in relation to climate change impacts, including ocean warming, sea level rise, and ocean acidification, includes limiting the increase in global average temperature to 1.5 degrees Celsius, preparing, communicating, and maintaining NDCs, and ensuring that entities and individuals are consistent with providing support and enabling sound EIAs.

The decisions of multiple Conferences of Parties (“COPs”) to the UNFCCC include provisions related to capacity building for developing countries and which have resulted in the Framework for capacity building in developing countries and includes financial assistance to developing countries. This will culminate in developing States being able to monitor, evaluate, and learn from adaptation plans and actions and to build the resilience of socio-economic and ecological systems.

\*\*\*

## **Micronesia**

**Country:** The [Federated States of Micronesia](#) (FSM)

**Date of Submission:** 16 June 2023

**Oral statement:** Yes held on Friday 15 September at 10 a.m.

### **General comments from the FSM**

The FSM is a small island developing nation (“SIDN”), for whom oceanic biodiversity and resources are of paramount importance, as is the case for other SIDNs. However, the international legal order does not adequately address the uniqueness of the challenges faced by such countries. This uniqueness is the vulnerability of FSM and other Pacific island Countries and Territories (“PICT”) to the effects of GHG emissions leading to climate change and more specifically to ocean acidification. Ocean acidification is already destroying oceanic biodiversity and its resources, putting FSM and other PICT economies and their food security under threat.

### **Preliminary observations from FSM on the questions presented.**

What matters most to the Tribunal is not to assess the facts and/or knowledge related to the consequences of anthropogenic GHG emissions on the marine environment, rather it is to provide an advisory opinion on the very substance of the specific obligations of States related to questions

a) and b), if necessary, based on facts and evidence provided by specialized / recognized institutions already working on climate change, biodiversity, and/or the marine environment. The FSM concurs with the opinion of COSIS that climate change and ocean acidification are different manifestations of anthropic greenhouse gas emissions on the marine environment.

### **Answer to question 1 of the Advisory opinion request**

Anthropogenic GHG emissions pollute the marine environment. Part XII of UNCLOS provides substantive (Articles 194, 195, 196, 207, 208, 209, 212, 217, 218, 220, 222) procedural, (Articles 198, 199, 200), as well as straddled obligations (Articles 204, 205, 206) for States to protect the environment. The various forms of obligations establish an obligation of due diligence for State Parties to UNCLOS to prevent, reduce, and control pollution to the marine environment. Due diligence relates to the conduct of a State with regard to the pollution of the marine environment. The ICJ clarified normative content of due diligence in the *Pulp Mills on the River Uruguay* case. It involves “not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operations.” This concept is dynamic as the conduct of State and private actors must always be in accordance with the latest advancements in science, technology, and general knowledge. To respect their due diligence obligation, States may implement not only domestic laws and regulations but also, in relation to Article 31 (3) c of the Vienna Convention, relevant sources of internationally agreed rules, standards, and recommended practices and procedures, that address the very issue of anthropogenic GHG emissions. The advising opinion of the Tribunal plays a key role in giving a coherent whole to the obligation of due diligence of the Parties, as well as either in rejecting or endorsing the concept of ambulatory baseline (and resources therein) and subsequent rights/entitlements as a consequence of sea level rise caused by GHG emissions. Finally, the FSM is of the opinion that a Party’s failure to fulfill its due diligence obligations triggers a full reparation obligation.

### **Answer to question 2 of the Advisory opinion request**

The FSM is of the opinion that the obligations of State Parties to UNCLOS to prevent, reduce, and control the pollution of the marine environment under Part XII of UNCLOS is not the totality of the obligation of States. There is also a customary obligation to cooperate in preserving and protecting the marine environment from anthropogenic GHG emissions. The aforementioned obligation of due diligence applies as well to the protection and preservation of the marine environment. Most important is the obligation to limit the rise of global temperature rise to 1.5 degrees Celsius above pre-industrial averages and to achieve net zero emissions by the middle of the century. The Tribunal plays a role in making this due diligence obligation a coherent whole. Additionally, States must take measures to protect and preserve the marine environment, including in areas beyond the national jurisdictions, by the various existing and pertinent legal instruments. Considering the adoption of the United Nations General Assembly of Resolution 76/300 recognizing the right to a clean, healthy, and sustainable environment as a human right, the failure to protect the marine environment within the existing international legal instruments and processes,

organizations and institutions is a violation of the abovementioned right. Finally, the failure of a State to comply with its obligation of due diligence triggers its responsibility for full reparation.

### **The additionality of the FSM's oral statement to its written statement**

The FSM representative elaborated on the applicability of international human rights, the rights and knowledge of Indigenous People, and the rights of nature. He argued that human rights apply in all times and places including in the marine environment. The present case represents an opportunity to substantively elaborate on the link between anthropogenic GHG emissions and human rights. International law recognizes, among others, the rights of indigenous people to use their traditional territories, including coastal and maritime spaces. Harms to such traditional territories from anthropogenic GHG emissions represent harm to the enjoyment by Indigenous people of their relevant rights. Failure to ensure the enjoyment of such rights would mean a failure of States as duty bearers of international law.

\*\*\*

## **Djibouti**

**Country:** [Republic of Djibouti](#)

**Date of Submission:** 16 June 2023

**Oral statement:** No

### **Jurisdiction**

The Republic of Djibouti is of the opinion that the Tribunal has the jurisdiction to respond to the request submitted by COSIS, based on an interpretation of Article 21 of ITLOS that does not limit it to contentious cases. Also, the Republic of Djibouti is of the opinion that the Tribunal has the discretion to deliver advisory opinions, based on article 138 of the rules of ITLOS.

### **Normative framework related to the proceedings**

The Republic of Djibouti is of the opinion that with regard to “other agreement,” some specific articles of the Rules of ITLOS apply, especially Articles 130 to 137. Also, Articles 23 of the Statute of ITLOS and 293 of UNCLOS provide grounds for ITLOS to provide an advisory opinion based not only on UNCLOS but also on other rules of international law not incompatible with UNCLOS.

### **Answer to questions under the prism of UNCLOS obligations**

The Republic of Djibouti addresses the clarification and scope of both obligations to “*to prevent, reduce and control pollution of the marine environment*” and to “*protect and preserve the marine environment*” under UNCLOS. It relates them to Article 192 - which the Republic of Djibouti understands as an obligation of conduct, not of result, which entails “*due diligence*”, meaning the best appropriate/available measures at the time to be taken by the States. Part XII of UNCLOS fleshes out the specificities of that obligation. Hence it entails Articles 194, 204, 206, 207, 208, 209, 210, 211, and 212 on substantive and procedural as well as straddled obligations related to

the protection and preservation of the marine environment. However, the Republic of Djibouti stresses that Article 192 is limited by Article 193 of UNCLOS, under which “*States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.*”

Additionally, the Republic of Djibouti is of the opinion that the aforementioned provisions must be interpreted in relation with other instruments of international law, so far as the protection of the environment is involved. Articles 208, 210, and 211 of UNCLOS provide for such considerations. Hence, the obligations stipulated by Article 192 must also be consistent with other instruments like the Paris Agreement, the Kyoto Protocol, and the Convention on Biological Diversity.

### **Answer to questions under the prism of customary international law**

The Republic of Djibouti is of the opinion that customary international law also provides for the protection and preservation of the marine environment. It identifies provisions related to climate change and pollution as sources of customary international law that can / may help protect the marine environment. Understood as a general practice of States that is accepted as being law, the vast corpus of international jurisprudence in relation to the protection and preservation of the environment has given rise to some customary obligations. Bearing in mind that treaties can generate customary obligations, as stated by the ICJ in the *North Sea Continental Shelf Case*, and also by accession to those very same treaties and the absence of their denunciation as stated by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Republic of Djibouti is of the opinion that the United Nations Framework Convention on Climate Change meets such criteria, including the Kyoto Protocol and the Paris Agreement. The obligation to protect the environment is reinforced by the customary obligation of States not to use their territory to harm other States, especially considering transboundary environmental harm, as mentioned by the ICJ in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*. Overall, those customary obligations are obligations of conduct, which entails also “due diligence” in regard to the impacts of climate change and pollution on the marine environment. For the Republic of Djibouti, cooperation is an essential component of this obligation and must take into consideration the principle of CBDR, as highlighted by Article 194 of UNCLOS. However, it also believes that due consideration must be given to Article 193 of UNCLOS which provides the legal basis for States to exploit their natural resources. Hence it supports the decision of the Conferences of the Parties of the UNFCCC which asked States to make their “highest possible mitigation efforts”.

\*\*\*



### **3. INTERGOVERNMENTAL ORGANIZATIONS INVITED TO SUBMIT WRITTEN STATEMENTS PURSUANT TO ARTICLES 138, ¶3, AND 133, ¶3, OF THE RULES OF THE TRIBUNAL**

#### **United Nations**

**Organization:** [United Nations](#)

**Date of Submission:** 2023 (exact date unspecified)

**Oral Statement:** No

#### **Reports from the United Nations Secretary-General Providing Background Information**

The United Nations Secretary-General drew up two reports, in 2017 and 2020, on the effects of climate change on oceans and sea-level rise and its impacts. Climate change generates several diverse, widespread, and profound effects, not only affecting the ecology of the oceans, but also producing significant socioeconomic consequences for all States. These impacts accumulate with other human-induced stresses, such as unsustainable coastal development, overexploitation of living marine resources, habitat alteration, and pollution. Therefore, mitigation of GHG emissions, adaptation to impacts, and building marine ecosystem resilience are critical. The effective implementation of UNCLOS and related instruments contributes to these necessary developments. Vice versa, their application is impacted by climate change. For example, coastlines and associated baselines may change as a result of sea-level rise, with potential impacts on the outer limits of maritime zones as well as maritime boundaries.

#### **UNCLOS and its Implementing Agreements**

UNCLOS is universal and unified in character, which includes its two Implementing Agreements, namely the 1994 Agreement relating to the implementation of Part XI of UNCLOS and the United Nations Fish Stocks Agreement, as well as the final draft of the BBNJ Agreement (on marine biodiversity beyond national jurisdiction), which was finalized in March 2023. [*Note: The BBNJ Agreement was [adopted](#) after the United Nations submitted its Written Statement to ITLOS.*] UNCLOS contains provisions on the protection and preservation of the marine environment, which the Statement summarizes broadly. Notably, it remarks that the ocean-related processes at the United Nations have not addressed the question of whether the absorption by the marine environment of anthropogenic GHG emissions, in particular carbon dioxide and heat and the resulting impacts of ocean warming and ocean acidification, meet the definition of pollution of the marine environment under the Convention.

#### **Pertinent Developments at the United Nations General Assembly and the International Law Commission**

The General Assembly first expressed its concern over the adverse effects of climate change on the marine environment and marine biodiversity in Resolution 61/222 of 20 December 2006. It has been reiterated ever since that this is a serious concern while emphasizing the urgency of

addressing climate change's adverse effects. In its most recent resolution, the General Assembly specified that the current and projected adverse effects of climate change on the marine environment and marine biodiversity include rising seawater temperature, ocean deoxygenation, sea-level rise, and ocean acidification. It highlighted the importance of preserving the ocean as a carbon sink. The General Assembly also addressed the consequences of climate change on fisheries in numerous instruments, including most recently in Resolution 77/118 of 9 December 2022.

Among other developments, the International Law Commission decided at its seventy-first session in 2019 to include the topic "Sea-level rise in international law" in its program of work and established an open-ended Study Group on the topic. Information on the background to the topic, its genesis, and inclusion in the International Law Commission's program of work and the work progress in the Commission and Sixth Committee are provided in Annex I of the Written Statement.

### **Other Pertinent Developments Within the Ambit of the United Nations**

Since 2007, when the Security Council discussed climate change, peace, and security at the thematic level for the first time, a number of open debates and other public Council meetings have addressed the security threat of sea-level rise. Most recently, in February 2023, the United Nations Security Council convened a ministerial-level open debate on sea-level rise and its implications for international peace and security, which included several statements highlighting the security implications and deepening tensions as coastlines recede, territory is lost, resources become scarce, and populations are displaced.

Sea-level rise has received increasing attention during the deliberations of the Meeting of States Parties to UNCLOS. For example, Pacific Islands Forum member countries submitted a Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise in 2021.

Besides, the Secretary-General has addressed the effects of climate change in their 2016 and 2023 reports to the resumed Review Conference on the United Nations Fish Stocks Agreement, which implements provisions of UNCLOS in relation to the conservation and management of certain fish stocks.

\*\*\*

## **International Union for the Conservation of Nature (IUCN)**

**Organization:** International Union for Conservation of Nature (IUCN)

**Date of Submission:** 13 June 2023

**Oral Statement:** Yes, on 21 September 2023

**Harmful effects from GHGs and other Human Activities: A scientific perspective**

The IUCN highlights the latest scientific evidence noting that it shows a deteriorating marine environment and worsening global conditions due to climate change, attributable to States' failure to regulate GHG emissions. GHGs like carbon dioxide, methane, and others, have far-reaching, interconnected effects on marine ecosystems, including ocean acidification, deoxygenation, and sea level rise. About 50% of coastal wetlands have been lost in the past century due to human activities and climate change, affecting both habitat and carbon storage. The IPCC projects worsening oceanic conditions and increased frequency of extreme sea level events by 2050. Current temperature increases already place warm-water coral reefs at high risk. Mitigation pathways assessed by the IPCC indicate that only very low GHG emission scenarios are likely to restrict temperature rise to 1.5°C and minimize damage to marine ecosystems, though some damage will be irreversible. Effective policies are urgently needed to mitigate these negative impacts.

#### **Answer to Question (a)**

The IUCN contends that Part XII UNCLOS imposes broad obligations on State Parties to address GHG emissions and their impact on marine environments. These obligations cover a range of sources, such as land-based activities, seabed operations, dumping, vessels, and atmospheric emissions. The precautionary approach and principle play a vital role in interpreting these obligations, particularly when scientific uncertainties about GHG emissions are present. Although UNCLOS does not explicitly refer to the precautionary approach, it is implied in Article 1(1)(4)'s definition of pollution. Further emphasis on the precautionary principle is found in the 1995 Fish Stocks Agreement and the draft Agreement under UNCLOS concerning marine biological diversity.

State Parties have distinct obligations, classified either as obligations of conduct or obligations of result, with respect to GHG emissions. They are either mandated to achieve specific outcomes or are required to use their best efforts to attain them, based on the specific provision in question. This applies to both State and private actors. Additionally, the Convention on the Protection of the Marine Environment (CMO) elaborates on the due diligence obligations of State Parties, which go beyond pollution control to include the conservation and preservation of marine ecosystems. To meet these obligations, States must adopt international rules, enforce national legislation, and take action to prevent, reduce, and control pollution. Non-compliance constitutes a breach of these obligations. Interpretation of these duties should also take into account other pertinent international frameworks like the UNFCCC and the Paris Agreement. Consequently, actions under UNCLOS must align with the objectives of the UNFCCC and the Paris Agreement, including the rapid reduction of GHG emissions and the goal of achieving net-zero CO<sub>2</sub> emissions by 2050. The precautionary approach remains central to due diligence in the fight against climate change, and States are required to act diligently in reducing GHG emissions to safeguard marine resources, as articulated in Article 194(5) of UNCLOS.

#### **Answer to Question (b)**

### ***Developing states need technical assistance to fulfill their obligations***

The IUCN discusses the varying capacities of State Parties in fulfilling obligations under the Convention to protect the marine environment. It emphasizes that all State Parties have a responsibility to prevent, reduce, and control pollution from GHG emissions, irrespective of their development status. However, the obligations may be adjusted based on explicit mention in the primary obligation and the State's scientific knowledge and technical capacity. Developing States may be subject to less stringent standards, provided these conditions are met. Additionally, developing States are entitled to scientific and technical assistance to fulfill their obligations. The text also discusses the nuanced approach to differentiation in modern international frameworks like the Paris Agreement, which factors in the State's capabilities and contributions to climate change.

### ***State responsibility in case of breach of obligations***

The IUCN notes failure to fulfill State Party obligations under the Convention or failing to act with due diligence may incur liability as outlined by Article 235 of the Convention and the 2001 ILC Draft Articles on State Responsibility. Legal consequences for breaches include cessation, non-repetition, and reparation, which may include ecological restoration. States are also required to cooperate in the development of international laws relating to liability and may establish compensation funds for damage to the marine environment. Further, the IUCN also recognizes the complexities of assigning liability given the diverse actors involved and the challenges of scientific uncertainty.

\*\*\*

## **International Maritime Organization (IMO)**

**Country/Organization:** [International Maritime Organization](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** No

The Written Statement submitted by IMO relates to Question 1 and Question 2 of the request for advisory opinion (Request). However, IMO is in a position to provide views only within the scope of its status as a specialized agency of the United Nations and as a “competent international organization” under certain sections of UNCLOS. IMO is tasked with the development of rules and regulations relevant to international shipping and navigation and the prevention and control of pollution in the marine ecosystem from shipping activity.

### **How IMO Addresses Climate Change**

IMO’s Written Statement begins with a description of the organization’s structure. It then specifies that the IMO has identified the need to respond to climate change among its strategic directions under its Strategic Plan for 2018-2023, which acknowledges the contribution of shipping towards

efforts to reduce emissions worldwide. Moreover, IMO is committed to further measures to ensure that international shipping continues to bear its responsibility in addressing climate change. Particularly, the IMO's Marine Environment Protection Committee (MEPC) is persistently working on revising GHG emissions reduction strategies, presently engaged in considering issues such as prevention of air pollution from ships and control and management of ships' biofouling. Furthermore, working under the auspices of IMO, the Contracting Parties to the London Convention and London Protocol regulate the prevention of pollution from dumping of wastes and other matters at sea. Lastly, besides technical standards, IMO also includes liability and compensation conventions for pollution of the marine environment.

### **Answer to Question (1) of the Advisory Opinion Request**

In response to Question (1), IMO's Written Statement explains that the specific obligations of UNCLOS State Parties to prevent, reduce, and control pollution of the marine environment are first contained in UNCLOS itself and second, elaborated through the generally accepted international rules and standards developed under the auspices of competent international organizations like IMO. Part XII of UNCLOS sets out obligations in Articles 192 to 237. Matters under the scope of IMO's mandate are also covered under the following counterpart provisions: Articles 210 and 2016 (pollution by dumping); Articles 211, 217, 218, and 222 (pollution from vessels); and Articles 212 and 222 (pollution from or through the atmosphere), the latter being the most relevant to the question specific to climate change effects caused by anthropogenic GHG emissions into the atmosphere.

Furthermore, specific obligations related to anthropogenic GHG emissions have been developed in the IMO context through the legal regime established in the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL). Moreover, Article 2 of the 1997 Kyoto Protocol states that IMO shall pursue limiting GHG emissions from marine bunker fuels. Despite no explicit reference to GHG emissions from international shipping in the 2015 Paris Agreement, IMO developed a GHG strategy enhancing IMO's contribution to global efforts by addressing this type of emissions emerging from international shipping.

### **Answer to Question (2) of the Advisory Opinion Request**

In response to Question (2), IMO's Written Statement explains that the specific obligations of UNCLOS State Parties to protect and preserve the marine environment in relation to climate change impacts are first, contained in UNCLOS itself and second, elaborated through the generally accepted international rules and standards developed under the auspices of competent international organizations like IMO. The Written Statement invokes Article 1(4) of UNCLOS, which defines "pollution of the marine environment," and Part XII of UNCLOS, which includes guidance related to the protection and preservation of the marine environment concerning climate change impacts.

IMO's Written Statement then discusses the obligations under IMO treaties relating to climate change impacts, including ocean warming and sea level rise, and ocean acidification. Even though the matter of sea level rise is not currently on IMO's agenda, ocean warming, and ocean

acidification are inherently and impliedly addressed in several of its instruments that concern ocean pollutants through shipping activity. Moreover, GHG and effluents discharged during shipping operations are also to be cumulatively factored into ocean warming and ocean acidification as contributory factors to global air pollution. Hence, MARPOL, the London Convention and London Protocol, the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, the International Convention for the Control and Management of Ships' Ballast Water and Sediments, the International Convention on Oil Pollution Preparedness, Response and Co-Operation and its Protocol, as well as liability conventions in relation to oil pollution all include specific obligations of States insofar as they constitute, or contain generally accepted international rules and standards developed by IMO as a competent international organization under UNCLOS. Additionally, ITLOS must consider other measures and mechanisms complementary to IMO instruments, including Port State Control and MOUs, training requirements for seafarers, routing measures and other area-based management tools, and IMO Member States Audit Scheme.

\*\*\*

## **Commission of Small Island States on Climate Change and International Law (COSIS)**

**Organization:** [Commission of Small Island States \(COSIS\)](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes, on September 11 and 12, 2023

### **Jurisdiction, admissibility, and applicable law**

COSIS notes that the Tribunal's advisory jurisdiction is grounded in Article 21 of its Statute, which covers not just "disputes" but "all matters," including advisory functions if specified in an authorizing agreement, such as the COSIS Constituting Agreement. The Tribunal's own previous rulings corroborate this jurisdictional basis (*SRFC* Advisory Opinion). COSIS further argued that while the Tribunal has the discretion to decline advisory opinions, there are no compelling reasons for it to decline jurisdiction in this case. Further, COSIS's request for an advisory opinion meets all prerequisites outlined in Article 138 of the Tribunal's Rules, which govern advisory proceedings. The COSIS Agreement, which is in line with UNCLOS, specifically empowers COSIS to seek such opinions.

As per Article 130(1) of the Rules, COSIS noted that the law applicable to advisory proceedings is the same as in contentious cases. It includes the Convention and any international law not in conflict with it. Articles 207 and 212 of UNCLOS offer additional standards. Finally, UNCLOS acts as the constitution of the ocean, providing a comprehensive framework for marine governance. It is a living instrument capable of adapting to new challenges like climate change.

### **Answer to Questions**

COSIS begins by explaining the scope of the questions posed to the Tribunal. It notes that Question (a) asks the Tribunal about State Parties' obligations under Article 194 to specifically address "pollution of the marine environment," as defined in Article 1(1)(4) of UNCLOS. In contrast, Question (b) broadens the scope to include Article 192's general obligation to protect the marine environment, encompassing broader climate change impacts and requiring actions beyond pollution control, such as resilience building and environmental restoration.

#### **Question (a)**

##### ***Anthropogenic GHG emissions change the physics and chemistry of the ocean and marine cryosphere, leading to severe harm***

The COSIS submission underscores IPCC findings that human activities, primarily through the emission of GHGs like CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O, are causing rapid global warming with significant impacts on weather and climate, particularly in vulnerable communities. The submission highlights that over 90% of the excess heat from these emissions is absorbed by the ocean and marine cryosphere, resulting in detrimental changes such as ocean warming and sea-level rise that adversely affect marine and human life. COSIS also emphasizes that more than a quarter of anthropogenic CO<sub>2</sub> is absorbed by the ocean, leading to increased acidification that poses substantial risks to marine ecosystems. The submission emphasizes the necessity of limiting global warming to 1.5°C above pre-industrial levels to mitigate these adverse effects.

##### ***The definition of pollution of the marine environment under UNCLOS***

COSIS proposes a broad definition of "pollution of the marine environment" under UNCLOS, encompassing both direct and indirect introduction of substances or energy by humans that result in harmful effects. Anthropogenic GHG emissions fit this definition as they introduce heat and substances like carbon into marine ecosystems, causing deleterious effects such as harm to marine life and human health. International jurisprudence supports this expansive interpretation, emphasizing States' obligations to prevent, reduce, and control such pollution. GHG emissions lead to significant changes in the marine environment, including ocean acidification and thermal expansion, further compounding the negative impacts outlined in UNCLOS. Therefore, UNCLOS serves as a comprehensive legal framework for addressing pollution of the marine environment, including those caused by climate change.

##### ***The Convention obliges State Parties to exercise due diligence to prevent, reduce, and control anthropogenic GHG emissions constituting pollution of the marine environment***

COSIS highlights the relationship between UNCLOS and the UNFCCC, including the Paris Agreement, noting that these instruments intersect on the issue of mitigating the impact of climate change on the marine environment. UNCLOS Part XII requires State Parties to take measures to control GHG emissions in their jurisdictions and obliges them to assist developing States in marine protection. The Paris Agreement's Nationally Determined Contributions (NDCs) articulate each State's commitment to mitigate climate change, which can serve as a baseline for meeting

UNCLOS obligations. While compliance with NDCs does not automatically satisfy UNCLOS requirements, they are deemed to reflect a State’s “best practicable means” for reducing marine pollution through GHG emissions. In summary, both instruments converge on the shared goal of environmental protection, with the Paris Agreement providing specific climate targets that help operationalize UNCLOS’s more general mandate to protect the marine environment.

### **Question (b)**

COSIS notes that Article 192 of UNCLOS imposes a general, legally binding obligation on all States to protect and preserve the marine environment, covering both positive actions and abstentions from harmful activities. The term “marine environment” is interpreted broadly to include ecosystems, species, and physical elements applicable in all maritime zones, including areas beyond national jurisdiction. This obligation is supported by international tribunals and is further detailed by subsequent UNCLOS articles, such as Article 193, which balances the obligation with States’ rights to exploit natural resources, and Article 194, which may require marine protected areas. The mandate of Article 192 is also considered relevant to climate change, encapsulating obligations to mitigate its impact, enhance resilience, and protect carbon-sequestering marine ecosystems.

\*\*\*

## **Pacific Community (SPC)**

**Country/Organization:** [Pacific Community](#) (SPC)

**Date of Submission:** 16 June 2023

**Oral Statement:** 20 September 2023, 3.00 pm.

The Pacific Community is the oldest (76 years), largest, and primary scientific and technical intergovernmental organization of the region. Its mandate and work programme have addressed issues relating to climate change, fisheries, marine ecosystems, and coastal geoscience for decades. The submission focuses on the obligations related to preventing, reducing, and controlling pollution of the marine environment in relation to climate change and protecting and preserving the marine environment in light of climate change impacts.

### **Displacement of Coastal Communities in the Context of Climate Change**

Coastal communities in the Pacific region have been significantly affected by the displacement caused by wave inundation, coastal erosion, and sea level rise. These environmental changes have forced communities to abandon their ancestral lands and relocate to safer areas, often resulting in the loss of cultural heritage, cultural identity, cultural practices, social cohesion, and economic stability. The displacement of these communities poses significant challenges in terms of safeguarding human rights, ensuring access to basic services, and maintaining community structures. The PC recalls that State Parties to UNCLOS have an obligation to prevent, reduce, and



control pollution of the marine environment resulting from anthropogenic GHG emissions into the atmosphere, which contribute to climate change impacts. In the context of coastal communities' displacement, this obligation requires proactive measures to mitigate the effects of climate change, including the implementation of sustainable development practices, the reduction of GHG emissions, and the promotion of climate change adaptation strategies that prioritize the protection of vulnerable communities.

In addition, State Parties have a duty to protect and preserve the marine environment, considering the impacts of climate change, such as ocean warming, sea level rise, and ocean acidification. This obligation extends to safeguarding the rights and well-being of coastal communities, in particular Indigenous communities, especially in light of global and regional cooperation requirements for formulating and elaborating international rules, standards, and recommended practices and procedures consistent with the Convention for the protection and preservation of the marine environment. To reduce the negative economic and cultural impacts on Pacific Small Island Developing States' (PSIDS) coastal communities, it is vital to recognize the critical contribution the marine environment has on community economies and livelihoods, particularly in regards to the redistribution of fish stocks and other losses of natural resources from the effects of climate and ocean change.

### **Loss and Damage**

The specific obligations of State Parties under UNCLOS in addressing the impacts of climate change on coastal communities are closely linked to the concept of loss and damage. Loss and damage refers to the adverse effects experienced by countries, particularly PSIDS, that cannot cope with the economic, social, and cultural losses resulting from the impacts of climate change. The displacement of coastal communities due to wave inundation and coastal erosion represents a significant aspect of loss and damage, as it entails the loss of land, property, livelihoods, food sources, and cultural heritage. By acknowledging the linkages between State obligations under UNCLOS and the concept of loss and damage, the advisory opinion can shed light on the nature of these obligations, especially regarding international cooperation.

### **Conclusion**

In conclusion, the Pacific Community requests that the advisory opinion on the specific obligations of State Parties to UNCLOS include the aforementioned dimensions on the observed effects of climate-related ocean changes on coastal ecosystems and communities. By recognizing the impacts on people and communities, the advisory opinion can better emphasize the urgent need for collective action to fulfill the obligations of State Parties under UNCLOS and ensure the protection and preservation of the marine environment in the face of climate change.

\*\*\*

# United Nations Environment Programme (UNEP)

Country/Organization: [United Nations Environment Programme \(UNEP\)](#)

Date of Submission: 16 June 2023

Oral Statement: No

## Key Arguments

UNEP highlights the role of climate science in informing States' legal obligations to protect the marine environment. Further, UNEP identifies relevant international laws and principles, including environmental and human rights rules that may be relevant for the Tribunal's advisory opinion.

### **The role of climate science in informing States' legal obligations to protect the marine environment**

UNEP underscores the pivotal role of science in addressing climate change within the context of international environmental law. Both the Paris Agreement and the United Nations Environment Assembly (UNEA) have recognized the significance of scientific evidence in interpreting and implementing environmental law. International courts and tribunals consistently rely on scientific findings to navigate complex legal matters, including those related to UNCLOS and customary international law. These scientific insights inform the understanding of legal provisions and their scope.

The dynamic nature of States' obligations under international law is exemplified by cases like the *Sub-Regional Fisheries Commission's Advisory Opinion* under UNCLOS Article 63(4). UNCLOS mandates that conservation measures be based on the best scientific evidence available, highlighting the evolving nature of legal obligations considering new scientific knowledge.

Furthermore, scientific evidence plays a pivotal role in determining compliance with legal obligations. For instance, in the *South China Sea Arbitration*, the tribunal considered scientific evidence to assess the applicability of environmental obligations under the Convention, emphasizing the importance of preserving "rare or fragile ecosystems." Additionally, cases like the *Indus Waters Kishenganga Arbitration* and the *Pulp Mills Case* extensively rely on scientific evidence to evaluate breaches of environmental obligations and the harm caused to the environment.

Moreover, UNEP underscores the critical role of the IPCC in providing essential climate science for legal deliberations. IPCC reports, subject to rigorous review, inform policymakers and legal proceedings regarding issues such as GHG emissions, climate change impacts, and the imperative to limit global warming. Understanding the science behind GHGs and their impact on global warming is fundamental to the mitigation and adaptation efforts outlined in the Paris Agreement.

Additionally, UNEP highlights the observed and projected impacts of climate change on the marine environment, including ocean warming, sea-level rise, and ocean acidification, all substantiated by scientific evidence. These impacts are of significant concern and warrant comprehensive international action.

In conclusion, science is a cornerstone in shaping international environmental law, guiding its interpretation, assessing compliance, and informing policies and actions aimed at addressing climate change. The evolving nature of legal obligations and the intricate interplay between science and law underscore the importance of scientific rigor in addressing environmental challenges at the international level.

### **Relevant International Law Principles and Approaches**

UNEP underscores the critical importance of interpreting the Convention with meticulous reference to other pertinent rules of international law, in strict accordance with article 31(3)(c) of the VCLT. Within this expansive purview, the concept of “relevant rules” encompasses not only the foundational principles of general international environmental law but also specialized agreements forged between States to meticulously protect and preserve the marine environment. Furthermore, as the Convention's terms and concepts may undergo dynamic interpretation to fulfill its overarching objectives, recent developments in international norms, such as those related to human rights, must be diligently considered. This is especially relevant when the Convention's scope extends to addressing contemporary challenges like climate change and the conservation of marine biodiversity.

The foundational principles and approaches of international environmental law, systematically outlined in this context, encompass the imperative to prevent transboundary harm, the commitment to safeguarding the marine environment, the adoption of the precautionary principle, the cultivation of robust State cooperation, and the unwavering adherence to the polluter pays principle. These principles collectively constitute the bedrock upon which effective environmental protection rests, offering guidance on preventing harm, mitigating transboundary pollution, and facilitating responsible environmental stewardship. Furthermore, the interconnection between these principles and their adaptability to the evolving global landscape are pivotal in addressing pressing issues such as climate change, where the level of scientific certainty may vary, and the potential consequences are often of significant and irreversible nature.

Importantly, human rights considerations have become inextricably linked to the Convention's objectives, particularly with the recent recognition by the General Assembly of the right to a clean, healthy, and sustainable environment. This recognition carries profound implications, as it signifies that the protection and preservation of the marine environment under the Convention are intrinsically tied to human rights considerations. Therefore, it is incumbent upon the Tribunal to judiciously consider the right to a clean environment, alongside other relevant human rights norms,

in its interpretation and application of the Convention's provisions. This becomes especially pertinent when addressing complex issues such as climate change and the conservation of marine biodiversity, where human rights, environmental protection, and international law converge in a delicate balance.

\*\*\*

## **African Union**

**Organization:** [African Union](#)

**Date of Submission:** 16 June 2023

**Notes:** The African Union is one of the intergovernmental organizations invited to submit written statements (pursuant to Art. 138, para. 3; and Art. 133, para. 3 of the Rules of the Tribunal)

**Oral Statement:** Yes ([Held on](#) Thursday, 21 September 2023, 3 pm-4 pm)

### **ITLOS jurisdiction**

The African Union's Written Statement also addresses ITLOS jurisdiction to grant advisory opinions like the one requested in this instance. ITLOS jurisdiction derives from Article 21 of the Statute of the International Tribunal for the Law of the Sea (Statute), read with the COSIS Agreement and the Request. Moreover, the COSIS Request meets the prerequisites of Article 138 of the Rules of the Tribunal.

### **Treaty Interpretation**

Like any other treaty, UNCLOS must be interpreted in accordance with customary international rules of treaty interpretation (codified in Arts. 31 and 32 of the Vienna Convention). The African Union's Written Statement comments on one particular aspect of the approach to the interpretation and application of treaties, namely: (i) the need to consider other, potentially newer, norms of international law, including other treaties and norms of customary international law and principles such as the CBDR-RC; and (ii) the need to consider currently available factual information, including scientific information and the state of technology.

### **Answer to Question (1) of the Advisory Opinion Request in light of Article 194 of UNCLOS**

Article 194(1) of UNCLOS obligates States to "prevent, reduce and control pollution of the marine environment." Question (1) tracks the terms of Article 194(1) and is directed at identifying the specific obligations that arise under said article in the context of climate change. The African Union's Written Statement explains the applicable legal standard and how the legal standard applies in the specific context of climate change.

Article 194(1) is triggered where there is pollution, or risk of pollution, of the marine environment. State Parties must, then, identify the measures necessary to prevent, reduce, and control the relevant marine pollution and must adopt those measures using the best practicable means available according to their capabilities. State Parties must, therefore, exercise their best efforts to

achieve that outcome. Furthermore, although cooperative efforts are accepted (Art. 197), the obligations remain on each State Party individually. Finally, in apportioning State Parties' responsibilities, so-called developed State Parties, with better means, resources, and capabilities, would have a heavier burden than so-called developing State Parties.

Regarding what specific obligations arise under Article 194(1), the African Union's Written Statement explains that GHG emissions into the atmosphere are a source of pollution of the marine environment through two different physical pathways: (i) carbon dioxide is emitted into the atmosphere through anthropogenic activities and absorbed into the ocean, leading to increase ocean acidification; and (ii) all GHG emitted into the atmosphere cause an increase in atmospheric thermal energy, which leads to increase in atmospheric temperatures, a portion of which is absorbed into the ocean, increasing its temperature as well. Introducing carbon dioxide and thermal energy into the ocean has significant "deleterious effects" on the marine environment. The African Union's Written Statement then sets out four specific, related obligations: (i) State Parties must adopt effective measures to reduce GHG emissions (mitigation measures); (ii) with respect to the degree of emission reductions, and in order to bring about a degree of "control" under Article 194(1) over the rate at which marine pollution increases, State Parties must collectively reduce emissions to a level which allows them to meet the 1.5°C temperature level; (iii) to "prevent" and "reduce" further marine pollution, State Parties must collectively reduce emissions beyond this level; and (iv) with respect to the individual actions required by State Parties, the burden of reducing emissions must be understood in light of the international climate change regime and, in particular, the agreement to tackle climate change on the basis of equity and in accordance with the CBDR-RC principle (higher burden of emission reductions on so-called developed State Parties in comparison to so-called developing countries).

**Answer to Question (2) of the Advisory Opinion Request in light of Article 192 of UNCLOS**  
Article 192 of UNCLOS, which reflects customary international law, provides that States have the obligation to protect and preserve the marine environment. This is a "general obligation" that appears at the start of Part XII of the Convention. The meaning of this general obligation is informed by other provisions of the Convention, which shed contextual light on the obligations to protect and preserve the marine environment. The African Union's Written Statement notes two general aspects arising from this context: (i) although the obligation rests on all States, collectively and individually, the context reveals that the way it applies to individual States varies depending on the State's geographic situation; and (ii) the general obligation is differentiated between and among State Parties according to their level of development, i.e., in accordance with the principle of CBDR-RC.

In light of the legal standard under Article 192, the African Union identifies three sets of specific obligations arising under the general obligation to protect and preserve the marine environment in relation to climate change impacts: (i) obligations of cooperation in respect of climate change mitigation and adaptation actions (by building institutions and providing financing to developing countries); (ii) obligations related to mitigation (such as to adopt effective measures to reduce

GHG emissions, to conduct research and develop technology in support of mitigation efforts, to deploy mitigation technology in a manner consistent with the obligations to protect and preserve the marine environment, and to allocate the burden of each of these obligations in a manner consistent with the UNCLOS, and the international climate change regime including the CBDR-RC principle); and (iii) obligations related to adaptation (including to conduct research and develop technology in support of adaptation efforts, to take adaptation actions to protect and preserve the marine environment physically, to adopt policies and measures to address threats to marine ecosystems and habitats, to consider climate change impacts when designing their conservation and management policies for marine resources, and to allocate the burden of each of these obligations in a manner consistent with UNCLOS and the international climate change regime, including the CBDR-RC principle).

\*\*\*

## **International Seabed Authority (ISA)**

**Organization:** [International Seabed Authority](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** No

### **General Considerations**

ISA's Written Statement points out two preliminary points: (i) the Seabed Disputes Chamber of ITLOS has already made an important contribution to the work of the Authority concerning activities in the Area through its Advisory Opinion of 1 February 2011, and (ii) the Tribunal has contributed much to international environmental law. The Authority is one of the three international institutions established by the Convention, and the rules that govern the Authority are contained in the same instrument. By exercising its regulatory powers, the Authority contributes to ocean governance and the rule of law in the ocean.

### **Article 192 of UNCLOS**

ISA's Written Statement argues that Article 192 must be understood as general in application (both material and spatial) and comprehensive in nature, as it applies to the whole marine environment and all maritime zones. Likewise, it includes all forms and sources of marine pollution. The article also requires not only "protection" from future damage but also "preservation" of the environment, implying a positive obligation to take active measures and a negative obligation to maintain the condition of the marine environment and not degrade it.

### **Article 194 of UNCLOS**

Moreover, ISA's Written Statement claims that Article 194 is related explicitly to pollution of the marine environment and the corresponding duty to take measures to prevent, reduce, and control it. ¶1-4 include specific obligations for State Parties in relation to avoiding pollution and damage.

The Statement also invokes article 1(1)(4) regarding the definition of “pollution of the marine environment,” which allows the impacts of climate change to be considered within the scope of application. The generation of CO<sub>2</sub> and its introduction (even indirectly) into the marine environment produces a deleterious effect, harms the marine environment, and hinders the legitimate uses of the sea. Hence, it constitutes pollution under UNCLOS and triggers the entire set of obligations.

More specific obligations are outlined in Section 5 of Part XII, i.e., Article 207 (pollution from land-based sources), Article 208 (pollution from seabed activities subject to national jurisdiction), and Article 212 (pollution from or through the atmosphere). Furthermore, there are other obligations with respect to the prevention, reduction, and control of pollution and the protection and preservation of the marine environment that could be considered relevant, such as those included in Articles 195, 197, 199, 200, 202, 203, 201, 204, 206, and 206.

In sum, the Written Statement contends that whatever the source of pollution, Part XII and the obligations attached apply to States concerning that pollution if it impacts the ocean, including polluting arising from the anthropogenic introduction of GHG emissions. This conclusion also applies to the general obligation to protect the marine environment and the specific obligation with respect to pollution from activities in the Area (Articles 209(1) and (2), and 215).

### **Part XI of UNCLOS, the protection of the marine environment and the role of ISA**

Part XI on the Area, read together with the 1994 Implementation Agreement, makes specific provisions for protecting the marine environment. Notably, Article 145 establishes a specific obligation for State Parties to UNCLOS to adopt, through the Authority, appropriate rules, regulations, and procedures to ensure effective protection of the marine environment from harmful effects. This duty is triggered when the following conditions are met: (i) the activities refer to activities in the Area; (ii) the objective is to ensure effective protection of the marine environment from harmful effects that may arise from such activities; and (iii) the measures must be taken in accordance with the Convention.

### **Measures taken by ISA to incorporate climate change considerations into its rules, regulations, and procedures**

ISA’s Written Statement ends with a description of three sets of exploration regulations adopted in fulfillment of Article 145 and covering: (i) prospecting and exploration for polymetallic nodules; (ii) polymetallic sulfides; and (iii) cobalt-rich ferromanganese crusts. Each of these three sets of regulations dedicates a special part to the “protection and preservation of the marine environment” and creates obligations for the Authority, the Legal and Technical Commission, the sponsoring States, other interested States or entities, and the exploration contractors. This normative structure is binding to all State Parties to the Convention, all of which are *ipso facto* members of the Authority pursuant to Article 156(2).

\*\*\*

## 4. STATEMENTS RECEIVED AFTER THE EXPIRY OF THE TIME LIMIT FIXED BY ORDER 2023/1 OF 15 FEBRUARY 2023

### Rwanda

Country: [Republic of Rwanda](#)

Date of Submission: 17 June 2023

Notes: Rwanda is a landlocked country whose interest in the proceedings is to express its right to participate on an equitable basis in the exploitation of living resources in the exclusive economic zones of nearby coastal States and access to the sea.

Oral Statement: No

#### **Preliminary observations on the link of climate change to the marine environment**

The IPCC's findings on the impacts of climate change affirm that the devastating effects of climate change in respect of the marine environment will continue to worsen. These effects are manifesting as three specific phenomena, namely: (1) ocean warming, (2) sea level rise, and (3) ocean acidification. Other causes of harm to the marine environment include "black carbon," a sooty black material emitted from gas and diesel engines and coal-fired power plants. Although affected by climate change, the marine environment, especially the ocean, can also play a role in regulating the climate and the specific impact of climate change. The ocean is responsible for the uptake and distribution of anthropogenic CO<sub>2</sub> in the atmosphere and may drive climate change mitigation and adaptation. In particular, the IPCC has highlighted the value of marine Nature-based Solutions (NbS), which consist of actions designed to protect, restore, and sustainably manage marine ecosystems to better prepare nature and populations for the impacts of climate change.

#### **The obligation to protect and preserve the marine environment from climate change**

Article 192 of UNCLOS imposes a substantive, legally binding obligation on States to protect and preserve the marine environment. In so far as the obligation under Article 192 (and Part XII more generally) forms part of customary international law, it similarly reflects a common or collective interest of the international community and, therefore, is owed *erga omnes*. Hence, Article 192 sets the overarching general standard and constitutes the framework for the complex and wide-ranging structure of powers and obligations. Article 192 is further strengthened by Article 194 provision on pollution of the marine environment, Article 197 on cooperation, and Articles 204-206 concerning monitoring and environmental assessment. There are further procedural obligations for clarifying the obligations. These include the obligations to (i) notify other States of imminent damage to the marine environment (Article 198), (ii) information, notification, and cooperation, (iii) conduct an environmental impact assessment, and (iv) continuous monitoring.

The foregoing is applicable in the climate change context when understood that activities underlying climate change fall within the scope of the notion of "pollution of the marine environment" as defined by Article 1(1)(4) of UNCLOS and clarified particularly by Articles 194, 207, and 212, which inform the scope of the definition of "pollution of the marine environment." In particular, pursuant to Article 194(1), State Parties are required to take measures to "prevent, reduce and control pollution of the marine environment from any source." In contrast, Article



194(3) requires adopting measures to address “all sources of pollution.” The definitional scope is wide enough to accommodate activities underlying climate change that pose problems for the ocean. Hence, in line with Part XII of UNCLOS, State Parties are expected to take all necessary *individual* measures to ensure that activities under their jurisdiction or control are conducted to “prevent, reduce and control” pollution that is land-based and is introduced to the ocean from or through the atmosphere.

### **Obligation to mitigate and adapt to the effects of climate change on the marine environment**

Obligation to mitigate and adapt to the effects of climate change is inherent in Article 192, which imposes a substantive obligation on States to “protect and preserve the marine environment” from the deleterious effects of climate change in areas both within and beyond national jurisdiction. Concerning mitigation, States must exercise due diligence and take mitigation measures against activities that have significant impacts of global warming on the oceanic ecosystem via ocean warming, ocean acidification, and sea level rise. Similarly, measures that serve adaptation purposes should be taken to make the ecosystems and marine environment more resilient, thereby lessening the deleterious effects of climate change. Adaptive measures to address climate impact on fisheries will include the reduction of non-climate stressors on fisheries, such as overfishing and pollution. Regarding Marine biodiversity, creating Marine Protected Areas (MPAs) may serve as part of an adaptation strategy to climate changes by ensuring resilient ecosystems.

### **Key interests of developing land-locked States in the context of obligations**

It is of utmost importance in responding to the Request’s questions for the Tribunal to consider the unique interests and rights of landlocked States, particularly landlocked developing States. The principle of CBDR-RC should apply in some circumstances so that developing countries are only expected to bear a lower burden than developed countries in taking measures to protect and preserve the marine environment. Interventions should be driven by Article 9(1) provision of the Paris Agreement on the need for developed States to take leadership on finances and by Articles 202 and 203 of UNCLOS on technical assistance and preferential treatment for developing States.

\*\*\*

## **Food and Agricultural Organization of the United Nations (FAO)**

**Organization:** [Food and Agriculture Organization of the United Nations \(FAO\)](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** 18 September 2023, 4 pm

### **Preliminary considerations on specific aspects of the Commission’s questions**

Many Parties to UNCLOS are also Parties to other binding international instruments adopted under the auspices of FAO. Parties to UNCLOS may have also endorsed non-binding instruments adopted under the auspices of FAO that are relevant to the Commission’s questions. While voluntary in nature, certain provisions of non-binding instruments may have a binding effect for all States if the provisions reflect customary international law.

### **The Commission’s Question Relating to Pollution of the Marine Environment**

From the perspective of FAO's mandate, pollution of the marine environment may be caused by (i) activities taking place in or interacting with the marine environment and which cause pollution *through the atmosphere* and (ii) activities that directly cause pollution *in marine waters*. Pollution *through the atmosphere* can be caused by GHG emissions from fishing vessels motorized by internal combustion engines for propulsion and onboard power. In addition, fishing vessels may introduce substances or energy into the marine environment, which can impact living resources and marine life, such as (i) marine litter, including abandoned, lost, or otherwise discarded fishing gear (ALDFG); and (ii) use of dynamites, poison, toxic or other noxious substances for fishing, which are generally prohibited by law. Additionally, marine aquaculture operations can contribute to wastewater discharge that can transmit disease and pollution; potentially harmful algal blooms that produce toxins, affect co-occurring organisms, and alter food-web dynamics; and the eventual use of unsustainable technologies or introduction of alien or new species that can transmit diseases to the natural aquatic fauna. UNCLOS specifies obligations concerning preventing, reducing, and controlling pollution of the marine environment from land-based sources (Article 207). Agriculture runoff may affect coastal waters by spreading sediments and chemical contaminants, concentration of nutrients (eutrophication), and leading to algae blooms that impact aquatic plants and animals.

### **The Commission's Questions Relating to the Protection and Preservation of the Marine Environment**

Parties to UNCLOS may adopt conservation and management measures (CMMs) through regional fisheries management organizations (RFMOs). Over twenty RFMOs have the competence to adopt binding CMMs. The adoption of CMMs by RFMOs may be reflective of a consensus amongst the respective RFMO members with respect to specific sustainable fisheries management and conservation measures that can support UNCLOS obligations on the preservation and protection of the marine environment. Such CMMs with obligations for the sustainable management of fisheries and conservation can contribute to the preservation and protection of the marine environment, including the protection of marine biodiversity and specific species.

### **Considerations Relating to Selected Instruments Adopted Under the Auspices of FAO**

#### **The Compliance Agreement and PSMA**

The Compliance Agreement is a treaty setting out States' responsibilities regarding the fishing vessels entitled to fly their flag and which are used or intended to be used for fishing on the high seas. The Compliance Agreement may be relevant to the Commission's question in so far as it supports the effectiveness of CMMs, which address the prevention, reduction, and control of marine pollution and the protection of the marine environment. The Compliance Agreement was adopted by consensus by all FAO Members in the Conference, and currently numbers 45 Parties, including the European Union.

The PSMA (Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing) may also be relevant to the Commission's questions, given its objectives. The PSMA addresses, for example, scenarios such as when a foreign fishing vessel is engaged or presumed to be engaged in Illegal, unreported and unregulated (IUU) fishing in the context of CMM violations relating to the prevention, reduction, and control of marine pollution or the protection and preservation of the marine environment. The adoption by the FAO Conference of

the PSMA, and adherence by 76 Parties, including the European Union, may reflect a developing international consensus on the matters falling under its scope.

### **International Conservation and Management Measures**

CMMs adopted by RFMOs may also be relevant to the Commission's questions. Of particular relevance are two RFMOs established under Article XIV of the FAO Constitution: the General Fisheries Commission for the Mediterranean (GFCM) and the Indian Ocean Tuna Commission (IOTC). GFCM CMMs cover a range of fisheries management issues, some of which have an environmental or conservation focus. In addition, some voluntary instruments adopted under the auspices of FAO may be relevant: the Code, which contains provisions on, *inter alia*, pollution and waste, and SSF Guidelines, which recommend that States prevent, deter, and eliminate all forms of illegal and/or destructive fishing practices harming marine ecosystems.

As regards part (b) of the Commission's question, various recommendations are provided in the Code, the SSF Guidelines, and the COFI Declaration, which consider that measures relating to fisheries management and conservation can contribute to the overall marine environmental protection and preservation.

\*\*\*

## **Viet Nam**

**Country/Organization:** [Viet Nam](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** Yes ([Held on](#) Wednesday, 20 September 2023)

### **GHG Emissions**

Vietnam's document asserts that anthropogenic greenhouse gas emissions (AGHGE) play a significant role in contributing to climate change impacts in the South China Sea region. AGHGE refers to human-generated emissions of gasses like carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O) into the atmosphere. These gasses are known for their ability to trap heat in the Earth's atmosphere, leading to global warming and related climate effects.

Vietnam contends that AGHGE emissions indirectly impact the marine environment in the South China Sea. This impact primarily arises from two factors: 1) Ocean Warming: AGHGEs lead to the warming of the Earth's atmosphere, which, in turn, increases ocean temperatures. Warmer ocean waters can disrupt marine ecosystems, affecting the distribution and behavior of marine species and potentially causing coral bleaching; 2) Sea Level Rise: AGHGE-induced global warming contributes to the melting of polar ice caps and the thermal expansion of seawater, resulting in rising sea levels. Sea-level rise can lead to coastal erosion, submersion of low-lying coastal areas, and the intrusion of saltwater into freshwater ecosystems.

Vietnam also argues that AGHGE emissions fall under the scope of "pollution" as defined in Article 1(1) of UNCLOS. According to UNCLOS, pollution of the marine environment refers to

the introduction, directly or indirectly, of substances or energy into the marine environment that results or is likely to result in deleterious effects. Vietnam maintains that AGHGE emissions meet the criteria of pollution as they involve the direct or indirect release of harmful substances (GHGs) into the atmosphere, which subsequently affect the marine environment.

### **Common But Differentiated Responsibilities (CBDR)**

Vietnam advocates for applying the principle of CBDR in addressing the impacts of AGHGE emissions and climate change in the South China Sea. CBDR is a concept in international environmental law that recognizes the varying responsibilities of States based on their historical contributions to environmental issues and their socio-economic capabilities. Vietnam suggests that CBDR should be taken into account when determining the obligations of States under UNCLOS regarding marine environment protection in the context of AGHGE impacts.

In summary, Vietnam's position underscores the interconnectedness of AGHGE emissions, climate change, and their consequences on the marine environment in the South China Sea. It argues that AGHGE emissions should be considered a form of pollution under UNCLOS, and the principle of CBDR should guide the allocation of responsibilities in addressing these challenges.

\*\*\*

## **India**

**Country/Organization:** [India](#)

**Date of Submission:**

**Oral Statement:** Yes ([Held on](#) Wednesday, 14 September 2023, 3 -6 pm)

### **Jurisdiction and Discretion**

India argues that ITLOS lacks advisory competence regarding the advisory opinion requested. The jurisdictional authority of the Tribunal, primarily rooted in UNCLOS Article 288 and the Statute of the Tribunal, does not explicitly include advisory jurisdiction. While the Convention allows advisory opinions within the Seabed Disputes Chamber, such competence was not extended to the full Tribunal.

India also contends that even if the Tribunal assumes jurisdiction, it should exercise discretion to decline the request. The questions raised seem unconnected to the Convention and might expand the obligations of State Parties beyond their consent. Climate change, as a specialized legal regime, should be addressed under the UNFCCC instead.

### **Merits of the Case**

India argues that UNCLOS does not explicitly address climate change and its impacts on marine environments. The Convention focuses on general obligations related to marine environmental protection, leaving climate change matters to the UNFCCC, the Kyoto Protocol, and the Paris

Agreement. The Convention's principles and provisions do not directly encompass climate change issues.

India emphasizes that climate change obligations should consider CBDR-RC. Developing countries like India, with a lesser historical contribution to global emissions, should have equitable access to carbon space and means of implementation to address climate change challenges.

India underscores the need for international cooperation under the UNFCCC framework to fulfill climate goals effectively. Developed countries' obligations, including climate finance, technology transfer, and capacity-building, play a crucial role in enabling developing countries to combat climate change.

### **Conclusion**

India concludes by asserting the following key ideas:

- The Tribunal may lack advisory competence, requiring fundamental consent from State Parties.
- If the Tribunal assumes jurisdiction, it should exercise discretion and decline the request.
- Climate change and marine environment obligations are best addressed under the UNFCCC.
- Climate obligations should respect principles of equity and CBDR.
- International cooperation and support from developed countries are essential for effective climate action in developing nations.

\*\*\*

## **5. STATEMENTS NOT SUBMITTED PURSUANT TO ARTICLES 138, ¶3, AND 133, ¶3, OF THE RULES OF THE TRIBUNAL (NOT PART OF THE CASE FILE)**

### **United Nations Special Rapporteurs on Human Rights & Climate Change, Toxics & Human Rights and Human Rights & the Environment**

**Organization:** [the UN Special Rapporteurs on Human Rights & Climate Change \(Ian Fry\), Toxics & Human Rights \(Marcos Orellana\), and Human Rights & the Environment \(David Boyd\)](#)

**Date of Submission:** 30 May 2023

**Oral Statement:** No

#### **The Tribunal should use the approach of systematic integration to interpret and apply UNCLOS**

Based on the text of UNCLOS and customary international law, the interpretation and application of UNCLOS requires consideration of international environmental law and international human rights law.

#### **GHG emissions pollute the marine environment**

The climate crisis falls under the scope of “pollution of the marine environment” defined by Article 1 (4) UNCLOS. The IPCC has extensively reported the adverse effects of climate change on the marine environment.

#### **Climate change-related pollution impairs the effective enjoyment of human rights**

The climate crisis has been a significant concern for UN human rights bodies, including the UN Human Rights Council and the UN Human Rights Committee. It impacts citizens globally and especially vulnerable persons disproportionately, including children and those relying on oceans as a source of food. UN Special Rapporteurs have published reports on the impairment of several rights, including the rights to safe drinking water and sanitation, the rights to associate, strike, and bargain collectively at all levels, the right to development, and the right to housing.

##### **a. Right to life**

In *Billy v. Australia* concerning Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee observed that the effects of climate change may expose individuals to a violation of their rights to life in the next 10-15 years. The Committee observed that the pollution of the marine environment by GHG emissions could threaten the right to life under certain circumstances. States have an obligation to take effective measures to mitigate climate change.

##### **b. Right to self-determination**

The right to self-determination, laid down in Article 1 UN Charter and Article 1 ICCPR, is dramatically affected by rising sea levels. While its realization is an essential condition for the effective enjoyment of individual human rights, climate change threatens the habitability of territory and the right to freely dispose of natural resources.

**c. Right to home, privacy, and family life**

The right to home, privacy, and family life provided in Article 17 of the ICCPR is endangered by climate impacts on the marine environment, including the reduction of marine resources used for food, the inundation of villages, and ocean acidification. A violation of Article 17 was found in *Billy v. Australia* as the impacts were both foreseeable and serious in light of “their intensity or duration and the physical or mental harm that they cause.”

**d. Right to a healthy environment**

The right to a clean, healthy, and sustainable environment has been recognized by resolutions of the UN Human Rights Council and the UN General Assembly without any opposition. It has also been recognized in regional human rights systems and domestic legal orders. Since the marine environment is an essential component of the environment, more broadly, interference may violate the right to a healthy environment when it is serious and foreseeable.

**e. Right to food**

The right to food is protected by the Universal Declaration on Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and requires States to take measures to safeguard access to nutrition. Pollution of the marine environment caused by GHG emissions compromises access to food. Findings of the UN Special Rapporteurs show that the impact of the climate crisis on the right to food is both serious and foreseeable.

**f. Right to livelihood, including fishing practices**

Article 7 of the ICESCR protects the right of everyone to work that ensures a decent living, and Article 11 recognizes the right of everyone to “an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The loss of coastal fisheries threatens the right to an adequate standard of living for communities that are economically dependent upon coastal resources. Further, Article 51 of UNCLOS requires States to recognize traditional fishing rights and to adopt appropriate measures.

**g. Cultural rights of minorities and Indigenous peoples**

Climate change impacts, such as sea level rise and extreme weather events, pose particular risks for Indigenous peoples and minorities that Article 27 ICCPR protects. In *Billy v. Australia*, the UN Human Rights Committee applied a foreseeability test and concluded that the State failed to adopt timely adequate adaptation measures.

**States’ obligations under UNCLOS**

Firstly, States must respect the right to science to fulfill their obligations, as provided by Article 27 (1) of the Universal Declaration of Human Rights and Article 15 of the ICESCR. Secondly, States must rapidly reduce GHG emissions in line with the principle of prevention and human rights standards. States are obliged to minimize their emissions to the fullest possible extent under Article 212 of UNCLOS and to protect and preserve the marine environment under Articles 193

and 194 (1). The reduction of GHG emissions should be carried out in line with the principles of equity and CBDR-RC. Moreover, States should regulate public and private entities within their jurisdiction and take necessary measures to achieve reductions in line with the Paris Agreement. This obligation is also found in Article 206 of UNCLOS. As the core of the harm prevention principle, due diligence undertaken to identify reductions in GHG emissions should be informed by the best available scientific knowledge. Thirdly, States must develop and implement international rules, standards, and recommended practices and procedures in accordance with Article 197 UNCLOS to ensure the full enjoyment of human rights. The Tribunal should find that States must implement those rules articulated in the relevant agreements, such as the Paris Agreement and the UNFCCC, and require States to use “maximum available resources” to fulfill their obligations under UNCLOS. Fourthly, States must adhere to the precautionary principle, meaning that States should act cautiously and diligently in the absence of scientific uncertainty. Finally, States must comply with international human rights and environmental law when carrying out mitigation and adaptation measures and must provide appropriate remedies for the violation of protected rights.

\*\*\*

## **High Seas Alliance**

### **SUMMARY OF AMICUS CURIAE MEMORIAL OF THE HIGH SEAS ALLIANCE TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (CASE NO. 31)**

**Organization:** [High Seas Alliance](#)

**Date of Submission:** 16 June 2023

**Notes:** Statement not submitted pursuant to Articles 138(3), and 133(3) of the Rules of the Tribunal (not part of the case file)

**Oral Statement:** No

#### **State Obligations to Protect and Preserve the Marine Environment in Relation to Climate Change Impacts, Including Ocean Warming and Sea Level Rise, and Ocean Acidification**

These obligations are listed in Articles 192 and 194(5) of UNCLOS. Under these articles, States have an obligation to protect and preserve the marine environment as well as to take measures to protect rare or fragile ecosystems and the habitat of threatened species. In addition, States need to comply with the precautionary principle to ensure that their activities and activities within their jurisdiction do not harm the marine environment. Finally, Article 197 of UNCLOS sets out the obligation to cooperate on an international and regional basis to preserve the marine environment. Article 22, Article 5, and Article 8 of the Convention on Biological Diversity should be read in conjunction with UNCLOS.



### **The BBNJ Agreement (A/CONF.232/2023/4)**

Upon listing the scientific evidence that supports the need for fulfilling the above obligations, the Alliance highlights that States should sign and ratify the Agreement under the United Nations Convention on the Law of the Sea on Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction ([adopted 19 June 2023](#)). The Agreement covers elements such as the preservation of ecosystem resilience (Article 7), cooperation (Annex II), and the assessment and reporting of environmental impact beyond national jurisdiction to prevent adverse impacts on the marine environment (Part IV).

\*\*\*

## **ClientEarth**

### **SUMMARY OF THE WRITTEN STATEMENT SUBMITTED BY CLIENTEARTH TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (CASE NO.31)**

**Country/Organization:** [ClientEarth](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** No

#### **The Legal Framework**

Article 194 of UNCLOS elaborates on the obligations of States to prevent, reduce, and control pollution of the marine environment. The pollution of the marine environment, as defined in Article 1(1)(4) of UNCLOS, encompasses all harmful effects by the anthropogenic introduction of both substances or energy, whether they are actual, potential, or only recognized as pollutants at a later time. These obligations are informed by the duty of due diligence. Based on the findings of the Seabed Dispute Chamber in a 2011 advisory opinion, due diligence requires States to consider new scientific knowledge and address sources of pollution even if not previously considered as such, namely GHG emissions.

Article 207 of UNCLOS establishes the obligation to prevent, reduce, and control pollution of the marine environment from land-based sources, including the duty to establish standards and the duty to re-examine such rules and standards (Article 207(4)), while Article 212 of UNCLOS relates to similar obligations regarding pollution of the marine environment that arises from or through the atmosphere).

GHGs are to be understood as a source of pollution of the marine environment in accordance with Article 194 of UNCLOS, as they are introduced to the sea through absorption and dissolution from the atmosphere as part of the carbon cycle, and create harmful effects. To fulfill the duty to prevent and reduce such pollution and the duty of due diligence, States must take action based on the best available science to reduce GHG emissions. Not basing State conduct on scientific findings leads

to ‘deleterious effects’ on the marine environment, as in Article 1(1)(4) of UNCLOS. States are required to enforce laws and regulations adopted in accordance with Articles 213 and 207 of UNCLOS. Failure to comply triggers State responsibility according to Article 235 UNCLOS and the ILC Draft Articles.

Notably, obligations under Part XII of UNCLOS as well as the duty of due diligence are informed by other international agreements concerning marine environmental protection. Article 31(3)(c) of the Vienna Convention confirms that treaties shall be interpreted in accordance with any relevant rules of international law applicable in relations between the parties. Hence, where the source of the pollution to the marine environment is GHG emissions, the governing framework on GHG emissions – the Paris Agreement being currently the international standard for the management and control of GHG emissions - is relevant to the interpretation of the obligations under Part XII of UNCLOS.

### **The Science of Climate Change & Oceans**

The written submission refers to the reports of the IPCC as the main source of information regarding the scientific consensus on climate change. The statement briefly illustrates the effects of climate change on the marine environment, as reported by the IPCC: global warming has caused the warming of the ocean. Carbon dioxide is further absorbed by the ocean, decreasing oxygen and increasing surface acidification. This impacts all of marine biodiversity and the ocean’s ecosystems. Marine species and their habitats also suffer from the impacts of the warming of the ocean.

Additionally, climate change has caused sea level rise and will continue to do so. Sea level rise has negative impacts on all coastal ecosystems. Coastal communities will be forced to relocate, threatening peace, security, cooperation, and friendly relations among States, which are, as seen in the preamble, further objectives of UNCLOS.

### **Application of the Law and Analysis**

Anthropogenic introduction of energy causing harm to the ocean, both existing and future introductions, constitutes ‘pollution’ under Article 1(1)(4) of UNCLOS. As General Principle 14 of the *General Principles for Assessment and Control of Marine Pollution* specifies, substances and energy are considered pollutants even if the negative effects become known after the fact. Hence, the definition of maritime pollution in UNCLOS also includes recently recognized threats to marine environments. The obligations under UNCLOS are to be defined in light of the UNFCCC. Hence, the management of GHG emissions includes and encompasses the obligations of State Parties to mitigate emissions under the Paris Agreement.

Where the duty of due diligence requires States to minimize harmful pollution by controlling and regulating anthropogenic GHG emissions, ClientEarth submits that this has to be done in accordance with the best available science. Finally, emissions have ‘deleterious effects’ on the

marine environment. States are thus required to cease such acts and re-establish the situation affected by the breach.

Additionally, the obligations under UNCLOS are to be interpreted in light of relevant internationally protected human rights. The written statement recalls *Billy and Others v Australia*, in which the UN Human Rights Council found that State Parties must prevent environmental damage which threatens disruption to the rights to privacy, family, and the home of individuals under their jurisdiction, and decisions by the European Court of Human Rights on State obligations to provide access to information and access to public consultation and participation in policy- and decision-making process as part of their obligation to prevent hazards to human health and life. Finally, States are obligated to provide effective remedies, including adequate compensation, whenever a human right is breached. Therefore, States must take action to decarbonize and avoid reliance on uncertain high-risk solutions, as their effectiveness remains uncertain, and their implementation might lead to human rights violations and severe environmental harms.

\*\*\*

## Opportunity Green

**Organization:** [Opportunity Green](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** No

### **GHG emissions from vessels constitute pollution of the marine environment under UNCLOS**

The definition of “pollution of the marine environment” as found in UNCLOS Article 1(1)(4) includes GHG emissions from vessels. According to the IPCC (including the [IPCC Special Report on Oceans and the Cryosphere in a Changing Climate](#) of 2019), GHG emissions can have deleterious effects on the marine environment. These include “warming and acidification, which alters the physical and chemical makeup of the ocean and threatens the functioning of marine ecosystems.” GHG emissions fall within the definition of pollution of the marine environment, as evident in the IPCC reports, but also in the work of legal scholars.

Following the above, the Tribunal should consider that GHG emissions fall within the definition of pollution of the marine environment. Therefore, any measures to control GHG emissions should be applied widely. In addition, the tribunal should clarify the obligations of State Parties (in this context, both flag and port States) in regulating and enforcing the regulation of GHG emissions from vessels in protecting the marine environment and preventing further deleterious effects of pollution in the marine environment.

## **GHGs from International Shipping and the Duty under Part XII to Prevent, Reduce and Control Pollution of the Marine Environment from Climate Change**

Article 194 of UNCLOS provides that States should take all necessary measures to prevent, reduce, and control GHG emissions within their jurisdiction. Within the article, obligations such as complying with any means possible with the Convention, ensuring that activities do not affect the environment of other States, and taking measures to minimize pollution, including that generated from vessels (on which they have a port, flag, or coastal jurisdiction). In addition, under Articles 202 and 203 of UNCLOS, States should support developing States to prevent and minimize pollution of the marine environment, as well as preferential treatment in allocating funds and technical assistance for these purposes. In essence, Opportunity Green suggests that these Articles read together “impose specific obligations on the States Parties to provide, *inter alia*, support, funds, technical assistance, equipment, facilities, and manufacturing capacity to climate vulnerable countries in relation to the marine pollution and climate change impacts resulting from GHG emissions from vessels.” Additionally, vessels produce atmospheric pollution, and therefore, States should take measures against the pollution of the atmosphere by vessels as per Article 194(1) UNCLOS.

### **GHGs from International Shipping**

Under Article 192 UNCLOS, State Parties should take measures to reduce GHG emissions from shipping to limit climate change and the impact of climate change on the marine environment. Further obligations include establishing international rules and standards (Article 211(1)) in minimizing vessel pollution through competent international organizations or general diplomatic conferences. The International Maritime Organization satisfies the definition of “a competent international organization,” as well as the Conference of the Parties in the context of the UNFCCC and the Paris Agreement and regional organizations such as the European Union. With a focus on the Paris Agreement and its near universal recognition, Opportunity Green suggests that States’ obligations within UNCLOS should be read together with the Paris Agreement, among other international instruments. Opportunity Green also finds that the International Maritime Organization has not been effective in enacting the obligations necessary to ensure State compliance with measures to minimize climate change and its effects on the marine environment. State Parties can, where appropriate, adopt more stringent standards in preventing, reducing, and controlling pollution of the marine environment.

### **Obligations of Port and Flag States**

Opportunity Green suggests that port States are obliged to enforce UNCLOS. Possible measures include the following: “(a) inspection and requests for information; (b) refusal of access to the port (of port services); (c) banning the ship from returning to port; (d) refusing to land or process cargo; (e) detention of a vessel; (f) fines, penalties, confiscation of cargo; and (g) prosecution for violation of the regulation.” However, Opportunity Green suggests that the due diligence obligations of port

and flag States should be addressed by the Tribunal or other international courts and tribunals, in particular in connection with Articles 217 and 218.

\*\*\*

## **Center for International Environmental Law (CIEL) and Greenpeace International**

**Organization:** [Center for International Environmental Law \(CIEL\) and Stichting Greenpeace Council \(Greenpeace International\)](#)

**Date of Submission:** 15 June 2023

**Oral Statement:** No

### **GHG emissions are a form of marine pollution as defined by UNCLOS**

CIEL and Greenpeace International argue that in accordance with the available scientific evidence, there is a need for quickly reducing GHG pollution through the reliance on fossil fuels and investing in resilience and adaptation in limiting the deleterious effects of GHG pollution. Under UNCLOS, GHG emissions are a form of marine pollution. The resulting climate change and its effects are leading to “deleterious effects” on the marine environment, health, and marine activity.

### **UNCLOS requires States to prevent, reduce, and control GHG emissions as a form of marine pollution**

Article 192 UNCLOS provides that States should “protect and preserve the marine environment.” This obligation includes the protection of the marine environment from future damage and ensuring the maintenance or improvement of its current condition. States have both negative and positive obligations to prevent any pollution from any source within or outside the jurisdiction of the State (Principle 21 of the 1972 Stockholm Declaration on the Human Environment, Rio Declaration on Environment and Development). Activities by both private and public parties within the State jurisdiction, or outside the jurisdiction should be regulated within the UNCLOS obligations. In addition, UNCLOS provides that regulatory and assessment frameworks should be used to control pollution of the marine environment. On the regulatory front, States should adopt laws and regulations in order to implement the international frameworks designed to prevent, reduce, and control pollution. In the event of failure to fulfill these obligations, recourse should be available within States. It is noted that “sufficient diligence” is a concept that needs to be interpreted following science and any new scientific findings.

### **ITLOS Should Interpret States’ Duties Under Part XII of UNCLOS Harmoniously with International Environmental and Human Rights Law, and the Available Science**

The commitments of States under other international instruments of environmental law and human rights law should be considered in interpreting State obligations within UNCLOS (Article 31(3)(C) Vienna Convention). In addition, the best available science should also be relied on when interpreting States’ duties under UNCLOS and other international instruments including the

UNFCCC and the Universal Declaration of Human Rights. In fulfilling the requirements of the UNFCCC and the Paris Agreement, States should act on reducing GHG emissions, while also enhancing the ability to adapt to climate change, building climate resilience, and reducing climate vulnerability. Such actions should be compliant with human rights obligations. In achieving this, cooperation between States is necessary.

On the effects of climate change on human rights, the statement suggests that there is an obligation to mitigate any actual or foreseeable threat to human rights by climate change (note the precautionary principle). In the [UN Human Rights Treaty Bodies' joint statement on human rights and climate change](#), it was recognised that “failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations,... even if the threat does not result in loss of life.” As has been decided by national courts, State failure to prevent climate change could amount to a violation of the right to life. The first action towards preventing further climate change and its effects is regulating and phasing out the use of fossil fuels. In addition, environmental impact assessments should be completed for any planned or proposed activities. Finally, adaptation measures should be implemented to protect human rights (*Billy et al v. Australia – Torres Strait Islanders Petition*, [CCPR/C/135/D/3624/2019](#)).

In designing such measures, there is an obligation to “(1) Take into consideration all forms of land use change induced by climate change; (2) protect all affected persons, particularly disadvantaged groups; and (3) ensure the effective participation and free prior, and informed consent of the Indigenous Peoples affected.”

Under the principle of intergenerational equity, States should ensure that no discrimination between the needs of present and future generations is committed by failing to curb climate change and its effects. Within this principle, the natural environment remains in the custody of the generation who holds it in trust for future generations.

\*\*\*

## **Advisory Committee on Protection of the Sea (ACOPS)**

**Organization:** [Advisory Committee on Protection of the Sea \(ACOPS\)](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** No

In answering Questions (a) and (b) of the Advisory Opinion Request, the Written Statement submitted by ACOPS focused on three main points: (1) the applicability of UNCLOS to anthropogenic GHG Emissions (GHG); (2) the significance of UNCLOS addressing the climate

crisis; and (3) the distinctive contribution of UNCLOS to protect and preserve the marine environment.

### **Applicability of the UNCLOS to Anthropogenic GHG Emissions**

Article 192 of UNCLOS prescribes States' obligation to "protect and preserve the marine environment" without any exception or qualification weakening or negating this duty. In discharging their obligation under Article 192, States must:

(...) 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 (...) (Art. 194 (1) UNCLOS; emphasis added)

That includes all sources of marine-based pollution (Art. 194 (3) UNCLOS), such as from vessels (Arts. 194 (3) (b), 211 UNCLOS) or various types of installations and devices (Art. 194 (3) (c) UNCLOS), but crucially for the issue of climate change, all sources of pollution from the land (Arts. 207, 213 UNCLOS), and from or through the atmosphere (Arts. 212, 222 UNCLOS). The meaning of pollution as per Article 1.1. (4) UNCLOS certainly includes GHG emissions that cause "ocean warming and sea level rise, and ocean acidification," as described in Question (a), and other deleterious effects. UNCLOS powerfully requires the unqualified protection of the marine environment from human activity in the land, sea, or air that can cause any harm not restricted to the marine environment; it could include hazards to human health (Article 1.1. (4) UNCLOS). States must prevent, reduce, and control all sources of pollution under their jurisdiction or control (Art. 194 UNCLOS). These three actions, i.e., prevention, reduction, and control, are not optional nor alternative courses of action. Exploitations of natural resources must be conducted within the limits of States' environmental obligations (Art. 193 UNCLOS), which are treated as customary international law and, therefore, apply to all States, irrespective of membership to UNCLOS.

### **UNCLOS is Essential to Address the Climate Crisis**

UNCLOS has specific provisions for protecting the marine environment, including concerning the oceans, coastal and marine ecosystems, and sinks and reservoirs, unlike the UNFCCC. At the same time, the UNFCCC supports and enhances the UNCLOS mandate for State action on GHG emissions, clarifying the requirements set in UNCLOS and providing strategies and means for implementation (e.g., nationally determined contributions; Art. 6 Paris Agreement). The two treaties reinforce one another, presenting a unique opportunity for complementarity in their application. Their regimes directly regulate anthropogenic GHG emissions and the climate crisis, with UNCLOS addressing the issues that are missing from the UNFCCC. Their consistency and overlap in scope and objectives encourage their joint application, supported by the rules of interpretation and a cohesive approach to international law.

### **UNCLOS Is the Keystone Treaty for the Protection and Preservation of the Marine Environment**

The very conception of UNCLOS distinguishes it from simple treaties. UNCLOS operates as the overarching international instrument for the seas and oceans. It integrates other key treaties by reference, such as the UNFCCC, which adds specificity and additional perspectives to its interpretation. Its comprehensive and complex composition, with direct obligations and incorporation of additional norms, global standards, practices, and procedures, elevates it to the keystone treaty for protecting and preserving the marine environment, which is essential to address climate change. The absence of ocean-specific provisions from the UNFCCC, as noted previously, is a testament to the distinctive contribution UNCLOS can have to the mitigation of global warming through its enforceable requirements for the protection of the marine environment and the elimination of anthropogenic GHG emissions.

It is also worth noting States' obligation to act with due diligence when taking steps to fulfill their duty to protect and preserve the environment. Traced back to *Argentina v. Uruguay* (2010), the principle of due diligence requires States to do the "utmost" and engage their "best efforts" to discharge the duty in question (e.g., under Arts. 192, 194 UNCLOS). This goes beyond the obligation to prevent, reduce, and control pollution; it extends to acting with "vigilance" in exercising administrative control, requiring States the effective exercise of jurisdiction and control (see *Argentina v. Uruguay* §§101, 197), which is particularly relevant in the context of continuous policy and legal developments on CO<sub>2</sub> storage. Overall, the UNCLOS is an essential treaty to protect the marine environment from the causes of climate change (including GHG emissions) and other degradations aggravated by human activity. In addition to the above, States' specific obligations under UNCLOS are also seen in Article 1.1.(4), Articles 192-199, Articles 204-206, Articles 207-212, Articles 213-220, Article 222, Articles 234-235, Article 237, and Article 288.

\*\*\*

## **World Wide Fund for Nature (WWF)**

**Organization:** [World Wide Fund for Nature International \(WWF\)](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** No

### **The state of the ocean and climate change**

Two-thirds of the Earth is covered by the ocean, which supports life on the planet and human well-being in many ways. Oceans and coastal ecosystems are a natural regulatory system for climate, adjusting cycles of heat, water, and carbon accordingly. Absorbing roughly 90% of excess heat and generated energy and 20-30% of human-produced carbon dioxide since the 1980s, oceans have become the Earth's greatest carbon sink. That results in melting sea- and land-ice, sea level rise, marine heatwaves, deoxygenation, and ocean acidification. The impact of these phenomena, particularly ocean warming and acidification, on marine biodiversity, ecosystems, and species can be irreversible, as evidenced in scientific findings, including by the IPCC. Their impact also



severely affects people and coastal communities, increasing their overall climate vulnerability. The ocean can store large quantities of carbon, decelerating global warming. A healthy ocean can naturally provide essential services through its marine and coastal habitats, keeping a balanced climate. Yet, the ocean's critical contribution to climate mitigation, adaptation, and resilience has so far been neglected. Failing to protect the ocean from the effects of climate change is failing to protect the very mitigation avenues that can assist us in responding to climate change.

### **UNCLOS is not static – it continuously evolves**

UNCLOS was not negotiated with climate change in mind, and therefore, Part XII of the Convention does not refer to the negative impact of climate change on the ocean and marine environment. Yet, importantly, UNCLOS is not a fixed, static regime but a dynamic, flexible framework capable of growing to adapt to new circumstances. The inherent flexibility of its design allows it to consider new realities, including developments in international law and policy. In that way, UNCLOS is considered “a living instrument,” which develops through the interpretation and construction of its articles against the background in question.

### **The Paris Agreement informs the interpretation of UNCLOS**

No treaty is interpreted in a legal vacuum, rather it is interpreted in its normative environment, which includes other sources of international law. In the *Torres Strait Islanders* case, the UN Human Rights Committee recognized that environmental treaties, such as the Paris Agreement, inform the interpretation of different legal instruments in the context of climate change. The Tribunal, in interpreting UNCLOS, must do so in its normative environment, including the Paris Agreement and obligations under its framework. That is also consistent with and supported by the principle of systemic integration, i.e., establishing systemic relationships between legal rules, which is a necessary ingredient of legal reasoning.

### **GHG Emissions as Marine Pollution**

GHG emissions constitute a form of pollution under Article 1.1. (4) of UNCLOS. The very wording of Article 1.1. (4) supports that, allowing for new sources of pollution to be included (read together with “pollution from or through the atmosphere;” see Arts. 194 (3) (a), 212, and 222 UNCLOS). The fact that Part XII of UNCLOS does not refer to the impacts of climate change does not exclude them from consideration when such a question arises. The same question, which is a preliminary issue before the Tribunal, has been considered before the Dutch District Court in *Milieudefensie et al. v. Royal Dutch Shell plc* (2021), which construed environmental damage as including the deleterious effects of climate change. Similarly, the UN Human Rights Committee in *Torres Strait Islanders* acknowledged the effects of climate change on a low-lying island as environmental harm.

### **Question (a)**

The key State obligations stem from Article 194 UNCLOS. According to its provisions, States must reduce GHG emissions and prevent marine pollution from any source (Art. 194 (1) UNCLOS). Reading together, Articles 194, 207 (pollution from land-based sources) and 212 (from or through the atmosphere) show that pollution includes airborne sources, including GHG emissions. Considering current climate knowledge, reducing GHG emissions requires obligations of result (e.g., reduce GHG not to exceed 1.5°C, include marine habitats to Nationally Determined Contributions) and obligations of conduct (e.g., due diligence). The obligation to prevent, reduce, and control pollution of the marine environment under Article 194 (1) of UNCLOS, read together with Articles 4 (3) and 4 (4) of the Paris Agreement, indicates taking a shared but differentiated responsibility between States, reflecting their respective capabilities and contributions to emissions.

Article 194 (2) UNCLOS requires States to ensure that activities under their jurisdiction or control do not cause pollution to the marine environment of other States. That is not confined to activities directly undertaken by the State or its organs; it covers all activities under the State’s jurisdiction or control, even when these are performed outside the State’s national boundaries. The obligation to “ensure (...) not to cause damage by pollution to other States and their environment” in Article 194 (2) is an obligation of due diligence, as is to “prevent, reduce, and control” pollution by taking “all measures” in Article 194 (1); see *South China Sea (Philippines v China)* (2016) relying on the *Pulp Mills on the River Uruguay* decision (due diligence requires “a level of vigilance”). Due diligence obligations under Article 194 take a sustainability- and not a legality-based approach. Failure to comply with basic sustainability standards (not only the laws in the country of production) renders an activity or its product unlawful. Conducting environmental impact assessments is a direct obligation under UNCLOS, and it should be an enhanced obligation considering the current planetary climate crisis, also taking into account the cumulative impact of existing projects.

### **Question (b)**

The State obligations concerning this question stem from Articles 192, 207, and 212 UNCLOS. The State obligation to “protect and preserve the marine environment” under Article 192 UNCLOS includes the duty to protect it from climate change impacts (present and future) and improve its existing condition. Therefore, deep-sea mining is naturally incompatible with Articles 192 and 145 UNCLOS. Articles 207 (protect against land-based sources of pollution) and 212 (prevent pollution of the marine environment through or from the atmosphere by adopting laws and regulations) create the State’s duty to mitigate land-based activities that generate GHG emissions, which is one of the targets of the UN Sustainable Development Goals (see Target 14.1 “reduce marine pollution of all kinds, in particular from land-based activities” by 2025).

\*\*\*

# **Our Children’s Trust and Oxfam International**

**Organization:** [Our Children’s Trust and Oxfam International](#)

**Date of Submission:** 16 June 2023

**Oral Statement:** No

The Written Statement submitted by Our Children’s Trust and Oxfam International paid particular attention to the use of the best available evidence of climate science as the basis to answer the legal questions of the Advisory Opinion Request. The authors defined “best available science” as the most up-to-date scientific findings that (i) maximize the quality, integrity, and objectivity of information; (ii) use publicly available data that are subject to peer review; and (iii) identify and document risks and uncertainties for drawing conclusions. The following summary focuses on (1) some of the key points of the best available science discussed in the submission, which forms the basis for (2) the interpretation of State obligations under the UNCLOS and (3) the remedies requested from the Tribunal.

## **Key points from the best available scientific evidence**

The 1.5 and 2°C temperature targets of the Paris Agreement are insufficient goals for ocean and marine protection and are not supported by scientific evidence. The Paris Agreement is an achievement of political negotiation and consensus, but not of scientific analysis. The current levels of warming (~1.1°C to 1.3°C) already significantly threaten and affect the oceanic and marine environments. Allowing the temperature to rise up to 1.5°C above pre-industrial levels could trigger multiple climate tipping points (crossing climate thresholds or “points of no return”), failing to protect the ocean and violating human rights. Therefore, the Paris Agreement temperature targets are a flawed and outdated point of reference to determine the State obligations under UNCLOS.

The Earth’s energy imbalance is the “most critical” metric, the test showing whether the climate action undertaken has produced results. The only way to restore and stabilize the Earth’s energy and climate system, and therefore protect the oceans and marine ecosystems, is by reducing the concentration of CO<sub>2</sub> in the atmosphere back to or less than 350 parts per million (ppm) (the 2022 levels are 419 ppm). This limit accurately reflects the urgency of the current climate crisis, unlike the Paris Agreement temperature targets that may suggest that more CO<sub>2</sub> in the atmosphere could be afforded without any harm caused. To reach the target of 350 ppm, there are technologically and economically feasible ways to do so and transition pathways detailed in hundreds of studies.

## **Applying the best available scientific evidence to the interpretation of UNCLOS**

The latest and best available climate science must lead the interpretation of State obligations under UNCLOS. That is necessary for the interpretation of UNCLOS provisions to be accurate and specific. Illustratively, bearing in mind the scientific evidence discussed previously, Article 192 UNCLOS not only requires States to avoid causing harm to the marine environment but also to

take active steps to protect it, imposing both negative and positive obligations. The best available scientific evidence must also guide the interpretation of international environmental law principles relevant to UNCLOS, such as the principle to prevent transboundary harm, the principle of CBDR, and the polluter pays principle. Further, the same science is necessary to fully understand and interpret the human rights impact of climate change in relation to UNCLOS. The protection and preservation of the marine environment is linked to the health and safety of all human populations, especially those relying on the ocean and its resources, and particularly vulnerable population groups, such as young people, who suffer from a number of climate-triggered impacts, such as trauma, mental health problems, and climate anxiety.

### **Remedies**

In light of the above, and considering the unprecedented urgency of the climate crisis, the Tribunal should find the following:

- a. The State obligations under Articles 192, 194, and 212 of UNCLOS include the duty to stabilize the planet's climate system.
- b. The best available scientific evidence must underpin States' action to respond to climate change. Currently, such evidence suggests that to balance the Earth's climate, States should strive to reduce CO<sub>2</sub> concentrations to 350 ppm as soon as possible.
- c. State laws and policy frameworks that do not align with the 350 ppm commitment should be immediately addressed, with States taking specific, immediate, and adequate action to phase out CO<sub>2</sub> emissions and remove it from the atmosphere to protect and preserve the ocean and marine ecosystems.
- d. Certain populations, such as coastal communities and children, are particularly climate-vulnerable. States failing to address the climate- and pollution-related risks, leading to the deterioration of the marine and oceanic environment, exacerbates the vulnerability of these populations, exposing them to increased risk.
- e. The liability of States for damages caused as a result of their failures to address these issues is prescribed in Articles 139 and 235 UNCLOS.

### **Conclusion**

In the concluding remarks, the submission by Our Children's Trust and Oxfam International underlined that the Tribunal has the unique opportunity to play a leading and pivotal role in showing by example that climate law and policy should be based on the best science available, setting a decisive legal precedent. A decision reflecting the current scientific knowledge available would indicate that the States cannot strive to do their best; they must do what is scientifically required to fulfill their obligations under UNCLOS and prevent disastrous climate effects. In that way, the Tribunal can protect our ocean and vindicate those disproportionately affected by the climate change crisis, including children and young people.

\*\*\*

# Observatory for Marine and Coastal Governance

**Organization:** [The Observatory for Marine and Coastal Governance](#)

**Date of Submission:** No date indicated.

**Oral Statement:** No.

## **Marine Justice and Critical Communities in the Context of the Anthropocene**

Marine justice as a concept is new, but it is an extension of environmental justice necessary to foreground States' obligations. While the Anthropocene emphasizes the harmful effects of human activities on the earth system, the burdens, benefits, responsibilities, and obligations in the face of climate change are not the same for all States, communities, and individuals. Hence, there should be a differentiated responsibility for the adverse impacts of climate change among countries. The notion of marine justice aims at dealing with climate change and environmental impact and injustice regarding the use of marine biodiversity and pollution, thereby protecting the interests of coastal communities, Afro-descendant communities, indigenous communities, and artisanal fishing communities. The *amicus brief* further highlights that participatory and distributive justice, differentiated obligations of developing countries, and the consideration of the rights of vulnerable populations within countries, including the artisanal fishing communities, are essential elements of the concept of marine justice.

## **Answer to the Advisory Opinion Request on States' Obligations in the Face of Climate Change**

The *amicus brief* argues that when interpreted in the light of the principles of international law, the obligations contained in UNCLOS will help determine the duties of care required of States in addressing climate change. Three principles of international law identified in the *amicus brief* are: a) the principle of non-detriment, b) the precautionary principle, c) the principle of intergenerational equity. The principle of non-detriment requires the exercise of due diligence by States to ensure that activities carried out on their territory or within their jurisdiction do not cause harmful consequences to other States or to areas beyond national jurisdiction. Considering that a State may be held liable on the basis that it has failed to take adequate measures to prevent adverse impacts on the climate system, it is possible to conclude that the principle of non-detriment, or its corollary principle of due diligence, applies to the interpretation of States' obligations. The precautionary principle, as shown in the submission, is a feature of a range of international environmental law instruments, including the Rio Declaration on Environment and Development, the United Nations Framework Convention on Climate Change, and the Convention on Biodiversity. It has also been the subject of case law. It is relevant as GHGs can be considered a form of pollution that States should control to avoid damage to other States from a precautionary perspective. The principle of intergenerational equity, the *amicus brief* contends, could play an active role by significantly increasing the level of action needed to address a potential risk to the marine environment that compromises the interests of future generations.

## **Answer to the Advisory Opinion Request on Human Rights Obligations of States**

States have an obligation to protect human rights from climate harm and an obligation to fulfill their international human rights commitments in the climate change context. This stems from the adverse effects of climate change on the enjoyment of a wide range of human rights, which have been documented in a range of soft and hard human rights instruments. It is also endorsed in the

preambular provision of the Paris Agreement. Hence, to ensure the fulfillment of these obligations towards communities such as indigenous communities and artisanal fishing communities, States must apply a rights-based approach to all aspects of climate change and climate action. Applying a rights-based approach is required to ensure the obligations of States and companies, catalyze ambitious action, highlight the plight of the poorest and most vulnerable, and empower people to participate in the design and implementation of solutions. The *amicus brief* classifies States' human rights obligations as: procedural, substantive, and special to those in vulnerable situations. It argues this framework can be operationalized in the context of climate change to respect, protect, and fulfill human rights. This is already being done as is evident in cases where courts have found that national governments had failed to take sufficient mitigation measures in the light of their human rights obligations. Hence, the foreseeable impacts on Small Island States, coastal communities, and fishing communities require that States must take their human rights obligations seriously.

### **Answer to the Advisory Opinion Request on States' Duties to Protect and Conserve the Oceans**

The *amicus brief* demonstrates that concrete and precise damages to marine ecosystems and States, especially coastal and small islands, result from climate change. Therefore, States should integrate the law of the sea to include climate change policy and environmental principles to protect and conserve the oceans. States must adopt measures for conserving living resources, for instance, to maintain or restore fish stocks at levels that can produce the maximum sustainable yield. Climate change poses significant risks to the oceans, although it can serve as carbon sinks. The legal basis of the duty to protect the marine environment is derived from several instruments, including the UNCLOS. It is evident in the decisions from arbitral tribunals such as the South China Sea Arbitration. Hence, given the foreseeable and potentially catastrophic adverse effects of climate change on the marine environment, it is possible to consider that the emission of greenhouse gases is a form of pollution that can affect the marine environment and invoke the States' obligation to prevent and mitigate the effects of climate change under related instruments.

\*\*\*

## **One Ocean Hub**

**Organization:** [One Ocean Hub](#)

**Date of Submission:** 2023 (exact date unspecified)

**Oral Statement:** No

### **Emphasis on the Ocean-Climate Nexus**

The ocean is understood as a body of water and its biodiversity plays a fundamental role in climate regulation because it is both a carbon and heat sink. Yet the ocean-climate nexus acts as a negative feedback loop, whereby climate change progression, moderated by carbon uptake by the ocean, compromises the ocean's continued ability to regulate global climate. In addition, climate change has increasingly negative impacts on the ocean, which is warming, rising, and acidifying. There is also an increase in the frequency and intensity of extreme weather events as well as marine heatwaves, which are predicted to further increase into the future, causing a plethora of biological

and socio-economic impacts. Some of the ocean's services and processes, especially deep-sea processes, require further research, which is underway.

### **Protection of Marine Biodiversity under UNCLOS at the Ocean-Climate Nexus**

UNCLOS does not mention climate change but can address it through its environmental protection provisions. Under UNCLOS, states have positive obligations to prevent, reduce, and control pollution (Article 194). The definition of that term is broad and the consensus in the literature is that these obligations include measures for the reduction of emission of GHGs into the atmosphere. Additionally, the need to protect and preserve the marine environment from pollution under UNCLOS is to be read in conjunction with other provisions in Part XII of UNCLOS as well as other applicable rules of international law, as illustrated in the *South China Sea* arbitration. Of particular importance among these other applicable rules are the UNFCCC, the Kyoto Protocol, the Paris Agreement, the Convention on Biodiversity, as well as the 2023 Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (the BBNJ Agreement). The BBNJ Agreement includes several explicit references to climate change and, notably, several provisions specifically on regime interaction, as well as an obligation for its parties to cooperate across different fora, so as to support synergies with other international regimes.

### **Protection of Marine Biodiversity under the Convention on Biodiversity at the Ocean-Climate Nexus**

According to UNCLOS Art. 194(5), measures to prevent, reduce, and control marine pollution include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life. This provision's interpretation must be informed by the Convention on Biodiversity (CBD) and the guidance adopted by the 196 CBD Parties. The CBD Parties have explicitly recognized both that biodiversity and ecosystem functions and services significantly contribute to climate change mitigation and adaptation and that climate change is one of the four drivers of global biodiversity loss. Thus, while the CBD does not explicitly mention climate change, several of its provisions are relevant to address climate change as a driver of biodiversity loss, as well as to ensuring consistency between international biodiversity and climate change law with regard to climate change response measures. For example, the CBD can be interpreted as requiring parties to integrate biodiversity issues into climate change plans, programs, and policies; to prevent the introduction of invasive alien species in the context of adaptation and mitigation measures; and to respect and preserve the traditional knowledge and practices of Indigenous peoples and local communities when implementing mitigation and adaptation measures, as well as ensuring their genuine participation in climate change-related decision-making and rewarding them for their intellectual contribution to mitigation and adaptation measures.

### **Protection of Marine Biodiversity under International Human Rights Law at the Ocean-Climate Nexus, Including Children's Human Rights**

In 2022, the Committee on Human Rights recognized the negative impacts of climate change on the ocean (sea-level rise and subsidence, coral bleaching, saltwater intrusion, and other alterations to marine ecosystems) on which livelihoods and culture depend, including the ability to transmit to children and future generations traditions related to the sea. This is particularly the case when marine resources are essential components of distinctive ways of life and when alternatives to subsistence livelihoods are lacking, such as in small islands. A human rights-based approach to climate change mitigation and adaptation is implicitly supported by the CBD guidance mentioned in the previous paragraph as well as explicitly and implicitly supported by the BBNJ Agreement and the work of the former UN Special Rapporteur on Human Rights and the Environment, John Knox.

In this context, children’s human rights are of paramount significance. Climate change and biodiversity loss prevent children from enjoying their human rights today and in the future, as their long-term physical and mental health and overall quality of life will be severely impaired. Consideration of children’s human rights provides important insights for the application of the precautionary principle and approach, notably in that it dictates that policymakers adopt a short-, medium-, and long-term outlook when assessing the threats of serious or irreversible damage.

\*\*\*