Annex A

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(CASE NO. 31)

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

WRITTEN STATEMENT OF NEW ZEALAND

15 JUNE 2023

CONTENTS

CHAPTER 1

INTRODUCTION

I. The questions posed to the Tribunal by the Commission

1. On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (the Commission) pursuant to the Agreement for the Establishment of the Commission for Small Island Developing States on Climate Change and International Law of 31 October 2021 (COSIS Agreement), submitted a request to the International Tribunal for the Law of the Sea (the Tribunal) for an advisory opinion on the following legal questions:[1]

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

2. By an Order dated 16 December 2022, the Tribunal invited State Parties to the United Nations Convention on the Law of the Sea (the Convention), the Commission, and certain intergovernmental organisations to present written statements on the questions, and fixed 16 May 2023 as the time limit within which written statements may be presented to the Tribunal.[2] By a subsequent Order dated 15 February 2023, that time limit was extended to 16 June 2023.[3]

3. This statement by New Zealand sets out, in this introductory Chapter, the context for consideration of the questions before the Tribunal and the principles of interpretation which New Zealand submits should guide the Tribunal's consideration of them. In Chapter 2, the statement addresses the jurisdiction and discretion of the Tribunal to give an advisory opinion in response to the request by the Commission. Chapter 3 is focussed on part (a) of the question posed by the Commission to the Tribunal and the duty to prevent, reduce and control pollution of the marine environment. Chapter 3 also encompasses general rules and principles of customary international law which are relevant to both part (a) and part (b) of the question. Chapter 4 addresses certain aspects of part (b) of the question posed by the Commission to the

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[1] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* ITLOS Case No. 31, 12 December 2022 [COSIS Request].
[2] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Order 2022/4)* ITLOS Case No. 31, 26 December 2022.
[3] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Order 2023/1)* ITLOS Case No. 31, 15 February 2023.

Tribunal that extend beyond the duty to prevent, reduce and control pollution. Finally, Chapter 5 concludes New Zealand's written statement.

II. General context relevant to this request for an advisory opinion

4. The Convention is "the international basis on which to pursue the protection and sustainable development of the marine environment and coastal environment and its resources".[4] It was established to be a comprehensive constitution for the oceans that would stand the test of time.[5] States have consistently recognised the unified character of the Convention and the vital importance of preserving its integrity.[6] New Zealand is deeply committed to upholding the Convention's position as the definitive legal framework within which all activities in the oceans and seas must be carried out.

5. New Zealand places great importance too on the conservation and sustainable use of the ocean. Across the Pacific region, the vast ocean that surrounds us is inextricably linked to our identity. It underpins cultures, communities and ways of life. Economies rely on the ocean, through fisheries and aquaculture, tourism and shipping; livelihoods are closely linked to the sustainable use of marine resources; and culture and recreation take shape around the ocean and its shores. Our ambition is that all Pacific peoples live in a sustainably managed Blue Pacific Continent, while steadfastly maintaining resilience to environmental threats.[7]

6. The Convention does not stand alone, but rather it sits within the framework of general international law.[8] The Charter of the United Nations is at the heart of this. It provides that the purposes of the United Nations include "achiev[ing] international cooperation in solving international problems".[9] United Nations Member States have agreed to cooperate with each other in good faith to fulfil their obligations under the Charter.[10] This is essential for the

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[4] *Agenda 21: Programme of Action for Sustainable Development* UN GAOR 46th Sess, Agenda Item 21, A/Conf 151/26 (1992) [Agenda 21] at [17.1].
[5] T B Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea "A Constitution for the Oceans" (remarks, adapted from statements by the President on 6 and 11 December 1982 at the final session of the Conference at Montego Bay) (available at: https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf, accessed 19 May 2023).
[6] See, for example, *Oceans and the law of the sea* GA Res 77/248 (2022), operative paragraph [1].
[7] *2050 Strategy for a Blue Pacific Continent* Pacific Islands Forum Secretariat (2022).
[8] See, for example, the final preambular paragraph of the United Nations Convention on the Law of the Sea 1833 UNTS (opened for signature 10 December 1982, entered into force 16 November 1992) [UNCLOS] which affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law"; art 293(1) which directs the Tribunal to apply the Convention "and other rules of international law not incompatible with [the] Convention". In addition, art 23 of "Annex VI: Statute of the International Tribunal for the Law of the Sea" to the UNCLOS [ITLOS Statute] provides that "The Tribunal shall decide all disputes and applications in accordance with Article 293". Article 293(1) of the ITLOS Statute directs the Tribunal to apply the Convention "and other rules of international law not incompatible with [the] Convention".
[9] *Charter of the United Nations,* art 1(3).
[10] *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* GA Res 2625 (1970), Annex, preamble at [5].

maintenance of international peace and security and for the implementation of the other purposes of the United Nations as set out in Article 1 of the Charter.

7. The applicable international legal framework also includes other treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. New Zealand notes the inclusion of these treaties in the dossier, submitted by the Co-Chairs of the Commission to the Tribunal, of documents likely to throw light upon the questions contained in the Commission's request for an advisory opinion.

8. The dossier also includes several recent reports of the Intergovernmental Panel on Climate Change (IPCC), the United Nations body responsible for assessing the science related to climate change. These reports reflect unequivocally that the earth is warming at an unprecedented rate, and that human activity is the principal cause.[11] They also reflect clear scientific evidence that the ocean is warming, rising and becoming more acidic at an accelerated rate.[12] This is leading to increasingly severe, interconnected and in some cases irreversible impacts on ecosystems, biodiversity, and human systems.[13] The documents in the dossier are highly relevant to the questions posed by the Commission and should provide useful guidance to the Tribunal in considering its response.

9. Climate change and its impacts, including on the marine environment, are of grave concern to New Zealand. The health of the ocean, which covers around 70 percent of the Earth's surface and represents its largest carbon sink, is inextricably linked to the climate crisis.[14] The impacts of climate change are acute, enduring and complex across the globe. These impacts are especially profound for communities that depend on the ocean, as well as States that are particularly vulnerable to the adverse effects of climate change, including Pacific Island States composed of atoll islands.[15] The Pacific Islands Forum has recognised that climate change is the single greatest threat to the livelihoods, security and well-being of the peoples of the Pacific.[16]

10. Climate change is a particularly difficult problem to respond to. Part of the reason for this lies in the multiple, diverse and widespread sources of greenhouse gas emissions, which have a cumulative impact.[17] In addition, some of the most severe impacts of climate change

[11] IPCC "Climate change widespread, rapid and intensifying" (press release, 9 August 2021).
[12] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* ITLOS Case No. 31, Dossier submitted by the Commission of Small Island States on Climate Change and International Law (available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/dossier-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law/ accessed 4 May 2023) [COSIS Dossier].
[13] Ibid.
[14] *State of the Global Climate 2022* World Meteorological Organization WMO-No 1316 [WMO Report] at 4.
[15] Ibid.
[16] *Boe Declaration on Regional Security* Pacific Islands Forum (2018).
[17] Philippe Sands and Jacqueline Peel *Principles of International Environmental Law* (4th ed, Cambridge University Press, Cambridge, 2018) at 462.

are experienced by States and communities that have contributed least to the problem in terms of their own emissions,[18] and that have limited capacity to respond to it. It follows that our response must be a global and collective one, underpinned by the duty of cooperation.

III. Rules of treaty interpretation relevant to the questions posed to the Tribunal

11. The questions posed by the Commission to the Tribunal relate to the interpretation of the Convention. The rules governing Treaty interpretation are set out in the Vienna Convention on the Law of Treaties (Vienna Convention).[19] New Zealand submits that the Tribunal should apply these rules in its consideration of the questions posed by the Commission.

12. Article 31 of the Vienna Convention provides as the general rule of interpretation that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[20] The "context" includes the text and structure of the treaty as a whole,[21] including its preamble and any annexes,[22] as well as any instruments related to the treaty made in connection with its conclusion.[23] The "object and purpose" may emerge from a consideration of the aims of the treaty as may be reflected, for example, in the scheme of the treaty and its preamble.[24] In addition, the subsequent practice of the parties to the treaty must be taken into account.[25]

13. Article 31 of the Vienna Convention further requires any relevant rules of international law applicable in the relations between the parties to be taken into account.[26] New Zealand notes in this regard that the Tribunal has previously made reference to other instruments of international law in the interpretation of obligations under the Convention, including in its *Sub Regional Fisheries Commission (SRFC)* advisory opinion.[27] Such rules may also include rules

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[18] Ibid.
[19] Vienna Convention on the Law of Treaties 1155 UNTS 331 (23 May 1969, entered into force 27 January 1980) [Vienna Convention].
[20] Vienna Convention, above n 19, art 31(1).
[21] See, for example, *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* [2011] ICJ Rep 644, 5 December 2011, at [97] and [98].
[22] Vienna Convention, above n 19, art 31(2).
[23] Vienna Convention, above n 19, art 31(2)(a).
[24] See, for example, *Oil Platforms (Islamic Republic of Iran v United States of America)* [1996] ICJ Rep 803 [*Oil Platforms (Islamic Republic of Iran v United States of America)*] at [27]; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel* [1977] UNRIAA 153 at [19].
[25] Vienna Convention, above n 19, arts 31(3)(a) and (b).
[26] Vienna Convention, above n 19, art 31(3)(c)*;* see, for example: *Oil Platforms (Islamic Republic of Iran v United States of America)*, above n 24, at [41]; *Gahéikovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7 [*Gahéikovo-Nagymaros Project*] at [112]; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S W Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at [53].
[27] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* [2015] ITLOS Rep 4 [*SRFC Advisory Opinion*] at [84]: the Tribunal concluded that "the Convention, the MCA Convention and other relevant rules of international law not incompatible with the Convention constitute the applicable law in this case". In addition, the arbitral tribunal in the *South China Sea Arbitration (Republic of the Philippines v the People's Republic of China (Award)* PCA 2013-19,12 July 2016 [*South China*

of customary international law. In the event of simultaneously applicable norms bearing on a single issue, these should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.[28]

Sea Arbitration (Award)] referred to the Convention on Biological Diversity to interpret the term "rare or fragile ecosystem" and to the Convention on International Trade in Endangered Species to interpret the phrase "depleted, threatened or endangered species" in Article 194 of the Convention.

[28] See, for example, "Article 13(3)(c) VCLT" in *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* Report of the Study Group of the International Law Commission A/CN.4/L.702, 18 July 2006, at 13 and following.

CHAPTER 2

JURISDICTION AND ADMISSIBILITY

I. Jurisdiction

14. This is the second occasion on which the Tribunal has been asked to render an advisory opinion under Article 21 of the Statute of the Tribunal (the Statute) and Article 138(1) of the Rules of the Tribunal (the Rules). Consistent with the principle of *compétence de la compétence*,[29] Article 288(4) of the Convention provides that it is for the Tribunal to settle any questions over whether it has jurisdiction to render an advisory opinion. In doing so, the Tribunal must act in accordance with the provisions of the Convention, its Statute and Rules. The Convention provides for the Seabed Disputes Chamber to issue advisory opinions, but does not otherwise make specific provision for the Tribunal to issue advisory opinions. The Tribunal's Order of 16 December 2022 which, *inter alia*, entered the request for an advisory opinion into the list of cases, had regard to Articles 21 and 27 of the Statute, as well as Articles 130, 131, 133 and 138 of the Rules.

15. Article 21 of the Statute provides:

> The jurisdiction of the Tribunal comprises 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* (emphasis added).

16. In response to the first request for an advisory opinion, the *Request for an Advisory Opinion submitted by the SRFC*, the Tribunal concluded that when another agreement confers advisory jurisdiction on the Tribunal, this combined with Article 21 of the Statute constitute the substantive legal basis for the Tribunal's advisory jurisdiction.[30]

17. In the *SRFC* advisory opinion, the Tribunal also opined that Article 138 of the Rules:

> …furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction. These prerequisites are: 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; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above [in Article 21 of the Statute]; and such an opinion may be given on "a legal question".[31]

18. In the current proceedings, New Zealand notes that the request has been submitted to the Tribunal by the Co-Chairs of the Commission under the terms of Article 2(2) of the COSIS Agreement. Three questions therefore arise for the Tribunal's consideration:

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[29] See, for example, the comments of the International Court of Justice on the principle in *Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111 at 119–120.
[30] *SRFC Advisory Opinion*, above n 27, at [58].
[31] Ibid, at [59]–[60].

a. First, is the COSIS Agreement "an international agreement related to the purposes of the Convention" that specifically provides for the submission to the Tribunal of a request for an advisory opinion?

b. Second, has the request been transmitted to the Tribunal "by whatever body is authorized by or in accordance with the agreement" to make such a request?

c. Third, are the questions contained in the request "legal questions"?

A. The COSIS Agreement is an international agreement related to the purposes of the Convention that specifically provides for the submission to the Tribunal of a request for an advisory opinion

19. The purposes of the Convention are set out in its Preamble. This recognises the desirability of establishing a legal order for the seas and oceans which will promote the protection and preservation of the marine environment.[32] The Preamble also recognises that the problems of ocean space are closely interrelated and need to be considered as a whole.[33] The Convention also establishes the Tribunal, composed of members of recognised competence in the field of law of the sea, to adjudicate disputes arising out of the interpretation of the Convention.[34] Part XV of the Convention (Settlement of Disputes) is integral to the resolution of issues relating to the interpretation and application of the Convention, including those relating to the protection and preservation of the marine environment.

20. The COSIS Agreement is, on its face, related to the purposes of the Convention. Article 2(1) of the COSIS Agreement provides that:

> The activities of the Commission shall include *inter alia* assisting Small Island States to promote and contribute to the definition, implementation and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals.

21. Paragraph 3 of the Preamble to the COSIS Agreement also highlights “the fundamental importance of the oceans as sinks and reservoirs of greenhouse gases and the devastating impact for Small Island States of related changes in the marine environment”. Paragraph 4 acknowledges “the importance of maritime zones and the significant reliance of Small Island States on marine living resources within such zones, as well as the impacts of climate change on the marine environment including marine living resources”. The Preamble specifically cites the Convention in paragraph 5 and in paragraph 10, in which the Parties:

> [Have] regard to the obligations of States under the 1992 United Nations Framework Convention on Climate Change and related instruments, the 1982 United Nations

[32] UNCLOS, preamble at [4].
[33] UNCLOS, preamble at [3].
[34] Statute of the International Tribunal for the Law of the Sea, art 2(1).

> Convention on the Law of the Sea, and other conventions and principles of international law applicable to the protection and preservation of the marine environment.

22. New Zealand acknowledges that the COSIS Agreement is focused on addressing climate change, to which the Convention does not make direct reference. The marine environment is nevertheless a fundamental part of the interconnected transnational climate system. It makes a significant contribution to the global exchange of water, energy and carbon.[35] In addition, the COSIS Agreement, like the Convention, seeks to promote and contribute to the preservation of the marine environment, including through international law. The COSIS Agreement is thus related to the purposes of the Convention.

B. The request has been transmitted to the Tribunal by the Commission, which is authorised under the COSIS Agreement to make such a request

23. The COSIS Agreement specifically provides for the submission to the Tribunal of a request for an advisory opinion, through its Article 2(2) which states:

> Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorised to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

24. New Zealand notes that the members of the Commission unanimously decided at their third meeting on 26 August 2022 to request an advisory opinion on the questions now before the Tribunal. The Co-Chairs of the Commission, pursuant to that decision, transmitted the request for an advisory opinion by letter dated 12 December 2022, as referred to in the Tribunal's Order 2022/4 of 16 December 2022. That procedure accords with the provisions of Article 3 of the COSIS Agreement. In particular Article 3(5) of the COSIS Agreement provides that "[d]ecisions of the Commission shall be made in principle by consensus, or otherwise by a majority of Members present and voting". In addition, Article 3(3) of the COSIS Agreement provides that "[t]he Commission shall be represented by a Chair, or by Co-Chairs…". The request has therefore been transmitted to the Tribunal by the body authorised by and in accordance with the COSIS Agreement.

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[35] Nerilie Abram and others "IPCC, 2019: Summary for Policymakers" in Hans-Otto Pörtner and others (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge and New York: Cambridge University Press, 2022) 3 at 5 [*IPCC, 2019: SFPM*] (available at: https://doi.org/10.1017/9781009157964.001 accessed 18 May 2023).

C. The questions contained in the request are legal questions

25. The questions posed in the request address the specific "obligations" of State Parties to the Convention, are framed in terms of law and raise questions of international law. They are therefore susceptible of an answer based on law.[36] Even if questions have political aspects, this does not deprive them of their legal character.[37] The questions posed by the Commission raise clear and definitive questions of law and the Tribunal is capable of providing a legal answer to them.

II. Admissibility

26. The ability of the Tribunal to render an advisory opinion under Article 138(1) of its Rules is discretionary: "[t]he Tribunal *may* give an advisory opinion ..." (emphasis added). In the *SRFC* advisory opinion, the Tribunal considered that this Article:

> …should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied. It is well settled that a request for an advisory opinion should not in principle be refused except for "compelling reasons" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 235, para. 14). The question is whether there are compelling reasons in this case why the Tribunal should not give the advisory opinion which the SRFC has requested.

27. New Zealand notes that, as a general principle, an advisory opinion is not legally binding.[38] Nevertheless, such opinions often carry considerable weight beyond the specific context in which they may have arisen.[39] As New Zealand submitted in the *SRFC* advisory opinion, it would expect that the Tribunal will exercise its discretion as to whether to render an advisory opinion in a responsible manner with due consideration for the implications of doing so. That is particularly the case where a request for an advisory opinion has been made under an agreement other than the Convention but which raises questions of general international law that are related to but go beyond the specific parameters of the Convention.

28. New Zealand also notes that, in the *SRFC* advisory opinion, the Tribunal observed that "[t]he object of the request by the SRFC is to seek guidance in respect of its own actions" and

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[36] See the comments to this effect by the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea in its Advisory Opinion on *Responsibilities and Obligations of States with respect to Activities in the Area* [2011] ITLOS Rep 10 [*Activities in the Area (Advisory Opinion)*] at [39].

[37] See, for example, the comments of the International Court of Justice on this point in its Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at [27].

[38] See, for example, *Interpretation of Peace Treaties (Advisory Opinion)* [1950] ICJ Rep 65 at 71; *SRFC Advisory Opinion*, above n 27, at [76].

[39] See, for example, Mohamed Shahabuddeen *Precedent in the World Court* (Cambridge: Grotius Publications, 1996) at 171; *Dispute Concerning the Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Preliminary Objections Judgment)* ITLOS Case No. 28, 28 January 2021, at [202].

that exercising its discretion to issue an advisory opinion the Tribunal would "assist the SRFC in the performance of its activities and contribute to the implementation of the Convention".[40] In this instance, the Tribunal may wish to consider how an advisory opinion would contribute to the functions of the Commission and contribute to the implementation of the Convention.[41]

29. New Zealand is not aware of any compelling reason for the Tribunal to decline to exercise its power to give an advisory opinion in this instance, particularly given the importance of the questions to members of the Commission and other small island developing States, and indeed the collective interest of State Parties to the Convention in the protection of the marine environment.

[40] *SRFC Advisory Opinion*, above n 27, at [76]–[77]. In addition, New Zealand notes that the Tribunal's jurisdiction was limited to the exclusive economic zones of the SRFC Member States.
[41] COSIS Request, above n 1.

CHAPTER 3

PREVENTION, REDUCTION AND CONTROL OF POLLUTION OF THE MARINE ENVIRONMENT

I. Introduction

30. The question posed to the Tribunal is set out in two parts. It reads:[42]

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

31. Part (a) of the question in essence reflects the obligation set out in Article 194 of the Convention to prevent, reduce and control pollution of the marine environment. Part (b) of the question reflects the obligation set out in Article 192 of the Convention to protect and preserve the marine environment.

32. Consistent with the rules of treaty interpretation set out in Part III of Chapter 1, the ordinary meaning of Article 192 is a broad, overarching requirement to protect and preserve the marine environment. This must be interpreted in light of its context, including other provisions of Part XII of the Convention in which Article 192 sits. This context includes Article 193, which reflects States' 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.

33. The context for Article 192 of the Convention also includes the more specific obligation in Article 194 to prevent, reduce and control pollution of the marine environment. Compliance with Article 194 of the Convention is a necessary condition for compliance with Article 192. That said, compliance with Article 194 would not alone be sufficient in and of itself to constitute compliance with Article 192. While Article 194 addresses one aspect of the protection and preservation of the marine environment, namely protection from the effects of pollution, Article 192 encompasses a broader requirement.

34. Accordingly, New Zealand submits that parts (a) and (b) of the question posed by the Commission overlap in some respects. This Chapter is primarily focused on part (a) of the question, but it is also relevant to part (b) of the question to the extent that the analysis under part (a) informs the analysis of part (b). Chapter 4 of these submissions goes on to address

[42] COSIS Request, above n 1.

certain other aspects of part (b) of the question which extend beyond the duty to prevent, reduce and control pollution – those being the implications of the broader obligation to protect and preserve the marine environment in relation to climate change impacts and ocean acidification.

II. The accumulation of anthropogenic greenhouse gas emissions constitutes pollution of the marine environment for the purposes of the Convention

35. Article 194 of the Convention requires State Parties to take measures necessary to prevent, reduce and control *"*pollution of the marine environment". Article 1(1)(4) of the Convention defines "pollution of the marine environment" as:

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

A. Anthropogenic greenhouse gas emissions are an introduction by humans directly and indirectly of substances and energy into the marine environment

36. In determining whether the obligations in the Convention relating to "pollution of the marine environment" apply with respect to anthropogenic greenhouse gas emissions, it must first be determined whether there is an introduction by humans, directly or indirectly, of substances or energy into the marine environment.

37. Anthropogenic greenhouse gases are emitted from various sources. Article 194(1) of the Convention refers to pollution "from any source", and specifically acknowledges the possibility of pollution of the marine environment, including from land-based sources, vessels, activities related to the seabed and subsoil, and from or through the atmosphere.[43] The Convention does not define "substance", but its ordinary meaning includes "a kind of matter of a definite chemical composition, as a compound or element".[44] Greenhouse gases are various substances of this nature, including carbon dioxide, methane and nitrous oxide.[45] Scientific evidence shows that between 20 and 30 percent of anthropogenic carbon dioxide emissions are absorbed into the ocean, increasing the acidity of surface ocean waters.[46] Ocean acidification reflects a direct introduction of substances into the marine environment.

38. Anthropogenic greenhouse gases are also known to absorb and re-emit infrared radiation, which when accumulated at a global scale, trap heat in the atmosphere as excess

[43] UNCLOS, arts 193(3) and 207–212.
[44] John Simpson and others (eds) *Oxford English Dictionary* (online ed) <www.oed.com>.
[45] IPCC "IPCC Updates Methodology for Greenhouse Gas Inventories" (press release, 13 May 2019).
[46] IPCC "Choices made now are critical for the future of our ocean and cryosphere" (press release, 25 September 2019).

energy (known as the greenhouse effect), resulting in global climatic change.[47] As recognised by the IPCC, it is virtually certain that the ocean has absorbed more than 90 percent of the extra energy from the enhanced greenhouse effect.[48] This constitutes an indirect introduction of energy into the marine environment.

39. It may be concluded therefore, that anthropogenic greenhouse gas emissions are an introduction by humans, directly *and* indirectly, of substances *and* energy into the marine environment.

B. The introduction of anthropogenic greenhouse gas emissions has deleterious effects on the marine environment

40. In order for the definition of "pollution of the marine environment" set out in Article 1(1)(4) of the Convention to be satisfied, it must also be determined whether anthropogenic greenhouse gas emissions have resulted, or are likely to result, in the kinds of deleterious effects set out in the definition.

41. The UNFCCC recognises the "adverse effects of climate change", which it defines as "changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare".[49] The IPCC and other experts have outlined the serious consequences that have resulted, and will result, from the accumulation of global anthropogenic greenhouse gas emissions. These consequences include the loss of land and property, health and ecological damage, threats to human security and potential human casualties.[50]

42. The impacts on the marine environment of greenhouse gas emissions include ocean warming, sea level rise and ocean acidification.[51] Ocean warming reduces the number of living marine organisms in certain areas.[52] This has implications for the marine ecosystem

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[47] "Climate Change 2023 Synthesis Report: Summary for Policymakers" in Core Writing Team, H Lee and J Romero (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge and New York: Cambridge University Press, 2022) [*Climate Change 2023 Synthesis Report: SFPM*] at 4.
[48] *IPCC, 2019: SFPM*, above n 35, at 9.
[49] United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC], art 1.
[50] Hans-Otto Pörtner and others "IPCC, 2022: Summary for Policymakers" in Hans-Otto Pörtner and others (eds) *Climate Change 2022: Impacts, Adaptation and Vulnerability; Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2022) 3 at 11 (available at: doi:10.1017/9781009325844.001, accessed 12 June 2023).
[51] Baylor Fox-Kemper and others "Ocean, Cryosphere and Sea Level Change" in Valerie Masson-Delmotte and others (eds) *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press) 1211 at 1214 and 1216 (doi pending activation by publisher at time of writing: doi:10.1017/9781009157896.011); *IPCC, 2019: SFPM*, above n 35, at 9.
[52] IPCC, "FAQ 5.1: How is life in the sea affected by climate change?" (available at https://www.ipcc.ch/srocc/about/faq/final-faq-chapter-5/ accessed 2 May 2023).

as well as for human communities who use and depend on marine resources for their income, livelihoods, health and food security.[53] Ocean warming also affects weather patterns, such as the frequency and strength of rainfalls, as well as the increase of extreme weather events and marine heatwaves.[54] This compromises the ocean's role in cultural, recreational and intrinsic values important for human identity and well-being.[55] Redistribution of fish stocks and related fisheries as a result of ocean warming will impact fish availability within existing maritime zones, changing the fisheries and economic dynamics of many coastal States. In many cases, moves to deeper, cooler waters will result in fish moving into international waters, thereby increasing the risk of illegal, unreported and regulated fishing.

43. Ocean warming and the impact it has on weather patterns also contributes to sea level rise.[56] Sea level rise has significant impacts on coastal communities, including through a near-doubling in the frequency of coastal flooding since the 1960s in many sites around the world.[57] With coastal regions at risk, communities may be forced to relocate if areas become uninhabitable. The intrusion of salt water, including into aquifers, contaminates freshwater and land, threatening livelihoods and food security.[58] Coastal ecosystems such as saltmarshes, mangroves and dunes become less able to adapt as sea levels rise, leading to habitat contraction, loss of functionality and biodiversity.[59] Some of the changes already set in motion, such as continued sea level rise, will continue over the 21st century, and are irreversible over hundreds to thousands of years.[60]

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[53] Lisa Alexander and others "IPCC, 2013: Summary for Policymakers", in Thomas Stocker and others (eds) *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2013), 3 at 26 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf, accessed 12 June 2023).

[54] Ibid, at 18.

[55] Ibid, at 26.

[56] WMO Report, above n 14, at 13.

[57] Robert Kopp "IPCC climate report: Profound changes are underway in Earth's oceans and ice – a lead author explains what the warnings mean" *The Conversation* (online ed, 9 August 2023) (available at: https://theconversation.com/ipcc-climate-report-profound-changes-are-underway-in-earths-oceans-and-ice-a-lead-author-explains-what-the-warnings-mean-165588, accessed 3 May 2023).

[58] United Nations "Stressing Rising Seas Already Creating Instability, Conflict, Secretary-General Says Security Council Has Critical Role in Addressing Devastating Challenges" (press release, 14 February 2023) (available at: https://press.un.org/en/2023/sgsm21688.doc.htm, accessed 12 June 2023).

[59] Michael Oppenheimer, Glavovic, Bruce and others "Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities: Executive Summary" in Hans-Otto Pörtner and others (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge and New York: Cambridge University Press 2019) at 323 and following (available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/06_SROCC_Ch04_FINAL.pdf, accessed 12 June 2023).

[60] IPCC "Climate change widespread, rapid and intensifying – IPCC" (press release, 9 August 2021); Hans-Otto Pörtner, Roberts, Debra and others (eds) *Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2022) (available at doi:10.1017/9781009325844, accessed 12 June 2023).

44. Ocean acidification has negative consequences for coral reefs and structure-forming and shell-forming organisms.[61] Coral reefs are essential to marine biodiversity, and will be affected by both warming and acidification. They are critical habitats for coastal fisheries, provide protection from storm surges and coastal inundation, and are cultural touchstones. Ocean acidification has serious consequences for sea life as it affects the ability of shellfish, urchins, corals and some plankton to build and maintain their shells and calcium carbonate structures.[62] It also affects fish behaviour, leaving some species more vulnerable to damage and predators.[63] Recent research suggests that ocean acidification may also affect fish larvae, including some commercially important species such as yellowfin tuna.[64] It also shifts the phytoplankton community structure that forms the base of the food web and inhibits ecosystem recovery.[65] All of this puts at risk the communities that depend on fish and shellfish or rely on coral reefs for protection.[66] As the acidity and temperature of the ocean increases, its capacity to absorb carbon dioxide from the atmosphere decreases, potentially impeding the ocean's role in moderating climate change.[67]

45. A feature of the deleterious effects outlined above is that they result from the global accumulation of anthropogenic greenhouse gas emissions from multiple sources in all States, over time. While States contribute to the global accumulation of greenhouse gases to varying degrees, it may be that for an individual State, the emissions originating from its territory or from activities otherwise under its jurisdiction or control are not on their own sufficient to give rise to the risk of deleterious effects described above. Further, scientific evidence shows that impacts of greenhouse gas emissions are observed and predicted to vary, in nature and degree, in accordance with the concentration of such emissions in the atmosphere.[68] For these reasons, when assessing whether the harm caused by anthropogenic greenhouse gas emissions amounts

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[61] Karen Scott "COP26 failed to address ocean acidification, but the law of the seas means states must protect the world's oceans" *The Conversation* (online ed, 19 November 2021, New Zealand) (available at: https://theconversation.com/cop26-failed-to-address-ocean-acidification-but-the-law-of-the-seas-means-states-must-protect-the-worlds-oceans-171949, accessed 1 May 2023).

[62] Christina McGraw and others (eds) *A Policymakers' Handbook for Addressing the Impacts of Ocean Acidification* (Wellington, New Zealand: Commonwealth Blue Charter Action Group on Ocean Acidification, 2021) [McGraw] at 2.

[63] Scott, above n 61.

[64] Andrea Frommel and others "Ocean acidification has lethal and sub-lethal effects on larval development of yellowfin tuna, *Thunnus albacares*" 482 Journal of Experimental Marine Biology and Ecology 18 (available at: https://doi.org/10.1016/j.jembe.2016.04.008, accessed 12 June 2023).

[65] Lisa Alexander and others "IPCC, 2013: Summary for Policymakers" in Thomas Stocker and others (eds) *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2013) 3 at 24 (available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf accessed 10 April 2023).

[66] McGraw, above n 62, at 2.

[67] Hans-Otto Pörtner and others (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge and New York: Cambridge University Press 2019) [IPCC, 2019: SROCCC] at 323 and following (available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/06_SROCC_Ch04_FINAL.pdf, accessed 12 June 2023).

[68] See, for example, Nerilie Abram and others "Cross-Chapter Box 1: Scenarios, Pathways and Reference Periods" in IPCC, 2019: SROCCC, above n 67, at 84, and Nerilie Abram and others "Time Scales, Thresholds and Detection of Ocean and Cryosphere Change" in Pörtner and others (eds), above n 67, at 81.

to pollution of the marine environment, it is necessary to have regard to the accumulation of gases from all sources of emissions, and the resulting concentration of those gases.

46. It follows that the direct introduction of substances and indirect introduction of energy into the marine environment caused by the accumulation of global anthropogenic greenhouse gas emissions results in deleterious effects on the marine environment. Accordingly, the definition of "pollution in the marine environment" in Article 1(1)(4) of the Convention includes the accumulation of anthropogenic greenhouse gas emissions. This is particularly the case in circumstances where the global accumulation of such emissions is at current and projected future levels.

III. States are required to prevent, reduce and control pollution of the marine environment

A. The Convention

47. The Convention imposes an explicit obligation on State Parties to take measures to prevent, reduce and control pollution of the marine environment. Article 194 of the Convention provides:

> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.
>
> 2. States shall take all measures necessary 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, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
>
> …

48. Consistent with the rules of treaty interpretation outlined in Part III of Chapter 1, Article 194 must be read in the context of the Convention as a whole, and in particular within the scheme of Part XII in which it sits. This includes Section 5: International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment, as well as Section 2: Global and Regional Cooperation, and Section 6: Enforcement. All three Sections emphasise cooperation between States through competent international organisations in relation to pollution of the marine environment.

49. For example, Article 207(1) provides that State Parties must take measures to prevent, reduce and control pollution from land-based sources "taking into account internationally agreed rules, standards and recommended practices and procedures" while Article 213 requires State Parties to "adopt laws and regulations and take other measures necessary to implement

applicable international rules and standards". Article 212(1) and Article 222 invoke similar requirements with respect to the pollution from or through the atmosphere. Similarly, Article 211(2) requires State Parties to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag that "at least have the same effect as that of generally accepted international rules and standards". In addition, Article 200 requires State Parties to cooperate, including through competent international organisations, for the purpose of research and exchange of information in relation to pollution of the marine environment, and, under Article 201 to cooperate in the same way in establishing appropriate scientific criteria for the formulation and elaboration of rules and standards for the prevention, reduction and control of pollution of the marine environment.

50. In interpreting the content of Article 194 (and Article 192) of the Convention, it is also important to consider that these obligations sit alongside, are underpinned by, and reflect, several key customary international law rules and principles. These include the principle of prevention, the requirement to act with due diligence and the duty to cooperate. The following sections elaborate on the relevance of these rules and principles.

B. The principle of prevention

51. Customary international law does not allow States to conduct or permit activities within their jurisdiction or control without regard for the protection of the global environment.

52. Article 194 of the Convention reflects the rule of customary international law known as the principle of prevention. This fundamental principle of international environmental law includes the duty of States, in the context of the regulation of activities within their jurisdiction which pose a significant risk of transboundary harm, to seek to prevent or minimise the risk of that harm so as to protect the environment.[69] Prevention is the preferred approach because compensation for the harm caused may not be able to restore the environment to the way it was prior to the activity.[70]

53. The principle of prevention has been widely affirmed.[71] For example, the Declaration of the United Nations Conference on Environment and Development (Rio Declaration) provides that:[72]

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their

[69] *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries* [2001] vol 2, pt 2 YILC 148 at 153 [*Draft Articles on Prevention of Transboundary Harm*].
[70] *Draft Articles on Prevention of Transboundary Harm*, above n 69, at 148.
[71] See, for example, *Trail smelter case (United States, Canada)* [1941] 3 UNRIAA 1905; Stockholm Declaration of the United Nations Conference on the Human Environment UN Doc A/CONF.48/14/Rev. 1, principle 21 [Stockholm Declaration]; the Rio Declaration on Environment and Development UN Doc A/Conf 151/26 (vol 1) (12 August 1992) [Rio Declaration]; *Convention on Biological Diversity*, above n 27, art 3; and UNFCCC, above n 49, at preambular paragraph 8; and the *Draft Articles on Prevention of Transboundary Harm*, above n 69.
[72] Rio Declaration, above n 72, principle 2.

> own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

54. The International Court of Justice (ICJ) has also affirmed on multiple occasions that:[73]

> The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the *corpus* of international law relating to the environment.

55. In the context of the international cooperation framework of Part XII of the Convention, Article 194 of the Convention is both an expression and elaboration of this principle. Article 194 applies not just to measures taken individually by State Parties within their jurisdiction or control to "prevent … pollution of the marine environment", including in areas beyond their national jurisdiction,[74] but also to measures taken jointly with other States, as appropriate.[75] This latter point is particularly relevant to the application of Article 194 in the context of pollution of the marine environment caused by greenhouse gas emissions. This is because the deleterious effects that result from these emissions occur as a combined result of actions within the jurisdiction of many States over a long period of time.

C. Due diligence

56. Articles 194(1) and (2) of the Convention establish an obligation to take "all measures necessary" both to prevent, reduce and control pollution of the marine environment "from any source", and to ensure that "activities" within their jurisdiction and control do not cause pollution damage to other States or their environment. Article 194(2) also makes clear that State Parties are responsible for regulating and controlling the risk of pollution from activities under their jurisdiction.

57. The principle of prevention, and the specific formulation of the obligations under Article 194 of the Convention as requirements to take "all measures necessary", imply an obligation to act with due diligence.[76] This requires the introduction of policies, legislation and administrative controls applicable to public and private conduct which are capable of preventing or minimising the risk of transboundary harm to other States or the global

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[73] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 3, at [29]. Also confirmed in *Gabčíkovo-Nagymaros Project*, above n 26, at [53] and *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 [*Pulp Mills*] at [101].
[74] UNCLOS, art 194(2).
[75] UNCLOS, art 194(1).
[76] Report of the International Law Commission on the work of its fifty-second session, ILC Report (2000) GAOR A/55/10 (available at: https://legal.un.org/ilc/documentation/english/reports/a_55_10.pdf accessed 4 May 2023), at [718].

environment.[77] Due diligence entails a standard that takes into account evolving technology.[78] It may also take differing means and capabilities into account.[79] This flexibility is reflected in the Convention, including Article 194(1), which requires States to use the "best practicable means at their disposal and in accordance with their capabilities".

58. It is well established that due diligence is an obligation of conduct, not an obligation of result.[80] Due diligence is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so.[81] The standard of due diligence against which a State's conduct should be examined "is that which is generally considered to be appropriate and proportional to the degree of risk in the particular instance".[82] In its *Activities in the Area* advisory opinion, the Seabed Disputes Chamber observed that this standard will depend on the level of risk and activities involved, and may vary over time.[83] The Chamber concluded that due diligence requires a sponsoring State "to take [reasonably appropriate] measures within its legal system".[84] The Tribunal has described this obligation, with respect to the prevention of illegal fishing, as "…. to deploy adequate means, to exercise best possible efforts, to do the utmost…".[85]

59. In the context of the prevention, reduction and control of pollution of the marine environment caused by greenhouse gas emissions, therefore, the obligation to act with due diligence requires action to be taken through appropriate measures such as policies, legislation and administrative controls to minimise the risk of deleterious effects. Given the cumulative and combined nature of the impact of greenhouse gas emissions, collective action is central to this.

D. The duty to cooperate

60. The Tribunal has recognised that the duty to cooperate is fundamental in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.[86] The International Court of Justice has also recognised, in *Pulp Mills on the River Uruguay*, that it is "by co-operating that the States concerned can jointly manage the

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[77] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & The Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 147.
[78] Ibid, at 148.
[79] Ibid, at 149; as reflected in UNCLOS, art 194(1).
[80] *Pulp Mills*, above n 73, at [77]; *Gabčíkovo-Nagymaros Project*, above n 26, at [140]; *Activities in the Area (Advisory Opinion)*, above n 36, at [110 – 111]; *SRFC Advisory Opinion*, above n 27, at [129].
[81] Report of the International Law Commission on the work of its fifty-third session, ILC Report (2001) GAOR A/56/10 (available at https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf) at 154.
[82] *Draft Articles on Prevention of Transboundary Harm*, above n 69, at [11].
[83] *Activities in the Area (Advisory Opinion)*, above n 36, at 74.
[84] Ibid, at [117]–[120].
[85] *SRFC Advisory Opinion*, above n 27, at [129]; *Activities in the Area (Advisory Opinion)*, above n 36, at [110].
[86] *The MOX Plant Case (Ireland v United Kingdom): Provisional Measures* [2001] ITLOS Rep 95 [*The MOX Plant Case*] at [82]; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)(Provisional Measures Order)* [2003] ITLOS Rep 10 [*Johor (PMO)*] at [92]; *SRFC Advisory Opinion*, above n 27, at [140].

risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question".[87] It is through the performance of both the procedural and substantive obligations that such cooperation is accomplished.[88]

61. The modes or forms of action that must be taken to fulfil the duty to cooperate may not be specified in the relevant international instruments, either with precision or at all.[89] Depending on the context, the duty to cooperate may entail not only substantive obligations contained in applicable agreements, but also the requirement to take certain procedural actions, such as notification,[90] exchange of information,[91] consultations,[92] negotiation,[93] undertaking appropriate environmental assessments,[94] or giving due regard to the recommendations of competent organisations.[95] The duty to cooperate is a duty of an ongoing nature and is also an obligation of conduct, rather than an obligation of result.[96]

62. In New Zealand's submission, what States are required to do to implement the duty to cooperate should also be assessed in a proportional manner relative to the degree of risk.[97] The greater the impact of a State's action on other interests, including the interests of other States, the greater the expectation of cooperation on the part of the State proposing to act.

63. The substantive and procedural requirements of the duty to cooperate take their form from the context in which the duty to cooperate is found. Thus, in the *Southern Bluefin Tuna* cases the Tribunal found that "under article 64, read together with articles 116 to 119, of the Convention, State Parties to the Convention have the duty to cooperate directly or through

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[87] *Pulp Mills*, above n 73, at [77]; see also *Draft Articles on Prevention of Transboundary Harm*, above n 69, commentary to preamble, at [1].
[88] *Pulp Mills*,above n 73, at [77].
[89] *The "Enrica Lexie" Incident (Italian Republic v Republic of India*) *(Award)* PCA 2015-28, 21 May 2020 [*Enrica Lexie (Award*)] at [722].
[90] *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia) (Judgment)* ICJ 1 December 2022 [*Silala (Chile v Bolivia)*] at [83].
[91] *The MOX Plant Case*, above n 86, at [84]; *Silala (Chile v Bolivia)*, above n 90, at [83].
[92] *Johor (PMO)*, above n 86, at [98] and 27. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Judgment)* [2015] ICJ Rep 665 [*Border Area (Costa Rica v Nicaragua)*] at [173]: "The Court also notes Nicaragua's commitment, made in the course of the oral proceedings, that it will co-operate with Costa Rica in assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof."
[93] *Gabčíkovo-Nagymaros Project*, above n 26, at [141]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment)* [1984] ICJ Rep at [112].
[94] *Border Area (Costa Rica v Nicaragua)* at [173]; *Silala (Chile v Bolivia)*, above n 90, at [83]; *South China Sea Arbitration (Award)*, above n 27, at [988].
[95] *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening) (Judgment)* [2014] ICJ Rep 226 at [83] and [240].
[96] *Enrica Lexie (Award)*, above n 89, at [723]; *Silala (Chile v Bolivia)*, above n 90, at [129].
[97] *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* Written Observations of New Zealand, at [104].

appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species."[98]

64. It follows that when addressing the obligation under Article 194 of the Convention to take all measures that are necessary to prevent, reduce and control pollution of the marine environment from any source, the requirement under Article 197 to cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations is pivotal. As noted in Section B above, the need for cooperation is foreseen in Article 194(1), which specifically envisages that it may be appropriate to jointly take the necessary measures to "prevent, reduce and control pollution of the marine environment".

65. In the climate change context, the content of the duty to cooperate set out in Article 197 of the Convention as it relates to Article 194, is for states to cooperate at the global level, through competent organisations, to elaborate international rules, standards and recommended practices and procedures applicable to the measures that States must take to address pollution of the marine environment from the effects of the accumulation of greenhouse gas emissions.

66. The dossier of documents that the Commission considers likely to throw light upon the question referred to the Tribunal include the UNFCCC and the Paris Agreement.[99] These treaties reflect the multilateral legal framework and principles for international climate change cooperation, aimed at stabilising atmospheric concentrations of greenhouse gases to avoid dangerous anthropogenic interference with the climate system.[100] The UNFCCC and Paris Agreement can be read consistently with the Convention and are not incompatible with it. They are mechanisms through which cooperation to prevent, reduce and control pollution from the adverse impacts of climate change are addressed and through which the duty to cooperate under the Convention with respect to the marine environment is given effect.[101]

67. Cooperation through the competent mechanisms of the UNFCCC and the Paris Agreement is essential to address climate change which is "a common concern of humankind".[102] As recognised in the 1972 Stockholm Declaration, "[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world".[103] Furthermore, the impacts of

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[98] *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures Order)* [1999] ITLOS Rep 280 [*Southern Bluefin Tuna Cases (PMO)*] at [48].
[99] COSIS Dossier, above n 13.
[100] UNFCCC, above n 49, art 2.
[101] There are also other instruments relevant to the control of pollution by greenhouse gases, including the Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS 3 (16 September 1987, entered into force 1 January 1989), theInternational Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Annexes I, II, III, V and VI) 1340 UNTS 61 (17 February 1978, entered into force 2 October 1983), and the Convention on International Civil Aviation 15 UNTS 295 (7 December 1944, entered into force 4 April 1947).
[102] Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016), preambular paragraph [11].
[103] Stockholm Declaration, preambular paragraph [2].

climate change, as a global phenomenon, must be addressed through the combined collective responses of individual members of the international community.

68. This collective response is increasingly being recognised in international law through its regard to the "community of interests" which seeks to balance State sovereignty with the interests of the community at large. This applies notably where there is mutual interest in a common goal, such as protection of the environment. Furthermore, it is the duty to cooperate which gives expression to this collective interest. As Judge Wolfrum said in his Separate Opinion in *The MOX Plant Case*:[104]

> The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests.

69. The principle of prevention, the obligation to act with due diligence, and the duty to cooperate, are standalone rules and principles of customary international law. They also inform the interpretation and implementation of State Parties' obligations under the Convention, including the obligation under Article 194 of the Convention to take all measures necessary to prevent, reduce and control pollution of the marine environment, as well as the obligation under Article 192 of the Convention to protect and preserve the marine environment.

IV. Implication of States' obligations to take measures to prevent, reduce and control pollution of the marine environment from the accumulation of anthropogenic greenhouse gas emissions

70. Because the risks of harm to the marine environment resulting from climate change are dependent on global concentrations of greenhouse gas emissions in the atmosphere, it is not possible to determine the standard of conduct, or the "necessary" measures, required of an individual State in isolation from the collective measures required for an appropriate and proportionate response to the risks caused by the emissions of all States. Therefore, in the context of pollution of the marine environment by the global accumulation of anthropogenic greenhouse gas emissions, the standard of due diligence against which States' conduct is to be examined, is informed by the rules, standards, and recommended practices and procedures that States have cooperated to formulate through the UNFCCC and the Paris Agreement.

71. New Zealand submits that the UNFCCC and Paris Agreement constitute "global and regional rules, standards and recommended practices and procedures to prevent, reduce and control [marine] pollution", established through diplomatic conferences, as encouraged in Articles 207(4) and 212(3) of the Convention. As such, they represent "international agreed

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[104] See the Separate Opinion of Judge Wolfrum in *The MOX Plant Case*, above n 86. The International Court of Justice has spoken of "a growing awareness of the risks for mankind – for present and future generations – of pursuit of [human] interventions at an unconsidered and unabated pace" on the environment which has triggered the development of new norms and standards in that field: *Gabcíkovo-Nagymaros Project,* above n 26, at [140]. See also *Pulp Mills,* above n 73, at [281].

rules, standards and recommended practices and procedures" that Articles 207(1) and 212(1) require State Parties to take into account when adopting laws and regulations to prevent, reduce and control pollution of the marine environment. The UNFCCC and Paris Agreement also help to define the content of what are "necessary" measures that Article 194(1) of the Convention requires State Parties to take to prevent, reduce and control pollution of the marine environment.

72. In the climate change context, the duty to cooperate requires an ongoing commitment to take action to reduce greenhouse gas emissions at the global level. While to some extent States may be given a degree of latitude as to what measures they will take,[105] elements of the duty to cooperate, as it relates to addressing the impacts on the marine environment arising from the adverse effects of climate change, that can be identified include the following:

a) States must actively engage in international collaborative efforts to reduce greenhouse gas emissions at the global level, in particular through adopting ambitious nationally determined contributions as required by Article 3 of the Paris Agreement.
b) States must take action to mitigate and adapt to the impacts of climate change within their capabilities and in light of their circumstances.
c) Consistent with the requirement in Article 9 of the Paris Agreement developed country Parties should provide financial resources to assist developing country Parties with respect to both mitigation and adaptation.
d) Enhanced efforts are required to build the capacity of developing State Parties to respond to the impacts of climate change, including mitigation and adaptation actions, as required by Article 11 of the Paris Agreement.

73. These require collective efforts, consistent with the issue of climate change being a common concern of humankind. It is through compliance with the duty to cooperate, interpreted in the context of the UNFCCC and the Paris Agreement, that the response to the impacts on the marine environment should be addressed collectively.

[105] See *Articles Concerning the Law of the Sea with Commentaries* [1956] vol 2 YILC 265 at 282, commentary to art 38 at [2], discussing the requirement in what is now UNCLOS, art 100 for cooperation in the repression of piracy. See also Paris Agreement, art 2(2): "This Agreement will be implemented to reflect equity and the principle of common but differentiated *responsibilities* and respective capabilities, in the light of different national circumstances" (emphasis added).

CHAPTER 4

PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN RELATION TO CLIMATE CHANGE IMPACTS AND OCEAN ACIDIFICATION

I. Introduction

74. The second question posed to the Tribunal is:[106]

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:
>
> …
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

75. As indicated in Part I of Chapter 3, the broad obligation to protect and preserve the marine environment encompasses the more specific obligation to prevent, reduce and control pollution of the marine environment discussed in Chapter 3. As such, New Zealand's submissions in Chapter 3 also apply to consideration of part (b) of the question before the Tribunal. This Chapter further addresses certain elements of how the obligation to protect and preserve the marine environment relates to climate change impacts and ocean acidification.

II. The obligation under the Convention to protect and preserve the marine environment

76. Article 192 of the Convention provides that "States have the obligation to protect and preserve the marine environment".

77. In the *South China Sea Arbitration*, the arbitral tribunal stated that:[107]

> This "general obligation" extends both to "protection" of the marine environment from future damage and "preservation" in the sense of maintaining or improving its present condition. Article 192 thus 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.

78. This general obligation encompasses the measures necessary to prevent, reduce and control pollution addressed in Chapter 3, as well as the measures necessary to ensure the

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[106] COSIS Request, above n 1.
[107] *South China Sea Arbitration (Award)*, above n 94, at [941].

protection and preservation of the marine environment from other potential sources of harm. It has been observed that Article 194(5) of the Convention:[108]

> …covers all measures under Part XII of the Convention (whether taken by States or those acting under their jurisdiction and control) that are necessary to protect and preserve "rare or fragile ecosystems" as well as the habitats of endangered species.

79. Article 192 therefore requires a holistic approach to be taken to the protection and preservation of the marine environment. It must include measures to prevent, reduce, and control pollution, but it also requires active measures to protect biodiversity and the integrity of ecosystems from all potential harms, including the cumulative impacts arising from climate change and ocean acidification.

80. It is relevant to the analysis in this Chapter to reiterate, as outlined in Part II of Chapter 3, that climate change and ocean acidification are having, and will have, harmful effects on marine species, habitats, ecosystems and biodiversity. Furthermore, the impacts of climate change and ocean acidification on the marine environment have been shown to interact with other human activities in the marine environment.[109]

III. Other rules and principles relevant to the obligation to protect and preserve the marine environment in relation to climate change impacts and ocean acidification

81. Consistent with the rules of treaty interpretation set out in Part III of Chapter 1, Article 192 must be interpreted in light of the Convention as a whole, particularly the provisions of Part XII, as well as other applicable rules of international law, including customary international law.

82. Part II of Chapter 3 focussed on the importance of the principle of prevention, the due diligence obligation and the duty to cooperate for the interpretation of Article 194 of the Convention. They are equally important for the interpretation of Article 192. The principle of prevention, which imposes a duty on states to seek to prevent harm before it is caused, is one way to protect and preserve the marine environment. The obligation of due diligence is also the applicable standard of conduct for States, especially when taking a holistic view of the protection and preservation of the marine environment in relation to climate change impacts and ocean acidification.

83. In addition to the applicability of these rules and principles, New Zealand submits that the precautionary approach and the duty to cooperate have particular relevance to the Article 192 obligation when considered in relation to climate change impacts and ocean acidification.

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[108] *South China Sea Arbitration (Award)*, above n 94, at [945]; *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* [2015] vol 31, pt 2 UNRIAA at [538].
[109] *IPCC, 2019: SFPM*, above n 35, at 12 – 13 and 22.

A. The precautionary approach

84. The principle of prevention, as well as the due diligence obligation, are closely linked to the precautionary approach.[110] Its purpose is to make greater allowance for uncertainty in the regulation of environmental risks and the sustainable use of natural resources.[111] While there are various formulations of the precautionary approach, at its most basic expression it is a requirement for States to act with "prudence and caution".[112] Principle 15 of the Rio Declaration requires that:

> In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

85. While the precautionary approach helps determine whether a risk is sufficiently foreseeable and serious to require a response, regardless of conclusive proof, it does not determine what the response should be.[113] States have nevertheless agreed on certain measures that should be taken in the context of the protection and preservation of the environment. Agenda 21, for example, sets out a list of precautionary measures intended to strengthen protection of the marine environment:[114]

> A precautionary and anticipatory rather than a reactive approach is necessary to prevent the degradation of the marine environment. This requires, inter alia, the adoption of precautionary measures, environmental impact assessments ….

86. In the context of climate change impacts and ocean acidification, where the interaction of those impacts with activities in the marine environment are not fully understood, the precautionary approach is particularly relevant to how States plan and manage the impacts of those activities. It suggests that prudence and caution should be exercised in order to preserve, as well as to protect, the marine environment.

B. The duty to cooperate

87. In accordance with the description of the nature of the duty to cooperate in Chapter 3, States have a general duty to cooperate for the protection and preservation of the marine environment in the same way as they do to prevent, reduce and control pollution of the marine environment. In relation to climate change impacts on the marine environment and ocean acidification, this duty to cooperate will exist in proportion to the risk of harm posed by the climate change impacts and ocean acidification in any given context. This duty may require

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[110] In *Activities in the Area (Advisory Opinion)* above n 36 at [131], the Tribunal regarded the precautionary principle as being "…. an integral part of the general obligation of due diligence of sponsoring States…".
[111] Birnie, above n 77, at 136.
[112] See *Southern Bluefin Tuna Cases (PMO)*, above n 98, at [77].
[113] Birnie, above n 77 at 164; *Pfizer Animal Health v Council of the EU* (2002) II ECR 3305, at [135 – 173].
[114] Agenda 21, above n 4, ch 17, at [21].

States to cooperate, including through existing agreements related to the protection and preservation of the marine environment, where those agreements provide for such cooperation.

88. The 1995 Fish Stocks Agreement is one such agreement. This Agreement applies to the conservation and management of highly migratory and straddling fish stocks, which as the Tribunal has recognised, is an element in the protection and preservation of the marine environment.[115] This agreement requires States to apply certain "general principles" when giving effect to the duty to cooperate under the Convention. These include the requirement to ensure measures are based on best available scientific evidence,[116] to apply the precautionary approach,[117] to assess the impacts of an activity, other human activities and environmental factors,[118] and to promote and conduct scientific research.[119] These principles are highly relevant and would also apply when considering the impacts of climate change and ocean acidification on the marine environment. Compliance with the duty to cooperate in the protection and preservation of the marine environment can be given effect, *inter alia*, through observance of these principles.

89. The specific obligation to cooperate through competent international organisations set out in Article 197 of the Convention also applies with respect to the formulation and elaboration of international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment, including from the impacts of climate change and ocean acidification.

90. States have given effect to this obligation most recently in the elaboration of the text of the draft agreement under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ text).[120] The BBNJ text includes an objective for the part of the text on "measures such as area-based management tools, including marine protected areas" to:[121]

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[115] *Southern Bluefin Tuna Cases (PMO)*, above n 98, at [70].
[116] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 2167 UNTS 3 (opened for signature 4 December 1995, entered into force 11 December 2001), [United Nations Fish Stocks Agreement], art 5(b).
[117] Ibid, at 5(b) and 6.
[118] Ibid, at 5(d).
[119] Ibid, at 5(k).
[120] The text of the agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction has not been adopted as of the date of submission of this statement. The text referred to is that agreed by the open-ended informal working group, established by the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction to ensure the uniformity of terminology throughout the text of the draft agreement and harmonize the versions in the six official languages of the United Nations, at its meeting on 3 May 2023.
[121] *Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, 4 March 2023 [BBNJ text], art 17(c).

> Protect, preserve, restore and maintain biological diversity and ecosystems, including with a view to … strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution.

91. The BBNJ text also includes the obligation for future State Parties to ensure that cumulative impacts are assessed and evaluated when an environmental impact assessment is conducted under that agreement.[122] Cumulative impacts is defined in the BBNJ text as "…the combined and incremental impacts resulting from different activities, … or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts."[123]

92. States' duty to cooperate to elaborate international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment from climate change impacts and ocean acidification is not exhausted by virtue of having elaborated the BBNJ text, but it does serve as an illustration of the reflection of the duty in relation to such impacts.

93. The obligation to protect and preserve the marine environment requires active measures to protect biodiversity and marine ecosystems, including from the cumulative impacts of climate change and ocean acidification. This requires cooperative efforts of the international community to elaborate appropriate international rules and standards in order to address the impacts of climate change, including ocean warming and sea level rise, as well as ocean acidification.

[122] BBNJ text, art 31(1)(c).
[123] BBNJ text, art 1.

CHAPTER 5

CONCLUSION

94. To conclude, New Zealand submits the following:

a) The Tribunal has jurisdiction to give an advisory opinion in response to the request submitted by the Commission.

b) New Zealand is not aware of any compelling reason for the Tribunal to decline to exercise its power to give an advisory opinion in response to the request by the Commission. The importance of the questions posed to members of the Commission and other small island developing States, and the collective interest of State Parties to the Convention in the protection of the marine environment, are factors that weigh in favour of the Tribunal exercising its discretion to issue an advisory opinion.

c) The global accumulation of anthropogenic greenhouse gas emissions constitutes pollution of the marine environment as defined in the Convention.

d) States are obliged to take measures under the Convention, and consistent with the principle of prevention, individually or jointly, to prevent, reduce and control pollution of the marine environment by the accumulation of anthropogenic greenhouse gas emissions.

e) The Convention, consistent with the duty to cooperate, requires States to cooperate to formulate and elaborate international rules, standards, and recommended practices and procedures to prevent, reduce and control pollution of the marine environment by the accumulation of anthropogenic greenhouse gas emissions.

f) Measures taken by State Parties to comply with their obligations under the Convention, including Articles 192 and 194, must take into account internationally agreed rules, standards, and recommended practices and procedures. Accordingly, the standard of conduct required of State Parties to the Convention is informed by the UNFCCC and the Paris Agreement.

g) In taking measures to implement these obligations, States are under an obligation of due diligence which requires action to be taken through appropriate measures such as policies, legislation and administrative controls to minimise the risk of deleterious effects on the marine environment through the accumulation of anthropogenic greenhouse gas emissions, including collective action.

h) States Parties' implementation of the general obligation to protect and preserve the marine environment requires a holistic approach. This must include measures to prevent, reduce, and control pollution, as well as active measures to protect biodiversity and the integrity of ecosystems from all potential harms, including the cumulative impacts arising from climate change and ocean acidification.

i) The application of the precautionary approach means that prudence and caution should be exercised to not only protect the marine environment from future damage, but also to maintain and improve its condition.

j) The obligation to protect and preserve the marine environment from the impacts of climate change and ocean acidification is informed by the duty to cooperate. Compliance with this duty can be given effect through cooperative endeavours and the application of certain principles including the use of best available scientific evidence, the precautionary approach, cumulative assessment of impacts, and the promotion of scientific research.

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