

Written Statement of the Arab Republic of Egypt

THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

(Case No. 31)

WRITTEN STATEMENT OF THE ARAB REPUBLIC OF EGYPT

16 JUNE 2023

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INTRODUCTION

1. On 12 December 2022, the International Tribunal for the Law of the Sea (hereinafter “**ITLOS**” or the “**Tribunal**”) received a request from the Commission of Small Island States on Climate Change and International Law (hereinafter the “**Commission**”) to render an Advisory Opinion. The Commission adopted a decision at its third meeting on 26 August 2022 to request an advisory opinion from the Tribunal, in accordance with article 2, paragraph 2, of the Agreement for the establishment of the Commission of 31 October 2021, on the following questions:

“What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (hereinafter the “**UNCLOS**” or the “**Convention**”), 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. The request for an advisory opinion has been entered in the list of cases of the tribunal as Case No. 31. Pursuant to article 138 of its Rules, the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention, specifically provides for the submission to the Tribunal of a request for such an opinion.

3. By the Note Verbale dated 13 December 2022, pursuant to article 133, paragraph 1, of the Rules of the Tribunal, the Registrar gave notice of the request for an advisory opinion to the States Parties to the Convention.

4. By order 2022/4 of 16 December 2022, the President of the Tribunal in accordance with article 133, paragraph 3, of the Rules of the Tribunal, invited States Parties to the Convention, the Commission and the intergovernmental organizations listed in the annex to the order to present written statements on the questions submitted to the Tribunal for an advisory opinion.

5. By order 2023/1 of 15 February 2023, the President of the Tribunal decided to extend the time-limit within which written statements may be presented to the Tribunal to 16 June 2023.

6. As a State Party to UNCLOS, Egypt wishes to avail itself of the opportunity afforded by the Tribunal to make a written statement on certain issues pertaining to the request.

7. At the outset, Egypt, as the host and president of the 27th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP27), held

in Sharm El Sheikh, emphasizes the global community's responsibility in the fight against the adverse effects of climate change as well as the protection of the marine environment for future generations.

8. While Egypt's written statement will not address, and is without prejudice to its position on, matters related to the Tribunal's jurisdiction, Egypt seeks to seize this opportunity to clarify its position on the legal framework governing the ocean-climate nexus. Egypt's statement will thus be divided into three parts. Chapter I provides a general background to the issue. Chapter II provides the legal framework in order to answer the question posed to the Tribunal. Chapter III provides Egypt's views on the legal questions submitted by the Commission.

9. This written statement specifically addresses the links between UNCLOS and the obligation of state parties relevant to the oceans and marine environment under subsequent climate change instruments. It does not address broader issues related to states' obligations under the UNFCCC, Paris Agreement, and other climate change agreements.

10. Egypt ends its statement with a conclusion summarizing its views on the questions posed to ITLOS in this advisory opinion request.

CHAPTER I: GENERAL BACKGROUND

12. There is irrefutable, empirical scientific evidence of the devastating impacts of climate change on our planet, and that urgent action is needed to prevent further damage to our ecosystem. The role of oceans in combatting climate change is crucial and indispensable.

13. In 2019, the Intergovernmental Panel on Climate Change (hereinafter the “IPCC”)¹ provided empirical evidence substantiating the importance of oceans, within the climate change regime. The oceans are considered to be the largest sink of carbon dioxide, a greenhouse gas (hereinafter “GHGs”), which substantially harms the marine environment, causing ocean acidification, ocean warming and sea level rise.²

14. The phenomenon of ocean warming is caused by the absorption of the oceans of the excess in global temperature heat caused by GHGs.³ Such absorption of heat causes a rise in the temperature of the surface of the oceans.⁴ This heat, consequently, penetrates the surface of the ocean and starts altering the ocean and its ecosystem negatively.⁵ As a result, the absorbed carbon dioxide dissolves into the ocean, and the ocean loses its oxygen, and consequently, the acidification of the ocean occurs.⁶

15. As to sea level rise, it is attributed to global mass loss and ocean thermal expansion, which are caused by rising global temperature and ocean warming. This, in turn, is caused by the pollution resulting from the emission of GHGs, and in particular CO₂.⁷ Climate change and global warming are therefore one of the major challenges confronting the marine environment, with particularly devastating impacts for low-lying states, deltas, and states and communities depending on fisheries for food security.⁸

16. UNCLOS⁹, described as the “constitution for the oceans”, is an almost universal treaty

¹ More about the IPCC can be found here: <https://www.ipcc.ch/>.

² IPCC, 2019: *Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegria, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–35 [hereinafter *the IPCC 2019 Report*], available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf

³ IUCN, Issues Brief, Ocean warming, accessible on: <https://www.iucn.org/resources/issues-brief/ocean-warming>

⁴ NASA, “Vital Signs: Ocean Warming”, available at: <https://climate.nasa.gov/vital-signs/ocean-warming/>

⁵ IPCC, “2013: Summary for Policymakers”, in Thomas Stocker et al (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 (IPCC WG1 AR5 SPM)* (Cambridge University Press 2013), p.24, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf.

⁶ IPCC 2019 Report.

⁷ *Idem*.

⁸ Boyle, A. (2020). Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime. In E. Johansen, S. Busch, & I. Jakobsen (Eds.), *The Law of the Sea and Climate Change: Solutions and Constraints* (pp. 81-103), p.83. Cambridge: Cambridge University Press. doi:10.1017/9781108907118.005, [hereinafter Boyle, *the LOSC Part XII Regime*].

⁹ The United Nations Convention on the Law of the Sea (1982), [hereinafter “UNCLOS”], can be accessed through: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

containing the international legal framework governing the world's oceans.¹⁰ Its preamble emphasizes the protection and preservation of the marine environment¹¹ as one of the Convention's aims.

17. Egypt notes that UNCLOS was negotiated and drafted at a time where climate change and its negative consequences were not yet perceived as the serious threat they are now acknowledged to be to lives and livelihoods. Therefore, it is understandable why UNCLOS does not explicitly refer to climate change in its provisions. However, UNCLOS includes the protection and preservation of the marine environment as one of its aims, as well as a dedicated part (Part XII) focusing specifically on the protection of the marine environment, which is crucial for the well-being of oceans and seas. Although UNCLOS does not refer explicitly to climate change, the following section on "Legal Framework" will discuss how the obligations under UNCLOS shall be interpreted and applied taking into account the member states' relevant obligations under general international law and the climate change instruments, with the result of identifying state parties' obligations for the protection of the oceans from the adverse impacts of climate change.

¹⁰ It has been ratified by 168 parties.

¹¹ UNCLOS, Preamble.

CHAPTER II: LEGAL FRAMEWORK

18. The applicable law for the ITLOS advisory proceedings is determined by Article 293 of UNCLOS which states that “a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention”.¹² Accordingly, Egypt submits that the applicable law for the purpose of this request is represented in the provisions on the protection of marine environment under UNCLOS and other relevant provisions in climate change instruments not incompatible with UNCLOS.

19. In interpreting UNCLOS, the Vienna Convention on the Law of Treaties (hereinafter “VCLT”) Article 31 (1) provides 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”.¹³ The International Court of Justice (ICJ) has stated that this rule reflects customary international law.¹⁴ Hence, Egypt starts by shedding light on UNCLOS’s definition of the “pollution of marine environment”.

Article 1 (1) (4) of UNCLOS: Definition of pollution to the marine environment:

20. Article 1 (1) (4) of UNCLOS defines the “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.¹⁵

21. The definition is widely phrased to include harm to “living resources and marine life”, “hazards to human health”, “hindrance to marine activities”, in addition to the impairment of quality for use of sea water. In addition, under article 194 (5) of UNCLOS, the marine environment encompasses “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.¹⁶ The definition is sufficiently broad to accommodate both existing and new sources of marine pollution.

22. According to the ordinary meaning of the text in the above-mentioned definition, it can be asserted that the introduction of substances or energy that cause harm to the oceans and their ecosystems, constitutes “pollution” under UNCLOS.

23. It is established by science that anthropogenic introduction of energy, such as heat

¹² UNCLOS, art. 293(1).

¹³ Vienna Convention on the Law of Treaties (1969), entered into force on 27 January 1980, ratified by 116 states, United Nations, *Treaty Series*, vol. 1155, p.331, [hereinafter “VCLT”], art. 31 (1), can be accessed through: https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

¹⁴ See *Territorial Dispute (Libya Arb Jamahiriya v Chad)*, Judgment, Merits, (1994) ICJ Rep 6, p. 22; *Oil Platforms (Iran v USA)*, p. 812; *Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment, Merits, (1999) ICJ Rep 1045, pp. 1059-64.

¹⁵ UNCLOS, article 1 (1) (4).

¹⁶ UNCLOS, article 194 (5).

(which is a source of energy) caused by GHGs emissions, deteriorates the marine environment thus causing ocean warming, acidification and sea level rise.¹⁷

24. As carbon dioxide is a “substance” that is “introduced by man”, whether “directly or indirectly”, into the marine environment through its absorption and dissolution by the oceans, and since it results in “deleterious effects” by causing their acidification¹⁸, thus, carbon dioxide qualifies as a substance polluting the marine environment, under the above-mentioned definition.

25. Furthermore, anthropogenic GHGs emissions satisfy the definition of pollution under UNCLOS as they “introduce” heat, which is a source of energy, into the atmosphere, which in turn gets absorbed into the oceans, resulting in “deleterious effects”.

26. Since carbon dioxide and GHGs emissions significantly harm the marine environment, they fall within the definition of “pollution of the marine environment” under UNCLOS, and are subject to the regulations under Part XII of the Convention on the protection and preservation of the marine environment.

Taking into account state’s relevant obligations under climate change instruments:

27. Part XII of UNCLOS, in addition to other provisions, provides for the prevention, reduction and control of pollution as well as the protection of the marine environment through conservation. These provisions are not to be read in clinical isolation from broader international law. Article 31(3)(c) of the VCLT provides that in interpreting a treaty, “there shall be taken into account, together with the context... any relevant rules of international law applicable in the relations between the parties”.¹⁹ It is generally recognized that international obligations shall be interpreted by reference to their normative environment.²⁰ As the ICJ stated in *South West Africa*, “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”²¹ Hence, in order to reflect on the questions submitted to the Tribunal, it is necessary for the Tribunal to interpret and apply the provisions of UNCLOS in harmony and taking into account the state parties’ relevant obligations under the climate change instruments.

28. In addition, a number of relevant UNCLOS provisions incorporate, by reference,

¹⁷ IPCC, “The Ocean” in VR Barros et al (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC WGII AR5 Ch30)* (Cambridge University Press 2014), available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap30_FINAL.pdf;

¹⁸ *Idem.*, IPCC 2019 Report.

¹⁹ VCLT, art. 31 (3) (c)

²⁰ International Law Commission, “Fragmentation of International Law, Difficulties arising from the Diversification and Expansion of International Law”, Report of the Study Group (13 April 2006) A/CN.4/L.682, 413.

²¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ, Reports 1971, p. 31.

“generally recognized international rules and standards” or “global rules and standards” which exist in other sources of international law.²² Specific obligations in relevant international agreements concerning marine environmental protection also inform states obligations under Part XII of UNCLOS.²³ For instance, Articles 207 and 212 of UNCLOS stipulate that states should take into account internationally agreed rules, standards and recommended practices and procedures, while adopting laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources or through the atmosphere.²⁴

29. Article 237 of UNCLOS contains a clause that governs the relationship of UNCLOS Part XII with other Agreements relating to the protection and preservation of the marine environment. It provides that “specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention”²⁵.

30. The arbitral tribunal in *the South China Sea Arbitration* emphasized the direct link between Article 192 of UNCLOS and other international rules and agreements.²⁶ Part XII of UNCLOS and related states parties’ obligations, such as due diligence, are informed by other international rules and treaty regimes relevant to marine environmental protection.²⁷

31. Consequently, ITLOS in responding to the request for an advisory opinion should consider the provisions of UNCLOS, and where appropriate, the relevant obligations of the State parties to combat climate change which are not incompatible with UNCLOS. This will help identify the obligations of States under Part XII of the Convention, which shall be further clarified and interpreted in harmony with the states’ relevant obligations in combatting climate change. This comprises relevant obligations in the United Nations Framework Convention on

²² UNCLOS, articles 207 & 212.²³ *The Dugzit Integrity Arbitration (Malta v São Tomé and Príncipe)*, PCA Case No 2014-07, Award (5 September 2016), p.54, para 208 [hereinafter *the Dugzit Arbitration*]; *South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China) (Award of 12 July 2016)* PCA Case No. 2013–19, para 941, [hereinafter *the South China Sea Arbitration*].

²³ *The Dugzit Integrity Arbitration (Malta v São Tomé and Príncipe)*, PCA Case No 2014-07, Award (5 September 2016), p.54, para 208 [hereinafter *the Dugzit Arbitration*]; *South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China) (Award of 12 July 2016)* PCA Case No. 2013–19, para 941, [hereinafter *the South China Sea Arbitration*].

²⁴ *Idem*.

²⁵ UNCLOS, Article 237 (1) and (2).

²⁶ *The South China Sea Arbitration*, para 941-942.

²⁷ *The Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ. Reports 2010, paras. 101, 193 [hereinafter *the Pulp Mills Judgment*]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665, para. 104; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS, 1 February 2011, p.4, para. 110 [hereinafter *Responsibilities of States in the Area*].

Climate Change²⁸, the Kyoto Protocol, and the Paris Agreement²⁹ (collectively referred to as “**The UNFCCC Regime**”), which are relevant to the protection and preservation of the oceans.

32. Thus, Egypt, when submitting its views on the question in Case No. 31, will address the obligations of state parties to UNCLOS under Part XII of the Convention taking into account their relevant obligations under the UNFCCC Regime, as well as other multilateral agreements that are not incompatible with UNCLOS³⁰.

²⁸ New York, 9 May 1992, in force 21 March 1994, [hereinafter the UNFCCC], the UNFCCC can be accessed through: <https://unfccc.int/resource/docs/convkp/conveng.pdf>

²⁹ Paris, 12 December 2015, in force 4 November 2016, [hereinafter the Paris Agreement], the Paris Agreement can be accessed through: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

³⁰ The Stockholm Declaration on the Human Environment (1972), adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, can be accessed through: <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf>; the Convention on Biological Diversity (1992), can be accessed through: <https://www.cbd.int/doc/legal/cbd-en.pdf>; and the Marine Environment Protection Committee of the International Maritime Organization.

CHAPTER III: RESPONSE TO THE LEGAL QUESTIONS

33. The legal questions before the tribunal are two questions that state as follows:

“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 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?”

34. The first question addresses state parties’ obligations to prevent, reduce and control pollution of the marine environment that results from “anthropogenic greenhouse gas emissions to the atmosphere”. The second question requests the Tribunal to identify state parties’ obligations to protect and preserve the marine environment from the impacts of climate change. The two questions are interrelated yet separate.

3.2 First Question

35. The first question states as follows;

“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 gas emissions into the atmosphere?”

3.2.1 State Parties obligations under Part XII of UNCLOS

36. Part XII of UNCLOS covers the protection and preservation of the marine environment. Many of the provisions of Part XII reflect customary international law.³¹ The provisions are ‘comprehensive’, in that they include “all forms and sources of marine pollution”.³²

37. The obligations under Part XII include the general duty to protect and preserve the marine environment (under Article 192 discussed under question (2), below). They also include “more stringent and detailed provisions”, addressing the different types of pollution, and the required legislative, enforcement and other measures.³³ These obligations include, *inter alia*:

³¹ *Territorial and Maritime Dispute (Nicaragua/Colombia)*, Judgment, I.C.J. Report, paras. 114-118, 138-139.

³² Detlef, Czybulka (2017). In A. Proelss (Ed.). United Nations Convention on the Law of the Sea: A Commentary, p.1278, para.2 [hereinafter *Czybulka, UNCLOS: A commentary*].

³³ *Idem*.

Article 194: The obligation to take measures to prevent, reduce and control marine pollution and prevent transboundary harm

38. Article 194 of UNCLOS requires State Parties to take all measures that are necessary to “prevent, reduce and control pollution of the marine environment from any source”.³⁴

39. In the context of climate change, the release of anthropogenic GHGs and carbon dioxide emissions from land-based sources or from or through the atmosphere that contributes to the adverse effects on the marine environment are defined as sources of marine pollution under Article 194 of the Convention.

40. Furthermore, state parties are obliged to take measures to avoid transboundary environmental harm and “ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”.³⁵ This obligation has been recognized as a rule of customary international law.³⁶ This is a due diligence obligation.

41. The ITLOS Seabed Disputes Chamber stressed that “the content of ‘due diligence’ obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that ‘due diligence’ is a variable concept. Hence, it may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific (...) knowledge”³⁷.

42. Article 194 (3) stipulates that states are required to adopt and take measures that “minimize to the fullest possible extent the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources [such as rivers, estuaries, pipelines and outfall structures]³⁸, from or through the atmosphere as or by dumping”.³⁹ This is further developed through articles 207 and 212 of the Convention.

43. In addition, Article 194 (5) requires states to take necessary measures to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.⁴⁰ This goes beyond preventing and controlling pollution to require the conservation of living resources. It is scientifically proven that measures to control GHGs emissions from land-based sources or through the airspace of

³⁴ UNCLOS, article 194 (1).

³⁵ UNCLOS, article 194 (2).

³⁶ *Pulp Mills Judgement*, para. 159; the *South China Sea Arbitration*, paras 941-942.

³⁷ *Responsibilities of States in the Area*, para. 117.

³⁸ UNCLOS, article 207 (1).

³⁹ UNCLOS, article 212.

⁴⁰ UNCLOS, article 194 (5).

states are critical to protect coral reef ecosystems from ocean warming and acidification.⁴¹

44. Although anthropogenic GHG emissions are not specifically listed among the sources of pollution under Article 194, Egypt is of the view that article 194 applies to these emissions when they cause or are likely to cause marine pollution.⁴² It is also scientifically established that GHGs emissions are harmful, persistent, substances and therefore should fall under the ambit of article 194(3).⁴³

45. States, therefore, have an affirmative duty under UNCLOS to take “all measures that are necessary” using “the best practicable means at their disposal” and “in accordance with their capabilities” to prevent, control and reduce pollution of the marine environment, which includes carbon dioxide and other GHGs, as long as they directly or indirectly result or likely to result in deleterious effects to the marine environment. Furthermore, these measures shall include those necessary to protect and preserve rare or fragile ecosystems and other forms of marine life including coral reef ecosystems. This is an obligation of conduct and depends on the differentiated capabilities of States. It is, in the words of the ITLOS Seabed Disputes Chamber, “an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”.⁴⁴ Any contrary interpretation to this end would contradict with the purposes of Part XII of the Convention and undermine the efforts to reduce marine pollution.

Articles 207-212: The obligation to adopt and enforce laws and regulations to prevent, reduce and control pollution of the marine environment

46. Part XII of UNCLOS is designed as a framework that requires implementation through national legislation as well as regional and sub-regional agreements.⁴⁵ Articles 207 and 212 of UNCLOS respectively, require States to adopt laws and regulations, as well as other non-legal measures to prevent, reduce and control the pollution of the marine environment derived from land-based sources and from or through the atmosphere.⁴⁶ Furthermore, States are required to enforce these rules and regulations.⁴⁷

47. Egypt notes that Articles 194, 207 and 212 comprehensively cover all airborne and land-based sources of marine pollution, including those generating carbon dioxide and other

⁴¹IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. IPCC AR4, at WG I, CHAPTER 5, 392–93, WGII, Chapter 16, 698.*

⁴² Boyle, the LOSC Part XII Regime, p.8.

⁴³IPCC Report 2007, WG I, Chapter 5, 392–93.

⁴⁴ *Responsibilities of States in the Area*, para. 110.

⁴⁵ Cyzbulka, *UNCLOS: A commentary*, p1282, para 8-9, UNCLOS, article 237 (1).

⁴⁶ UNCLOS, articles 207 and 212.

⁴⁷ UNCLOS, articles 213 and 222.

GHGs emissions. Egypt also notes that the sources for land-based pollution included in article 207 of the Convention are not exhaustive, and can therefore include GHG emissions. Furthermore, article 212 of the Convention refers to pollution of the marine environment from or through the atmosphere.

48. Article 207 (5) of UNCLOS requires states to adopt laws, regulations and measures “designed to minimise, to the fullest possible extent, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment”. Notably, Article 207(4), regarding the development of global and regional rules and standards on land-based pollution, takes into account “characteristic regional features, the economic capacity of developing states and their need for economic development”.⁴⁸

49. A States’ obligation to adopt and enforce laws and regulations to prevent, reduce and control pollution to marine environment is one of due diligence. Accordingly, States are not only required to adopt laws and regulations to prevent or minimize harmful marine pollution, but also adopt a “certain level of vigilance in their enforcement and the exercise of administrative control” including environmental impact assessment, regulation and use of best available technology, application of the precautionary principle or approach, and enforcement.⁴⁹

Articles 197-201: The duty to cooperate, notify, exchange data and information

50. States are required, under article 197 of the Convention, to cooperate on a regional and global basis “in formulating and elaborating international rules, standards and recommended practices consistent with the Convention for the protection and preservation of the marine environment”.⁵⁰ Furthermore, article 198 requires states to notify affected, or likely to be affected states and the relevant international organizations of any imminent danger or transboundary harm that causes or is likely to cause damage to the marine environment.⁵¹

51. The Tribunal has previously emphasized, in several cases that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”⁵².

52. This obligation to cooperate is also enshrined under article 200 of the Convention, which requires states to cooperate “for the purpose of promoting studies, undertaking

⁴⁸ UNCLOS, article 207 (4), See also Boyle, the LOSC Part XII Regime, p. 89.

⁴⁹ *Pulp Mills Judgment*, p. 79, para. 197.

⁵⁰ UNCLOS, article 197.

⁵¹ UNCLOS, article 198.

⁵² *The South China Sea Arbitration*, para. 946; *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, para. 82 [hereinafter *MOX Plant*]; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 92.

programs of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment”.

53. The obligation is further enhanced through article 201 of the Convention, which requires states to cooperate “in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment”.

54. States reiterated the duty to cooperate in both the UNFCCC and its Paris Agreement⁵³. Furthermore, the IPCC noted that the effective mitigation of climate change is a global problem that requires collective action, including international cooperation.

Articles 204, 206: The obligations to adopt a “Precautionary Approach”, conduct “Environmental Impact Assessments (EIAs)”, and monitor the risks of pollution

55. Although the precautionary approach is not explicitly mentioned in UNCLOS, ITLOS confirmed the approach in the *Southern Bluefin Tuna Case*, in which it ordered parties to act with prudence and caution to prevent serious harm to Southern Bluefin Tuna Stock.⁵⁴ The precautionary approach is also “an integral part of the general obligation of due diligence”.⁵⁵

56. According to this principle, States should take all appropriate measures to prevent damage “when there are plausible indications of potential risks”⁵⁶, and therefore, states are not required to act only when there is an absolute certainty of harm. This means that states are under an obligation to take precautionary measures to prevent potential environmental harm, even where scientific evidence is uncertain.

57. Relatedly, Article 206 of UNCLOS requires states to conduct environmental impact assessments (EIA) where there are reasonable grounds to believe that activities under their jurisdiction or control may cause substantial pollution or significant and harmful changes to the marine environment.

58. Environmental impact assessment is crucial to ensure that human activities do not harm the environment, particularly in shared and transboundary contexts. In the *Seabed Dispute Chamber Advisory Opinion*, ITLOS stated that an EIA is a general obligation under customary international law.⁵⁷ This was reinforced by the Arbitral Tribunal in the *South China Sea Arbitration*.⁵⁸

⁵³ UNFCCC, articles 3.5, 4(1) (C), (d), (e), (g), (h), (i), Paris Agreement, Articles 7.6, 7.7, 8.3, 8.4, 12.

⁵⁴ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p.280, paras. 77-80.

⁵⁵ *Responsibilities of States in the Area*, para. 131.

⁵⁶ *Idem*.

⁵⁷ *Responsibilities of States in the Area*, para 145.

⁵⁸ *The South China Sea Arbitration*, para. 948.

Article 202-203: Scientific and technical assistance to developing states

59. Article 202 provides that “States shall, directly or through competent international organisations” promote technical assistance and enhance the capacities of developing states for the prevention, reduction and control of marine pollution. Article 203 further provides for the preferential treatment by international organisations for developing states in the allocation of relevant funds and technical assistance.

3.2.2 State Parties’ obligations under other relevant agreements and rules

60. As discussed previously, the UNFCCC and its 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.

3.2.2.1 The UNFCCC

61. As previously established, the most current, reliable available science clearly indicates that GHGs resulting from anthropogenic human activities have a direct impact on the living environment, including the marine environment. The UNFCCC provisions are relevant when interpreting and applying UNCLOS provisions with regard to the protection of marine environment.

62. The UNFCCC, which was adopted 10 years after the UNCLOS, dealt with stabilizing GHG concentrations at a level that would prevent “dangerous anthropogenic interference with the climate system”. Article 2 of the UNFCCC explicitly states that the ‘ultimate objective (...) is to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.

63. This indicates that the convention espoused a precautionary approach in determining its objectives in light of the relative scientific uncertainty on one hand, and the risks of serious and irreversible harm to all ecosystems on the other hand. This is further demonstrated by the same paragraph that stipulates that “(...) should be achieved within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure food production is not threatened and to enable economic development to proceed in a sustainable manner”.

64. Article 3 (3) of the UNFCCC requires state parties to take precautionary measures to anticipate, prevent or minimize climate change and mitigate its effects, which strengthens the ambition to reduce GHG emissions.

65. Article 3 (1) of the UNFCCC provides that the protection of the climate system for the benefit of present and future generations shall be “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.” It further stipulates that developed countries should take the lead in combating climate change and its

adverse effects. Consequently, the implementation of state parties' obligations under Part XII of UNCLOS relating to the marine environment, should be based on their differentiated responsibilities and respective capabilities. Egypt would like to highlight, in particular, that African countries which are the lowest contributors to GHG emissions, are disproportionately impacted by climate change.⁵⁹

66. The oceans, as indicated under article 4 of the UNFCCC play a role in the stabilization of the GHG concentrations. Article 4 paragraph 1 (d) of the UNFCCC clearly stipulates that “all parties taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, *of sinks and reservoirs*⁶⁰ *of . . . greenhouse gases . . .* including biomass, forests and *oceans* as well as other terrestrial, coastal and marine ecosystems⁶¹”.

3.2.2.2 The Paris Agreement

67. The Paris Agreement aims to enhance the implementation of the UNFCCC.

68. With regards to the protection of oceans, the Paris Agreement building on the UNFCCC, stipulates in article 5 (1) that “Parties should take action to conserve and protect, as appropriate, sinks and reservoirs of greenhouse gases as referred to in article 4, paragraph 1 (d), of the convention, including forests”.

69. This demonstrates that states parties while drafting the UNFCCC and the Paris Agreement, were cognizant of the negative impacts of climate change on oceans and the marine environment, as well as the need to take action to limit such damage.

70. The marine environment is heavily impacted by anthropogenic greenhouse gas emissions, and the mitigation of these impacts is among the objectives of the Paris Agreement.

71. In order to enhance the implementation of the UNFCCC, the Paris Agreement has indicated that its objective is to hold “the increase in the global average temperature well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”⁶².

⁵⁹ Trisos, C.H., I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemed, K. Kalaba, C. Lennard, C. Masao, Y. Mgaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldein, 2022: Africa. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegria, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 1285–1455, doi:10.1017/9781009325844.011.

⁶⁰ Sinks are defined under Article 1, para. 8 of the UNFCCC as “any process, activity or mechanism which removes a greenhouse gas, an aerosol, or a precursor of a greenhouse gas from the atmosphere”; Reservoirs are defined under Article 1, para. 7 of the UNFCCC as “a component or components of the climate system where a greenhouse gas or a precursor of greenhouse gas is stored”.

⁶¹ UNFCCC, article 4, para. 1 (d).

⁶² Paris Agreement, article 2, para 1 (a).

72. Given the effects of climate change on the marine environment as explained above, Egypt notes that in order to comply with their obligations under Part XII of UNCLOS, state parties should comply with their corresponding commitments under the UNFCCC and the Paris Agreement (“holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”).⁶³ The Paris Agreement is to be implemented “to reflect equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances ⁶⁴”.

73. According to the above, and based on the most current reliable, available science and without prejudice to the principles of equity and common but differentiated responsibilities and respective capabilities, Egypt is of the view that in order for states to effectively comply with their obligations under Part XII of UNCLOS, they are required to, *inter alia*:

(i) Prevent, reduce and control ocean warming, ocean acidification and sea level rise through the reduction of the emission of GHGs and CO₂, in accordance with their obligations under the UNFCCC and its Paris Agreement.

(ii) In this regard, states should prepare, communicate, and maintain successive nationally determined contributions (hereinafter “NDCs”)⁶⁵. In communicating these NDCs, Parties “shall provide the information necessary for clarity, transparency and understanding⁶⁶”. Further, Parties are required to communicate their NDCs every 5 years⁶⁷. States’ NDCs should “reflect its highest possible ambition” and “represent a progression” beyond its previous NDCs⁶⁸.

(iii) Article 5 of the Paris Agreement provides that states should enhance and conserve sinks and reservoirs, while articles 6, 7 and 9 provide for technology transfer, capacity building and financial resources that achieve a balance between adaptation and mitigation to assist developing country parties.⁶⁹

74. Since “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries⁷⁰”, developed states in particular, should take the lead in “modifying longer-term trends in anthropogenic emissions”⁷¹ and this can happen “by

⁶³ Paris Agreement, Article 2, para 1 (a).

⁶⁴ Paris Agreement, Article 2, para 2.

⁶⁵ Paris Agreement, article 4 (2).

⁶⁶ Paris Agreement, article 4 (8).

⁶⁷ *Idem*, para. 9.

⁶⁸ *Idem*, para. 3.

⁶⁹ Paris Agreement, articles 5, 6, 7 and 9.

⁷⁰ UNFCCC, Preamble.

⁷¹ UNFCCC, article 4 (2).

undertaking economy-wide absolute emission reduction targets”⁷²

3.3 **Second Question**

75. The second question states as follows:

“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?”

76. As indicated above under the response to question (1), climate change has direct deleterious effects on the marine environment. The continued acidification of the oceans, caused by the absorption of CO₂ from the atmosphere, is leading to the alteration of the marine ecosystem and loss of biodiversity. Ocean warming leads to coral bleaching and migration of species⁷³. As to the sea level rise, it is affecting biodiversity and in particular species that inhabit coastal areas.

77. Egypt considers that when states comply with their obligations to prevent, reduce, and control marine pollution they will, consequently, protect and preserve the marine environment from further climate change impacts. Therefore, state parties’ obligations identified in the answer to question (1) are also obligations to protect and preserve the marine environment.

78. However, the answer to the first question which specifies the obligations of states in order 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, provides only part of the answer for the second question in relation to the protection and preservation of the marine environment from climate change. This will be discussed in further detail below:

The obligation to protect and preserve the marine environment

79. Article 192 of UNCLOS, which is the core of Part XII of the Convention, establishes a specific affirmative and overarching obligation on State Parties “to protect and preserve the marine environment”.⁷⁴ States have “the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, [...] the negative obligation not to degrade the marine environment”.⁷⁵

⁷² Paris Agreement, article 4 (4).

⁷³ IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp, accessed through: https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf

⁷⁴ UNCLOS, article 192.

⁷⁵ *The South China Sea Arbitration*, p.373, para. 941

80. As previously discussed, the marine environment can be defined as “the ocean and all seas and adjacent coastal areas”⁷⁶. Article 192 thus covers both areas within and beyond national jurisdiction. Article 194 (5) encompasses “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”⁷⁷. It includes “living resources and marine life” as clarified under the definition of marine environment under article 1 of the Convention. This was further reiterated by the PCA in the *South China Sea Arbitration*.⁷⁸

81. The marine environment that states are required to protect and preserve thus includes biodiversity, particularly where species are threatened and ecosystems are fragile, which is further indicated by article 194, paragraph 5 of the Convention which stipulates that “the measures taken (...) shall include those 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”.

82. The PCA has previously indicated that “Part XII of the Convention [is not] limited to measures aimed at controlling marine pollution. While the control of pollution is certainly an important aspect of environmental protection, it is by no means the only one”⁷⁹. The PCA stressed the fact that “Article 194 (...) is not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems. (...)”⁸⁰. It thus follows that, in addition to the obligations previously specified under the answer to the first question, there are additional obligations that states should comply with in order to protect and preserve the marine environment.

83. Egypt is therefore of the view, that in order to protect and preserve the marine environment from climate change impacts, additional measures, other than those related to the prevention, control and reduction of marine pollution should be taken. It is important to note here that these additional measures are directly linked to protecting, and preserving the marine environment from climate change, and to adapting to its adverse impacts.

84. The content of these obligations is informed by other duties stipulated in the provisions of Part XII of UNCLOS, international agreements not incompatible with the Convention, and applicable rules and principles of customary international law.⁸¹ As discussed earlier,

⁷⁶ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, para.17.1, can be accessed through:

<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, para.17.1.

⁷⁷ UNCLOS, article 194, para. 5.

⁷⁸ *The South China Sea Arbitration*, para.945.

⁷⁹ *The Chagos Marine Protected Areas Arbitration (Mauritius v. UK)*, PCA, Award 18 March 2015, p. 128, para. 320 [hereinafter *the Chagos Marine Protected Areas*].

⁸⁰ *Ibid.*, para.538.

⁸¹ *Ibid.*, paras 941 and 957.

international agreements not incompatible with UNCLOS include the UNFCCC and the Paris Agreement as explained earlier. The UNFCCC requires all State Parties to promote sustainable management, conservation, and enhancement of sinks and reservoirs of GHGs, including oceans and other ecosystems.⁸²

85. Another example of a measure to protect and preserve the marine environment is reflected in the 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 (hereinafter the **BBNJ Draft Agreement**). Although this agreement is yet to be adopted or to enter into force, it is useful for further clarifying the obligations of states with respect to the protection and preservation of the marine environment with reference to climate change. It is crucial to highlight here that the BBNJ Draft Agreement stipulates that it “shall be interpreted and applied in a manner consistent with the Convention”⁸³.

86. The preamble of the BBNJ Draft Agreement recognizes “the need to address in a coherent and cooperative manner, biological diversity loss and degradation of ecosystems of the ocean, due, in particular, to climate change impacts on marine ecosystems, such as warming and ocean deoxygenation, as well as ocean acidification, pollution (...)”⁸⁴.

87. Furthermore, the BBNJ Draft Agreement is being guided by “an approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role of the ocean in climate”⁸⁵

88. In this regard, the BBNJ Draft Agreement provides for the establishment of area-based management tools, including marine protected areas. As such, the draft stipulates that the objective of establishing marine protected areas is to “*protect, preserve, restore and maintain biological diversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution*”⁸⁶. This was further confirmed by the PCA in its *Marine Protected Areas Arbitration*⁸⁷.

89. In conclusion, Egypt notes that 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 as well as taking additional measures to protect and

⁸² UNFCCC, article 4 (1) (d).

⁸³ BBNJ Draft Agreement, Article 5.

⁸⁴ BBNJ Draft Agreement, Preamble.

⁸⁵ BBNJ Draft Agreement, Article 7 para. h.

⁸⁶ BBNJ Draft Agreement, Article 17 para. c.

⁸⁷ *The Chagos Marine Protected Area*, para.538.

preserve the marine environment, such as establishing area-based management tools including marine protected areas.

3.4 The responsibility to fulfill the obligations concerning the protection and preservation of the marine environment and for wrongfulness:

Article 235 UNCLOS 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”.⁸⁸ Under general international law, state responsibility shall arise if an action or omission attributable to such state was taken in breach of its international obligations.⁸⁹ Hence, in Egypt’s view, states in breach of their obligations are under an obligation to cease the wrongful act⁹⁰, and shall make reparations for the injury caused.⁹¹

⁸⁸ UNCLOS, article 235 (1).

⁸⁹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, adopted by the International Law Commission at its fifty-third session, articles 2 and 30, para. 6.*

⁹⁰ *Ibid.*, article 30

⁹¹ *Ibid.*, articles 31 and 34.

CHAPTER III: CONCLUSIONS

90. Egypt concludes that international law mandates that the State parties' obligations under UNCLOS Part XII concerning the protection and preservation of the marine environment shall be interpreted and applied taking into account the relevant obligations of the state parties under the subsequent climate change instruments (i.e. the UNFCCC and its Paris Agreement, and other related agreements).

91. Article 194 of UNCLOS, regarding the obligation to prevent, reduce and control pollution of the marine environment, imposes on states a due diligence obligation, which is an obligation of conduct rather than result. The content of the due diligence obligation is further clarified by the provisions of Part XII of UNCLOS and the relevant obligations of states under the climate change instruments, including the UNFCCC and its Paris Agreement.

92. In order for states parties to effectively comply with their obligation under UNCLOS to prevent, reduce and control pollution of the marine environment, they are required, *inter alia*, to reduce greenhouse gas emissions in line with their relevant obligations under the UNFCCC and its Paris Agreement, including ensuring fulfillment of their NDCs, cooperating in formulating rules and practices for the protection and preservation of the marine environment, and adopting laws and regulations to prevent, reduce and control pollution of the marine environment. State parties shall implement these obligations in accordance with the principles of the UNFCCC and its Paris agreement, in particular the principles of equity and common but differentiated responsibilities and respective capabilities, and the fact that developed countries have the largest share of historical and current global emissions.

93. In order 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 be also required including, *inter alia*, the establishment of marine protected areas.
