

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 BY THE EUROPEAN  
UNION

15 JUNE 2023

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## LIST OF ABBREVIATIONS AND ACRONYMS USED

BBNJ Agreement	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
COP	Conference of the Parties
COSIS	Commission of Small Island States on Climate Change and International Law
EIA	Environmental Impact Assessment
GHG	Greenhouse gas
ICJ	International Court of Justice
IMO	International Maritime Organization
IPCC	Intergovernmental Panel on Climate Change
ITLOS, the Tribunal	International Tribunal for the Law of the Sea
MARPOL	International Convention for the Prevention of Pollution from Ships
PCA	Permanent Court of Arbitration
SEA	Strategic Environmental Assessment
EU	The European Union
UN	The United Nations
UNCLOS, LOSC, the Convention	The United Nation Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties

**WRITTEN STATEMENT BY THE  
EUROPEAN UNION**

**CHAPTER I**

**INTRODUCTION**

1. On 28 March 2013, the International Tribunal for the Law of the Sea (hereinafter “ITLOS” or “the Tribunal”) received a request for an advisory opinion from the Commission of Small Island States on Climate Change and International Law (hereinafter “COSIS”). The request was based on a Decision by COSIS, adopted by unanimity of its Members at the third meeting of COSIS on 26 August 2022, with which the COSIS referred the following legal questions to the Tribunal for an advisory opinion:

*“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. The request was entered in the List of cases of ITLOS as Case No. 31.
3. By order of 16 December 2022, the President of ITLOS invited the Contracting Parties to UNCLOS to present written statements on the questions submitted to the Tribunal in Case No. 31. In accordance with Article 133(3) of the Rules of the Tribunal, the President of the Tribunal fixed 16 May 2023 as the time limit within which written statements may be presented to ITLOS<sup>1</sup>. By Order of 15 February 2023, the President of ITLOS extended the time limit to present such statements by one month, until 16 June 2023<sup>2</sup>.

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<sup>1</sup> ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Order 2022/4 of 16 December 2022.

<sup>2</sup> ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Order 2023/1 of 15 February 2023.



4. The European Union<sup>3</sup>, a Party to the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS")<sup>4</sup>, respectfully submits the following observations.

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<sup>3</sup> The European Union, which has replaced and succeeded the European Community, is founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union (as last amended) and has legal personality. Its Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

<sup>4</sup> See Decision 98/392/EC of the Council of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of part XI thereof, Official Journal of the European Union, OJ L 179 of 23 June 1998 (**Annex 1**).

**CHAPTER II**  
**JURISDICTION AND ADMISSIBILITY**

**I. Jurisdiction**

5. This written statement is without prejudice to the question of the jurisdiction of the Tribunal to examine the request for an advisory opinion in respect of the questions raised before it.

**II. Admissibility**

6. Pursuant to Article 138 (1) of the Rules of the Tribunal, “[t]he Tribunal may give an advisory opinion”, which implies *inter alia* that it has discretion in regard to the admissibility of individual questions.
7. This written statement is without prejudice to the question of the admissibility of the questions referred to the Tribunal by COSIS.

## CHAPTER III

### RESPONSES TO THE QUESTIONS

#### I. Substance

##### A. Structure of the Statement by the European Union on the proposed replies to the questions by the COSIS

8. In order to answer the questions in a useful manner, it is necessary to determine whether, and if so to what extent, UNCLOS, and notably Part XII thereof, establishes obligations requiring its Parties to take action in relation to climate change. To this end, the written statement will proceed first by analysing the applicable law, and then by considering these three fundamental questions: (i) What is the specific content of the obligations of Contracting Parties to protect and preserve the marine environment against climate change impacts, such as ocean warming, ocean acidification and sea-level rise, which are caused by Greenhouse Gas (GHG) emissions?; (ii) Does the term “*pollution of the marine environment*” comprise GHG emissions?; (iii) If the reply to (ii) is in the affirmative, what is the precise content of the obligations of Contracting Parties to prevent, reduce and control GHG emissions, with a view to limiting the deleterious effects for the marine environment that result or are likely to result from climate change caused by such emissions?
9. This statement does not have the ambition to analyse in detail the content of each and every obligation under Part XII of UNCLOS related to the protection and preservation of the marine environment, nor to address matters concerning the delimitation of jurisdiction between flag and coastal States in relation to the obligations of Part XII of UNCLOS, which appear to exceed the scope of the questions referred to the Tribunal.
10. Question (a) referred to ITLOS reflects the wording of Article 194(1) of UNCLOS, according to which “*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*”. Question (b) reflects the wording of Article 192 of UNCLOS, according to which “*States have the obligation to protect and preserve the marine environment*”.
11. Considering that Article 192 of UNCLOS constitutes the primary and general obligation of Part XII, setting the basis for all the obligations further specified in its following provisions, the European Union’s written statement should consider question (b) first.

##### B. Applicable law

12. The law applicable to the questions referred to the Tribunal stems from three sets of sources:
- a. UNCLOS itself, to which the questions explicitly refer;
  - b. other applicable rules of international law, referred to explicitly or implicitly by the provisions of Part XII of UNCLOS Part XII, among which the most relevant for the purpose of replying to the questions referred are those laid down by the United Nations Framework Convention on Climate Change (UNFCCC)<sup>5</sup> and the Paris Agreement<sup>6</sup>;
  - c. the Vienna Convention on the Law of Treaties (VCLT), which is particularly relevant to define the scope of the definition of ‘pollution of the marine environment’ enshrined in Article 1(1)(4) of UNCLOS.
13. These sets of applicable rules are inter-linked, and their relation is central to reply to the questions referred. Indeed, UNCLOS, which is considered to be the “constitution of the oceans”, is broadly recognised as a “*living treaty*”<sup>7</sup> which needs to be interpreted in light of other international legal instruments supplementing it and therefore to be applied having regard to subsequent international law and policy developments<sup>8</sup>. This feature is particularly relevant with regard to Part XII of UNCLOS, whose objective to protect and preserve the marine environment is largely achieved “*by advancement (furtherance) of the Convention in regional treaties and regulations, in which individual and regional factors can be taken into account, and in national laws relating to the internal waters, the territorial sea and the respective EEZ transposing the obligations of Part XII*”<sup>9</sup>. This feature is therefore a central element to consider when replying to the questions referred to ITLOS.
14. As concerns the questions at issue, the openness of Part XII of UNCLOS to other international legal instruments and regimes is reflected in particular in three sets of provisions of Part XII of UNCLOS, namely: (1) Articles 192 and 194, which constitute the primary and general obligations of Part XII and are characterised by broad terms and due diligence obligations, whose interpretation is to be informed by other international law principles and provisions; (2) the source-specific obligations of Section 5 of Part XII of UNCLOS, which explicitly refer to “*internationally agreed rules, standards and recommended practices and procedures*” external to UNCLOS, which are to be considered or to be taken into account in order to comply with those obligations under UNCLOS; and (3) Article 237, which acknowledges and upholds the role of “*agreements which may be concluded in furtherance of the general principles set forth in this Convention*”, hence confirming UNCLOS’s intention to coordinate and integrate different legal regimes to substantiate its own provisions.

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<sup>5</sup> United Nations Framework Convention on Climate Change, New York, 9 May 1992, UN Treaty Series No. 30822.

<sup>6</sup> Paris Agreement, 12 December 2015, UN Treaty Series No. 54113.

<sup>7</sup> See in this regard: T. Stephens, *Law of the Sea: UNCLOS as a Living Treaty*, Barrett, Jill, and Barnes, Richard (eds.), *British Yearbook of International Law*, 2016, pages 225–231, Vol. 86, Issue 1.

<sup>8</sup> See in this regard: A. Boyle, *Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime*, Johansen, E., Busch, S., and Jakobsen, I. (eds), *The Law of the Sea and Climate Change: Solutions and Constraints*, Cambridge: Cambridge University Press, 2020, page 84.

<sup>9</sup> A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary*, C.H. Beck; Hart; Nomos, 2017, page 1281.

15. The VCLT guides the interpretation of the general obligations in Article 192 and 194 in so far the “*context*” and “*object and purpose*” of UNCLOS for the purpose of Article 31(1) VCLT help defining the scope of the definition of “*pollution of the marine environment*”, which is key to answer question (a) referred to the Tribunal.

C. Question (b): What are the specific obligations of State Parties to UNCLOS, including under Part XII, to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

16. Article 192 of UNCLOS imposes an obligation on States to protect and preserve the marine environment. This constitutes the primary and general obligation of Part XII of UNCLOS, which the subsequent provisions of Part XII of UNCLOS further develop and detail.

17. In *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, this Tribunal has already had the opportunity to clarify that the obligation enshrined in Article 192 UNCLOS is a duty of due diligence<sup>10</sup>, or an obligation of conduct, rather than of result. This means that Article 192 UNCLOS does not provide for an obligation of State Parties to necessarily *achieve* compliance with the requirement to protect and preserve the marine environment, but merely to *take all necessary measures to ensure* compliance with that requirement.

18. In the *South China Sea Arbitration*, the Arbitral Tribunal found that the obligation under Article 192 UNCLOS features a dual nature, as it “*extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition*” and hence encompasses both “*the positive obligation to take active measures to protect and preserve the marine environment*” and “*the negative obligation not to degrade the marine environment*”<sup>11</sup>.

19. Thereby the Arbitral Tribunal clarified that Article 192 of UNCLOS also covers the protection of the marine environment from *future* damage. This should not, however, be construed as a duty to anticipate any hypothetical risk, but rather as a “*duty to prevent, or at least mitigate significant harm to the environment*”<sup>12</sup> in accordance with a standard of due diligence informed – as discussed below – by applicable international law and other provisions of UNCLOS.

20. Further, ITLOS has already clarified that the precise content of due diligence obligations varies depending on the circumstances of the specific case and notably the level of risk related

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<sup>10</sup> ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case N° 21, Advisory Opinion of 2 April 2015, paragraph 219. See also: Permanent Court of Arbitration (PCA), *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Case N° 2013-19, Award of 12 July 2016, paragraph 959 (hereinafter ‘the *South China Sea Arbitration*’)

<sup>11</sup> PCA, *The South China Sea Arbitration*, Case N° 2013-19, Award of 12 July 2016, paragraph 941.

<sup>12</sup> *Ibidem*.

to the activity at stake<sup>13</sup> requiring, however, “*the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to the public and private operators*”<sup>14</sup>.

21. Finally, in terms of the object of protection, Article 192 UNCLOS covers the preservation and protection of the marine environment *per se*, beyond the issue of pollution. Indeed, as already clarified by the ITLOS “*living resources and marine life are part of the marine environment*”<sup>15</sup> and “*the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment*”<sup>16</sup>. Further, the Arbitral Tribunal in the *South China Sea Arbitration* found that Article 192 UNCLOS “*is given particular shape in the context of fragile ecosystems by Article 194(5)*”<sup>17</sup>. The fulfilment of such duty of due diligence may for instance comprise the establishment of marine protected areas<sup>18</sup>. These findings resonate with the words of the ICJ – then applied specifically to Article 192 UNCLOS in the *South China Sea Arbitration*<sup>19</sup> – according to which “*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The 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*”<sup>20</sup>.
22. Such obligation to protect and preserve the living and non-living marine resources also applies and is particularly important in relation to threats posed by the effects of climate change, as it essentially requires States to enhance the adaptation capacities of marine ecosystems vis-à-vis those effects<sup>21</sup>.

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<sup>13</sup> ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Case N° 17, Advisory Opinion of 1 February 2011, paragraph 117.

<sup>14</sup> Ibidem, paragraph 115, citing ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, I.C.J. Reports 2010, p. 18, paragraph 197.

<sup>15</sup> ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Case N° 21, Advisory Opinion of 2 April 2015, paragraph 216.

<sup>16</sup> ITLOS, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, List of cases: Nos. 3 and 4, Order of 27 August 1999 (Provisional Measures), ITLOS Reports 1999, p. 280, at page 295, para. 70.

<sup>17</sup> PCA, *South China Sea Arbitration*, paragraph 959. In particular, the Tribunal considered that in this context “*Article 192 imposes a due diligence obligation to take those measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”*”.

<sup>18</sup> See in this regard: PCA, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Case N° 2011-03, Award of 18 March 2015, paragraph 538, in relation to Article 194(5) of UNCLOS, which can be considered as reflecting the broader obligation under Article 192 UNCLOS.

<sup>19</sup> PCA, *South China Sea Arbitration*, paragraph 941.

<sup>20</sup> The ICJ, *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at page 240, paragraph 29.

<sup>21</sup> See in this regard: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Biodiversity Strategy For 2030 Bringing Nature Back Into Our Lives, COM(2020) 380 final (**Annex 2**), page 2: “*nature-based solutions, such as*

23. Further, the content of this obligation of due diligence “*is informed by the other provisions of Part XII and other applicable rules of international law*”<sup>22</sup>. Indeed, “[t]he content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention”<sup>23</sup>.
24. Other rules of international law to be taken into account in defining the obligation of Article 192 UNCLOS include the principle of prevention of environmental harm, which according to the ICJ “*has its origins in the due diligence that is required of a State in its territory*” and constitutes customary international law<sup>24</sup>, and the precautionary principle<sup>25</sup>, as reflected notably in the Rio Declaration on Environment and Development<sup>26</sup>, which may lower the minimum threshold at which States are required to take action, albeit leaving them discretion as to what action is to be taken<sup>27</sup>.
25. Taken together, these principles notably require States to exercise their best efforts to formulate and implement “*policies designed to prevent significant transboundary harm or to minimize the risk thereof*”<sup>28</sup>, exercise prudence and “*review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge*”<sup>29</sup> according to their capabilities<sup>30</sup>.

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*protecting and restoring wetlands, peatlands and coastal ecosystems, or sustainably managing marine areas, forests, grasslands and agricultural soils, will be essential for emission reduction and climate adaptation”.*

<sup>22</sup> PCA, *South China Sea Arbitration*, paragraph 941.

<sup>23</sup> Ibidem, paragraph 942.

<sup>24</sup> ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 18, paragraphs 197 and 101.

<sup>25</sup> It is debated whether the precautionary principle constitutes customary international law. See in this regard ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Case No. 17, Advisory Opinion of 1 February 2011, paragraph 135.

<sup>26</sup> UN, Rio Declaration on Environment and Development, The United Nations Conference on Environment and Development, Rio de Janeiro, 1992, A/CONF.151/26 (Vol. I), Principle 15: “*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*”. Further, in the context of the 2012 review of the Agenda 21 of the 1992 Rio Conference (see UN, UNGA Res 66/288, 2012, Annex, paragraph 158), States committed “*to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development*”.

<sup>27</sup> In this regard see: J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford: Oxford University Press, 2017, page 32.

<sup>28</sup> International Law Commission, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries’, 2001, II/2 YB Intl L Commission 148, 155, commentary to Article 3, paragraph (10).

<sup>29</sup> Ibidem, commentary to Article 10, paragraph (7).

<sup>30</sup> See UN, Rio Declaration of 1992, Principle 15, according to which: “*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats*

26. Moreover, as concerns the protection and preservation of the marine environment vis-à-vis climate change and its effects, the general obligation enshrined in Article 192 and all relevant obligations in Part of XII UNCLOS should be informed by the commitments set out in the UNFCCC, the Paris Agreement, and the subsequent relevant decisions taken by the governing bodies of these treaties.
27. Indeed, the absence, in Article 192 UNCLOS, of any clause qualifying the type of harm against which the protection and preservation of the marine environment must be ensured means that under that provision States are required to take measures to protect and preserve the marine environment against *any kind of harm*, including harm caused by climate change, such as ocean warming, sea level rise and ocean acidification, which are caused by GHG emissions into the atmosphere.
28. In particular, because it reflects the most relevant expression of States' understanding of their legal obligations in respect of climate change, the Paris Agreement constitutes the primary instrument of international law governing climate change compliance with which is necessary and appropriate in order to respect the general obligation in Article 192 and with all obligations in Part XII of UNCLOS based thereon.
29. The relevance of the Paris Agreement in the context of the law of the sea has also been confirmed by the UN Secretary-General in his report on 'Oceans and the law of the sea', in which he noted that: *"Increased near-term action, reflected in nationally determined contributions, will be essential to reach the Paris Agreement targets, which include many possibilities for ocean-related action"*<sup>31</sup>.
30. Pursuant to Article 237(1) UNCLOS, the provisions of Part XII of UNCLOS *"are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention"*. This provision marks once again the openness of UNCLOS Part XII to other legal regimes and – as it is also the case for Article 31(3)(c) VCLT – suggests that its provisions are to be interpreted taking into account other relevant rules of international law applicable between its parties.
31. In so far as the Paris Agreement is considered to contribute to the protection of the marine environment (see also paragraph 63 below), it may be interpreted as *"concluded in furtherance of the general principles set forth in"* Part XII of UNCLOS within the meaning of Article 237 of UNCLOS. However, should one consider the Paris Agreement as not covered by Article 237, the preservation of the rights and obligations arising from the Paris Agreement would still be ensured by the more general conflict and articulation rules laid down in Article

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*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"*.

<sup>31</sup> UN General Assembly (UNGA), Report of the Secretary-General, *Oceans and the law of the sea*, A/76/311, 30 August 2021, paragraph 48.



311(2)<sup>32</sup> and (5)<sup>33</sup> UNCLOS, given that the Paris Agreement is fully compatible with UNCLOS.

32. Relevant rule of international law to inform the duty of due diligence as regards the specific aspect of the conservation of the living resources of the sea (paragraphs 21-22 above) should notably include those laid down in the Convention on Biological Diversity<sup>34</sup>, which aims at *“the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”*<sup>35</sup> and, as concern the marine environment specifically, requires its Parties to: *“implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea”*<sup>36</sup>.
33. Other provisions of Part XII of UNCLOS, in further detailing the general obligation in Article 192, likewise contribute to informing the content of that provision. Section 5 of Part XII notably establishes obligations specific to the different sources of marine pollution and will be discussed below in section D.2. On the other hand, the general obligation in Article 192 is informed by the horizontal obligations to act in good faith<sup>37</sup> and to cooperate internationally for the protection and preservation of the marine environment<sup>38</sup>.
34. Likewise, Article 192 UNCLOS is informed by the procedural obligations laid down in Section 4, which notably establish the requirement to carry out an environmental impact assessment (EIA) in cases where States *“have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”*<sup>39</sup>, along with the requirement to monitor *“the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment”*<sup>40</sup> and to report the results of such monitoring<sup>41</sup>.
35. In *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber of ITLOS found that *“[t]he obligation to*

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<sup>32</sup> Article 311(2) provides that: *“This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention”*.

<sup>33</sup> Article 311(5) provides that: *“This article does not affect international agreements expressly permitted or preserved by other articles of this Convention”*.

<sup>34</sup> UN, Convention on biological diversity, Rio de Janeiro, 5 June 1992, Treaty Series, vol. 1760, page 79.

<sup>35</sup> Article 1 of the UN Convention on biological diversity.

<sup>36</sup> Article 22(2) of the UN Convention on biological diversity.

<sup>37</sup> Article 300 of UNCLOS.

<sup>38</sup> Article 197 of UNCLOS.

<sup>39</sup> Article 206 of UNCLOS.

<sup>40</sup> Article 204 of UNCLOS.

<sup>41</sup> Article 205 of UNCLOS.

*conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention*<sup>42</sup>.

36. The EIA obligation in UNCLOS should be interpreted as applying to all planned activities, whether they take place within or beyond national jurisdiction, if they risk causing ‘substantial pollution of or significant and harmful changes to the marine environment’.
37. 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’ (the BBNJ Agreement) will contain a dedicated part on EIAs<sup>43</sup>. One of its objectives is to “[o]perationalize the provisions of the Convention on environmental impact assessment for areas beyond national jurisdiction by establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties”<sup>44</sup>. Therefore, once it has entered into force<sup>45</sup>, the BBNJ Agreement will further implement and strengthen the EIA obligation laid down in Article 206 of UNCLOS.
38. The EIA obligation in Article 206 of UNCLOS should be interpreted as covering all phases of a planned activity. Even if that obligation seems to primarily target individual activities, there is a clear relationship with strategic environmental assessments (SEAs) for plans and programmes relating to such activities. This is also reflected in the BBNJ Agreement, as one of the (other) objectives of the aforementioned EIA part is to “[p]rovide for strategic environmental assessments”<sup>46</sup> and it indeed contains a dedicated provision on SEA<sup>47</sup>.

D. Question (a): What are the specific obligations of State Parties to UNCLOS 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

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<sup>42</sup> ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, *ITLOS Reports 2011*, page 75, paragraph 242. In *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement of 20 April 2010, paragraph 204, the ICJ recognised that: “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”.

<sup>43</sup> See Part IV on Environmental Impact Assessments of 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.

<sup>44</sup> Article 27 (a) of the draft BBNJ Agreement.

<sup>45</sup> The BBNJ Agreement is to be adopted at the further resumed fifth session of 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, taking place on 19 and 20 June 2023 in New York (see UN, A/77/L.62, Draft decision on Intergovernmental conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction). After its adoption, the BBNJ Agreement will enter into force “120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession” (Article 68 of the draft BBNJ Agreement).

<sup>46</sup> Article 27 (d) of the draft BBNJ Agreement.

<sup>47</sup> Article 39 of the draft BBNJ Agreement.

through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

*1. The interpretation of the definition of 'pollution of the marine environment' and the ensuing obligations of States under Article 194 UNCLOS*

39. Question (a) partially reflects the language used in Article 194 of UNCLOS. While further developing the general principle enshrined in Article 192 and translating it into more concrete obligations for State Parties, the obligation under Article 194 is still very broad and open-ended in scope.
40. On the one hand, Article 194 explicitly applies to pollution of the marine environment *from any source*, and can be interpreted as applying to both transboundary and non-transboundary pollution<sup>48</sup>. On the other hand, it contains obligations of due diligence rather than of result, the content of which is highly general and to be defined as described in section C above in relation to Article 192. This notably means that Article 194 does not introduce a total prohibition of pollution of the marine environment nor a requirement to immediately cease all pollution – including in the form of GHG emissions – but rather obliges States to take the necessary measures and use their best efforts to prevent, minimize and gradually reduce GHG emissions, including by cooperating internationally and regionally, observing the precautionary principle and the requirement of good faith, carrying out EIAs when needed and using the best available technology, while retaining a certain margin of discretion as to the precise measures to be taken<sup>49</sup>.
41. However, Article 194 of UNCLOS goes beyond the obligation under Article 192, laying down further and more precise obligations for States, mostly as regards the prevention, reduction and control of pollution of the marine environment.
42. The notion of 'pollution of the marine environment' for the purposes of UNCLOS is defined in its Article 1(1)(4) of UNCLOS 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.
43. GHG emissions should be considered as falling within this definition in so far as they constitute substances which, when introduced in the marine environment, result or are likely to result in such deleterious effects as harm to living resources and marine life, hazards to human

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<sup>48</sup> See in this regard: J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford: Oxford University Press, 2017, page 27.

<sup>49</sup> See in this regard: J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford: Oxford University Press, 2017, page 29; and A. Boyle, "Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime", in *The Law of the Sea and Climate Change: Solutions and Constraints*, Johansen, E., Busch, S., and Jakobsen, I. (eds), Cambridge: Cambridge University Press, 2020, page 88.

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<sup>50</sup>.

44. The scientific evidence for the deleterious effects which GHG emissions have on the marine environment is well documented<sup>51</sup>. These effects include, notably, ocean warming, ocean acidification and, indirectly, sea level rise, which should therefore be considered as “*deleterious effects*” for the purposes of Article 1(1)(4) of UNCLOS.
45. Ocean warming harms the marine environment in a number of ways, for instance by contributing to “*changes in biogeography of organisms ranging from phytoplankton to marine mammals (high confidence), consequently changing community composition (high confidence), and in some cases, altering interactions between organisms (medium confidence)*”<sup>52</sup>. Ocean acidification, which is caused mainly by the ocean’s uptake of carbon dioxide from the atmosphere<sup>53</sup>, is also one of such effects in so far as, by determining a reduction of the ocean pH, causes inter alia the “*reduction of calcareous species and loss of ecosystem biodiversity and complexity shifting towards algae dominated habitats (high confidence)*”<sup>54</sup>.
46. Further, GHG emissions indirectly determine sea level rise<sup>55</sup>, which likewise constitutes a ‘deleterious effect’ for the purposes of Article 1(1)(4) UNCLOS in so far as it “*threaten[s]*

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<sup>50</sup> In this regard see: A. Boyle, “*Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime*”, in *The Law of the Sea and Climate Change: Solutions and Constraints*, Johansen, E., Busch, S., and Jakobsen, I. (eds), Cambridge: Cambridge University Press, 2020., page 85; N. L. Nguyen, *Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits, Ocean Development & International Law*, Vol. 52, Issue 4, 2021, 419-444, page 430,; and M. McCreath, , *The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes, Climate Change Litigation in the Asia Pacific*, Lin, J. and Kysar, D. (eds.), Cambridge: Cambridge University Press, pages 120-143, page 123.

<sup>51</sup> See for instance Intergovernmental Panel on Climate Change (IPCC), Synthesis Report of the IPCC Sixth Assessment Report (AR6), *Climate Change 2023 - Summary for Policymakers*, page 5, paragraphs A.1, A.2: “*Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence)*” and A.2.3 “*Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (high confidence)*”; see also: UNGA, Report of the Secretary-General on Oceans and the law of the sea, 30 August 2021, A/76/311; UNGA, Report of the Secretary-General on Oceans and the law of the sea, 28 March 2022, A/77/68; UNGA, A/RES/77/248, 30 December 2022,.

<sup>52</sup> IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate, Changing Ocean, Marine Ecosystems, and Dependent Communities — Special Report on the Ocean and Cryosphere in a Changing Climate*, 2019, Chapter 5, page 450.

<sup>53</sup> IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6) Longer Report, 2023, page 11, paragraph 2.1.2: “*It is virtually certain that human-caused CO2 emissions are the main driver of current global acidification of the surface open ocean*”

<sup>54</sup> IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate, Changing Ocean, Marine Ecosystems, and Dependent Communities — Special Report on the Ocean and Cryosphere in a Changing Climate*, 2019, Chapter 5, page 453.

<sup>55</sup> IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate - Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, 2019, Chapter 4, page 328: “*The larger the emissions the larger the risks associated with SLR*” and 340: “*Part of this regional sea level rise is due to global sea level rise of which a majority is attributable to anthropogenic greenhouse gas emissions (high confidence; Slangen et al.*

*coastal zones through a range of coastal hazards including (i) the permanent submergence of land by higher mean sea levels or mean high tides; (ii) more frequent or intense coastal flooding; (iii) enhanced coastal erosion; (iv) loss and change of coastal ecosystems; (v) salinisation*”<sup>56</sup>.

47. Therefore, GHG emissions should be considered as a form of pollution of the marine environment for the purposes of Part XII of UNCLOS. On this basis, Article 194 of UNCLOS should be read as requiring States to take all measures necessary to prevent, reduce and control pollution of the marine environment in the form of GHG emissions.
48. This interpretation is also in line with Article 31(1) of the VCLT. Indeed, based on the broad wording of the ‘pollution of the marine environment’ definition in Article 1(1)(4) and on the ‘General Principles for Assessment and Control of Marine Pollution’ which likely inspired it<sup>57</sup>, the context and the object and purpose of the conclusion of UNCLOS suggest that “*the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law*”<sup>58</sup>. Indeed, Principle 14 provided that: “*The development and implementation of control should be sufficiently flexible to reflect increasing knowledge of the marine ecosystem, pollution effects, and improvements in technological means for pollution control and to take into account the fact that a number of new and hitherto unsuspected pollutants are bound to be brought to light*”<sup>59</sup>.
49. The ICJ has indeed already applied the “*idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those*

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2016). *The remaining part of the regional sea-level rise in ocean basins is a combination of the response to anthropogenic GHG emissions and internal variability*”. See also, IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6) Longer Report, 2023, page 34: “*Ocean acidification (virtually certain), ocean deoxygenation (high confidence) and global mean sea level (virtually certain) will continue to increase in the 21st century, at rates dependent on future emissions.*”

<sup>56</sup> IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate - Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, 2019, Chapter 4, page 328, paragraph 4.1.3.

<sup>57</sup> It seems that the definition of pollution in Article 1(1)(4) of UNCLOS is based on a text developed by the Group of Experts on the Scientific Aspects of Marine Environmental Protection, whose intentions were reflected in the ‘General Principles for Assessment and Control of Marine Pollution’ developed by the UN Conference on the Human Environment, see: UN, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, A/Conf.48/14/Rev.1, 1972, Annex III. The 1972 UN Conference on the Human Environment recommended Governments to “*collectively endorse [those principles] as guiding concepts for the Conference on the Law of the Sea*” (Recommendation 92, UN, A/Conf.48/14/Rev.1, 1972). In this regard see also: J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford: Oxford University Press, 2017, pages 26-27; and A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary*, Beck, Hart, Nomos, 2017, page 23.

<sup>58</sup> ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, I.C.J. Reports 2009, p. 213, paragraph 64.

<sup>59</sup> UN Conference on the Human Environment, A/Conf.48/14/Rev.1 (1972).

*terms to have an evolving meaning*<sup>60</sup>. According to that Court, in such cases “*in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied*”<sup>61</sup>.

50. In the current historical context in which the deleterious effects of GHG emissions are significant and backed by scientific evidence, the definition of ‘pollution of the marine environment’ cannot but cover also these substances.
51. Crucially, this conclusion seems to have been endorsed by the State Parties to UNCLOS themselves, which at their latest meeting in June 2022 not only recognised the deleterious effects of climate change on the marine environment, but also explicitly linked such effects to the concept of ‘pollution’<sup>62</sup>.
52. On the other hand, the proposed interpretation of Article 1(1)(4) of UNCLOS is not put into question by the fact that most GHG emissions that reach the marine environment are produced on land and introduced first in the atmosphere. Indeed, Articles 1, 207 and 212 of UNCLOS take this aspect into account, defining ‘pollution of the marine environment’ as including the **indirect** introduction by man of energy or substances therein, and specifically regulating pollution of the marine environment from ‘land-based sources’ and ‘from or through the atmosphere’.
53. Question (a) specifically asks what State Parties’ obligations are “*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*” (emphasis added). In light of the above considerations, this question should be read as enquiring about State Parties’ obligations to prevent, reduce and control GHG emissions with a view to limiting the deleterious effects that result or are likely to result from climate change caused by such emissions to the marine environment.
54. Based on the foregoing, the contracting parties’ obligations to ‘protect and preserve the marine environment’ (Article 192 of UNCLOS) and to ‘prevent, reduce and control pollution of the marine environment’ (Article 194 of UNCLOS) in relation to the deleterious effects that result or are likely to result from climate change should be held to include a general obligation to protect the marine environment by preventing, reducing and controlling the deleterious effects of GHG emissions thereon and to take climate change mitigation measures.
55. As seen above, this general duty is chiefly informed by the UNFCCC and the Paris Agreement. In this regard it should be noted that, while the ultimate objective of the UNFCCC is the “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would*

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<sup>60</sup> ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, I.C.J. Reports 2009, p. 213, paragraph 66.

<sup>61</sup> Ibidem, paragraph 64.

<sup>62</sup> UN, *Report of the thirty-second Meeting of States Parties*, SPLOS/32/15, 5 July 2022, paragraph 80: “*Several delegations emphasized that contemporary issues, including those related to illegal, unreported and unregulated fishing, **the effects of climate change such as sea level rise, loss of biodiversity and pollution**, should be resolved within the framework of the Convention*” (emphasis added).

*prevent dangerous anthropogenic interference with the climate system*”<sup>63</sup>, the Paris Agreement specifically aims at the progressive *reduction* of GHG emissions<sup>64</sup> in order to achieve the long-term temperature goal.

56. Articles 192 and 194 of UNCLOS should further be held to include an obligation to take into account the specific effects of GHG emissions and climate change on the marine environment in the context of measures taken in application of the source-related obligations under Section 5 of Part XII of UNCLOS and the ‘monitoring and assessment’ obligations under Section 4 of Part XII of UNCLOS. For instance, ocean acidification, which is caused by carbon dioxide, and its further effects on the marine environment should be specifically taken into account in the implementation of obligations laid down in Article 207 and 212 of Section 5, and when carrying out environmental impact assessments pursuant to Article 206 UNCLOS<sup>65</sup>, so as to ensure that adequate action is taken to address it.

57. Because ocean acidification is not caused by all kinds of GHG emissions, but specifically by CO<sub>2</sub> emissions, complying with Articles 192 and 194 of UNCLOS and the ensuing obligations in sections 4 and 5 of Part XII of UNCLOS would thus require State parties to adopt measures to prevent, control and reduce CO<sub>2</sub> emissions specifically, in order to preserve and protect the marine environment against acidification.

## *2. The Obligations of States under Section 5 of Part XII as regards pollution of the marine environment from land-based sources and from or through the atmosphere*

58. The provisions of Section 5 of Part XII of UNCLOS operationalise, also through “*rules of reference*”, i.e. through the recourse to existing rules and standards contained in instruments external to UNCLOS<sup>66</sup>, the general obligations laid down in Articles 192 and 194 of UNCLOS. The analysis of both the types of obligations imposed on State Parties by UNCLOS and the rules that are being referenced are relevant to determine the exact scope of the UNCLOS obligation concerned. Therefore, the content of the obligations imposed on States under UNCLOS and their relationship with obligations laid down in other relevant international agreements and instruments would need to be clarified by the Tribunal when replying to the questions referred to it.

59. In the context of the source-specific obligations laid down in Section 5 of Part XII of UNCLOS, Articles 207 and 213 of UNCLOS on the one hand, and Article 212 and 222 of UNCLOS on the other, are the most relevant for pollution consisting in GHG emissions. Indeed, while GHG emissions may relate to various provision of Section 5, these fall predominantly under the category of ‘Pollution from land-based sources’, regulated by Articles 207 and 213 of UNCLOS, and of ‘Pollution from or through the atmosphere’, regulated by Articles 212 and 222 of UNCLOS.

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<sup>63</sup> Article 2 of the UNFCCC, emphasis added.

<sup>64</sup> See notably Articles 4 and 10(1) of the Paris Agreement.

<sup>65</sup> As stated above in paragraph 28, the Paris Agreement remains the necessary and appropriate climate change instrument to comply with UNCLOS Part XII, even with reference to the limited specific UNCLOS obligations regarding ocean acidification and EIA.

<sup>66</sup> See inter alia: N.L. Nguyen, *Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits*, *Ocean Development & International Law*, Vol. 52, Issue 4, 2021, page 421.

60. For instance, Article 211 of UNCLOS on ‘Pollution from vessels’ also relates to pollution in the form of GHG emissions. However, Article 212 of UNCLOS on ‘Pollution from or through the atmosphere’, which can also integrate a particular type of (air-borne) pollution from vessels, is specifically relevant in the context of the questions referred to the ITLOS<sup>67</sup>.
61. Articles 207 and 213 as well as Article 212 and 222 of UNCLOS, require States Parties (1) to adopt laws and regulations and take other necessary measures to prevent, reduce and control pollution of the marine environment from land-based and atmospheric sources, “*taking into account internationally agreed rules, standards and recommended practices and procedures*”<sup>68</sup>; (2) to “*endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment*” from land-based and atmospheric sources<sup>69</sup>; and (3) to enforce those national laws and regulations and implement those international rules and standards<sup>70</sup>.
62. While a number of international agreements<sup>71</sup> may constitute relevant ‘internationally agreed rules, standards and recommended practices and procedures’ for the purposes of Articles 207, 212, 213 and 222 of UNCLOS, as seen in relation to Article 192 and 194, the UNFCCC and the Paris Agreement constitute the most relevant international rules to be taken into account and that have been further established and implemented to prevent, reduce and control GHG emissions.
63. Indeed, while the Paris Agreement does not explicitly address the marine environment in its operative part, it does contribute to the prevention, reduction and control of pollution of the marine environment by requiring States to progressively reduce their overall GHG emissions, which are in turn responsible for deleterious effects on the marine environment. The aspiration of the Paris Agreement to control GHG emissions for the benefit of all ecosystems – including the marine ones – is reflected in its Preamble, which explicitly mentions “*the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity*”<sup>72</sup>. Further, the Conference of the Parties (COP) to the UNFCCC has acknowledged the need to increase actions in relation to ocean and climate change. The first ocean and climate change dialogue to strengthen mitigation and adaptation action in this

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<sup>67</sup> To this effect see for instance: *Ibidem*, page 431.

<sup>68</sup> Articles 207(1) and 212(1) of UNCLOS.

<sup>69</sup> Article 207(4) and 212(3) of UNCLOS. For pollution from land-based sources, Article 207(3) also requires State Parties to “*endeavour to harmonise their policies in this connection at the appropriate regional level*”.

<sup>70</sup> Articles 213 and 222 of UNCLOS.

<sup>71</sup> For instance the International Convention for the Prevention of Pollution from Ships (MARPOL) and the Convention on Biological Diversity. In particular, MARPOL Annex VI concerns the Prevention of Air Pollution from Ships. The latest amendments to MARPOL through MEPC Resolution.366(79) of 16 December 2022 provide rules for limiting GHG emissions encouraging Member States, together with port authorities and the shipping sector, to contribute to reducing GHG emissions from ships through shipping routes and maritime hubs consistent with international law. On the other hand, as mentioned above, Article 194(5) of UNCLOS goes beyond the issue of pollution, also providing for the protection and preservation of rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. In the context of Section 5 of Part XII of UNCLOS, the provisions of the Convention on Biological Diversity may in particular be relevant to implement Articles 207 and 212 of UNCLOS read in combination with Article 194(5) of UNCLOS.

<sup>72</sup> Paris Agreement, Recital (13). See also Articles 1(3) and 2 of the UNFCCC.



context was established at COP25<sup>73</sup>, while COP27 “[e]ncouraged Parties to consider, as appropriate, ocean-based action in their national climate goals and in the implementation of these goals, including but not limited to nationally determined contributions, long-term strategies and adaptation communications” and appointed facilitators to steer the implementation of the dialogues<sup>74</sup>.

64. On this basis, the specific content of the obligations under Articles 207, 212, 213 and 222 of UNCLOS as regards the effects of climate change should be interpreted as follows.
65. In order to comply with Articles 207(1) and 212(1) of UNCLOS, as well as with the more general obligations enshrined in Articles 192 and 194 of UNCLOS, States Parties must take into account the rules laid down in the Paris Agreement and in the UNFCCC when adopting national laws and regulations for the protection of the marine environment.
66. The obligation to ‘take into account’ external rules and standards does not result in the external rules and standards as such becoming binding on States Parties to UNCLOS, which hence do not become obliged to implement those external rules through UNCLOS, unless they have individually consented to be bound by those rules and standards<sup>75</sup>. Rather, this obligation establishes a minimum standard of conduct for States Parties, while leaving them a broad margin of discretion in deciding whether and how to implement these external rules when applying UNCLOS provisions<sup>76</sup>.
67. It follows that States Parties to UNCLOS adopting legislation which disregards the Paris Agreement would not act in conformity with the obligation to ‘take into account’ that Agreement and should thus be considered to be non-compliant with Articles 207 and 212 of UNCLOS and, hence, also with Articles 194 and 192 of UNCLOS.
68. At the same time, by referring to existing internationally agreed rules, UNCLOS does not impose on States Parties more stringent obligations than those already agreed in those rules. Specifically, as concerns obligations regarding climate change effects, it does not by itself impose more stringent commitments than those laid down in the UNFCCC and the Paris Agreement.
69. Indeed, the open-ended and evolutionary obligations of the Parties under the Paris Agreement are broad enough to provide for the level of due diligence which is necessary and appropriate to comply with Articles 192 and 194 of UNCLOS.
70. Articles 207(4) and 212(3) of UNCLOS lay down the obligation to endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment. States must then take into account the

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<sup>73</sup> UNFCCC COP, Decision 1/CP.25, Chile Madrid Time for Action, paragraph 31.

<sup>74</sup> UNFCCC COP, Decision 1/CP.25, Chile Madrid Time for Action, paragraph 31.

<sup>74</sup> UNFCCC COP, Decision 1/CP.27, Sharm el-Sheikh Implementation Plan, paragraphs 49-50.

<sup>75</sup> See in this regard J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford: Oxford University Press, 2017, page 68.

<sup>76</sup> In this regard see inter alia: L. N. Nguyen, Lan, *Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits*, *Ocean Development & International Law*, Vol. 52, Issue 4, 2021, 419-444, page 421..

results of such international cooperation when adopting national legislation pursuant to Articles 207(1) and 212(1) of UNCLOS.

71. Calling for the further development of national, regional and international rules, standards and recommended practices and procedures in the field of marine environmental protection to complement UNCLOS provisions, this obligation reflects the “*fundamental principle*” of international cooperation for the protection of the marine environment<sup>77</sup> which, as seen above, underpins the whole Part XII of UNCLOS.
72. As is the case for Articles 192 and 194 of UNCLOS, also this international cooperation obligation is conduct- rather than result-oriented, in that it only requires States to ‘endeavour’ to establish international rules, regardless of whether such end is actually met.
73. However, in Article 207(4) of UNCLOS this obligation is explicitly subject to the qualification that the characteristic regional features, the economic capacity of developing States and their need for economic development are to be taken into account. This cannot surprise, considering the relationship between the nature of the activities falling under the scope of Articles 207 of UNCLOS and the economic development of a State. Therefore, the different financial and technical resources at the disposal of a State can contribute to determine the precise standard of due diligence required by a given State under Article 207(4) of UNCLOS<sup>78</sup>. Further, the exercise of good faith, in accordance with Article 300 of UNCLOS, should be a relevant criterion for the assessment of compliance with this due diligence obligation.
74. In any case, the obligations under Articles 207 and 212 of UNCLOS are eminently open-ended, in so far as they require States to also “*take other measures as may be necessary to prevent, reduce and control*”, respectively, pollution from land-based sources and from or through the atmosphere<sup>79</sup>.
75. Finally, Articles 213 and 222 of UNCLOS lay down the obligation for States to enforce their laws and regulations adopted in accordance with Articles 207 and 212(1) and to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere.
76. These articles complete Articles 207 and 212 of UNCLOS, respectively, by laying down the provisions for their enforcement. Whereas Article 222 of UNCLOS concerns enforcement within the air space under a given State’s sovereignty and regarding vessels flying its flag or vessels and aircraft of its registry, Article 213 of UNCLOS concerns only sources of pollution based on the State’s land territory. Both provisions leave a broad discretion to States on how to actually enforce their laws and regulations.

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<sup>77</sup> ITLOS, *MOX Plant (Ireland v. United Kingdom)*, Order of 3 December 2001 (Provisional Measures), Case No. 10, paragraph 82.

<sup>78</sup> See in this regard: J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford: Oxford University Press, 2017, page 67.

<sup>79</sup> Articles 207(2) and 212(2) of UNCLOS.

77. As concerns Article 213 of UNCLOS, the obligation to enforce their laws and regulations adopted in accordance with Article 207 should be interpreted as requiring States to “*provide necessary technical know-how, appropriate management strategies and adequate administrative procedures to prohibit or permit, regulate and control sources of pollution based in its territory, including internal and territorial waters, rivers and estuaries, as well as pipelines and outfall structures*”<sup>80</sup>. Further, the obligation to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources should be interpreted to the effect that States must at least comply with the legally binding rules and standards they have already committed to in global or regional treaties<sup>81</sup>.
78. Because atmospheric pollution by vessels is (*inter alia*) a specific form of vessel-source pollution, enforcement activities in accordance with Article 222 of UNCLOS should take place consistently with Article 217 of UNCLOS on enforcement by flag States, and with Article 220 of UNCLOS on enforcement by coastal States.
79. Finally, Article 222 of UNCLOS requires States to enforce their laws and regulations adopted not only in accordance with Article 212(1), but also with other provisions of UNCLOS. These may for instance include measures taken in accordance with Articles 194 or 211 of UNCLOS<sup>82</sup>.

E. How the European Union is complying with Articles 192 and 194 and Articles 207, 212, 213 and 222 of UNCLOS

80. The European Union (the EU) , through its ambitious climate legislation and as an international cooperation leader in this field, is complying with and even adopting higher standards than those required under Articles 192, 194, 207, 212, 213 and 222 of UNCLOS.
81. To implement the Paris Agreement, and in particular the requirement to prepare, communicate and maintain successive nationally determined contributions (NDCs) in accordance with Article 4 thereof, the EU has indeed adopted or is in the process of adopting an ambitious legislative package to reduce, minimize and control GHG emissions and thereby limit climate change and its impacts, including on the marine environment. This notably includes:
- the EU Climate Law (**Annex 3**)<sup>83</sup>;
  - the Regulation establishing a carbon border adjustment mechanism (**Annex 4**)<sup>84</sup>;

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<sup>80</sup> A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary*, Beck, Hart, Nomos, 2017, page 1455.

<sup>81</sup> *Ibidem*. International agreements that may constitute relevant ‘internationally agreed rules, standards and recommended practices and procedures’ for the purposes of Articles 207, 212, 213 and 222 UNCLOS include those mentioned in footnote 71 above.

<sup>82</sup> *Ibidem*, page 1525.

<sup>83</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.7.2021, pages 1–17.

<sup>84</sup> Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023, p. 52–104.

- the Regulation on binding annual GHG emission reductions (**Annex 5**)<sup>85</sup>;
- the Renewable Energy Directive (**Annex 6**)<sup>86</sup>;
- the Energy Efficiency Directive (**Annex 7**)<sup>87</sup>;
- the Directive providing a framework for the taxation of energy products and electricity (**Annex 8**)<sup>88</sup>;
- the Alternative Fuels Infrastructure Directive (**Annex 9**)<sup>89</sup>;
- and the Regulation on deforestation-free products (**Annex 10**)<sup>90</sup>;
- the proposal to extend the Emission Trading System to the maritime shipping sector (**Annex 11**)<sup>91</sup>; and
- a series of proposals to foster the decarbonisation of maritime transport<sup>92</sup>.

82. Through this ambitious climate legislation, the EU is fully complying with its obligations under Part XII of UNCLOS to protect and preserve the marine environment, pursuant to Article 192 of UNCLOS; to take all measures, consistent with UNCLOS, which are necessary to prevent, reduce and control pollution of the marine environment in the form of GHG

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<sup>85</sup> Regulation (EU) 2018/842 of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, p. 26–42.

<sup>86</sup> Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328, 21.12.2018, p. 82–209.

<sup>87</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56.

<sup>88</sup> Directive (EC) 2003/96 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003, p. 51–70.

<sup>89</sup> Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure, OJ L 307, 28.10.2014, p. 1–20.

<sup>90</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206–247 (not yet into force at the time of writing).

<sup>91</sup> See: Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757, COM(2021)551.

<sup>92</sup> For instance: Proposal for a Regulation on the use of renewable and low-carbon fuels in maritime transport and amending Directive 2009/16/EC, COM(2021)562 final (**Annex 12**); the Proposal for a Regulation on the deployment of alternative fuels infrastructure and repealing Directive 2014/94/EU of the European Parliament and of the Council, COM(2021) 559 (**Annex 13**); Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity, COM(2021) 563 final (**Annex 14**); Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, COM/2021/557 final (**Annex 15**).

emissions, pursuant to Article 194 of UNCLOS; to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based and atmospheric sources taking into account relevant internationally agreed rules, standards and recommended practices and procedures, pursuant to Articles 207(1) and 212(1) of UNCLOS and; to adopt laws and regulations to implement those applicable international rules and standards, pursuant to Articles 213 and 222 of UNCLOS.

83. In addition to contributing to the EU's implementation of the Paris Agreement, the EU Marine Strategy Framework Directive (**Annex 16**)<sup>93</sup> aims to protect the marine environment from the impact of deleterious human activities, explicitly taking into account the EU's and Member States' obligations as State Parties to UNCLOS. On the other hand, the EU maritime transport legislation takes into account and implements the International Maritime Organization (IMO) legislative framework<sup>94</sup>, which also sets out relevant rules and standards for the purposes of Articles 212 and 222 of UNCLOS.
84. Further, the EU is also protecting and preserving the marine environment through legislation and policies aimed at fostering mitigation of and adaptation to climate change's effects on the marine environment by increasing its resilience. Notably, this includes the Habitats Directive (**Annex 21**)<sup>95</sup> and the EU Biodiversity Strategy (see annex 2)<sup>96</sup>, which aim to protect 30% of the seas of the EU Member States by 2030 while fostering the ambitious implementation of the Convention on Biological Diversity; and the Regulation on the conservation of fisheries resources and the protection of marine ecosystems through technical measures (**Annex 23**)<sup>97</sup>.

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<sup>93</sup> Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy, OJ L 164, 25.6.2008, p. 19–40, see in particular Recital (17).

<sup>94</sup> See: Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels (codification), OJ L 132, 21.5.2016, p. 58–78, which transposes into Union law the designation of sulphur oxides emission control areas under Annex VI to the MARPOL Convention, (**Annex 17**); Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, OJ L 123, 19.5.2015, p. 55–76 (**Annex 18**), which in Article 22 explicitly takes into account the IMO framework; Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, OJ L 76, 19.3.2018 (**Annex 19**); and Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC, OJ L 264, 9.10.2015, p. 1–5 (**Annex 20**), which in recital (4) explicitly takes into account the IMO GHG emission reduction strategy.

<sup>95</sup> Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7–50.

<sup>96</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380 final. See also: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a new approach for a sustainable blue economy in the EU Transforming the EU's Blue Economy for a Sustainable Future, COM/2021/240 final (**Annex 22**).

<sup>97</sup> Regulation (EU) 2019/1241 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005, OJ L 198, 25.7.2019, p.

85. Moreover, the EU Adaptation Strategy (**Annex 25**)<sup>98</sup> aims to increase the resilience of coasts and marine environment by improving the knowledge of local impacts of climate change to minimize material damage thereof, by promoting nature-based solutions to enhance coastal defence and by engaging in a global cooperation to integrate climate considerations for international resources managed by the EU jointly with other partners, such as the protection of biodiversity beyond areas of national jurisdiction under the UN Convention on the Law of the Sea.
86. Moreover, the EU fully complies with the obligation, in Article 207(4) and 212(3) of UNCLOS, to endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment in the form of GHG emissions with a view of limiting the deleterious effects that result or are likely to result from climate change.
87. First and foremost, the EU has actively engaged in the negotiations of the Paris Agreement and promptly ratified it along with all its Member States.
88. Further, the EU has taken an active role in the negotiation of the above-mentioned BBNJ Agreement. The EU will contribute to ensuring a swift achievement of the ratification threshold necessary for the entry into force of the Agreement<sup>99</sup>, and *“has pledged €40 million as part of a Global Ocean Programme and has invited members of the High Ambition Coalition to do the same within their capabilities”* in order to support developing countries prepare for the implementation of the Agreement<sup>100</sup>.
89. Likewise, the EU is a Contracting Party to less recent treaties for the protection of the marine environment from land-based or atmospheric pollution, such as the Convention for the protection of the marine environment of the north-east Atlantic<sup>101</sup> and the Barcelona Convention<sup>102</sup> and its Protocol on Pollution from Land-Based Sources<sup>103</sup>.
90. As concerns the shipping sector, despite not being able to become a Party to the relevant IMO conventions, the EU endeavoured to develop those instruments both through the European Commission’s observer status and by coordinating positions and submissions of Member

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105–201. See also: Council Regulation (EC) No 734/2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears, OJ L 201, 30.7.2008, p. 8–13 (**Annex 24**).

<sup>98</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Forging a Climate-Resilient Europe - the new EU Strategy on Adaptation to Climate Change, COM/2021/82 final.

<sup>99</sup> Pursuant to its Article 61, the BBNJ Agreement will enter into force *“120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession”*.

<sup>100</sup> European Commission, Protecting the ocean, time for action (europa.eu), [https://oceans-and-fisheries.ec.europa.eu/ocean/international-ocean-governance/protecting-ocean-time-action\\_en](https://oceans-and-fisheries.ec.europa.eu/ocean/international-ocean-governance/protecting-ocean-time-action_en).

<sup>101</sup> Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic, OJ L 104, 3.4.1998, p. 1–1 (**Annex 26**).

<sup>102</sup> Council Decision 77/585/EEC of 25 July 1977 concluding the Convention for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of the pollution of the Mediterranean Sea by dumping from ships and aircraft, OJ L 240, 19.9.1977, p. 1–2 (**Annex 27**).

<sup>103</sup> Council Decision 83/101/EEC of 28 February 1983 concluding the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, OJ L 67, 12.3.1983, p. 1–2 (**Annex 28**).

States in areas of EU competence. Notably, it actively supported amendments to the MARPOL Convention so as to increase the emission reduction targets reflected therein<sup>104</sup>.

## II. Final remarks

91. As can be concluded from the above, UNCLOS lends itself to an evolutionary interpretation, which also takes into account other international legal instruments.
92. Based on this premise, if ITLOS decides to respond to the questions in the form submitted to it, the Advisory Opinion should interpret UNCLOS as laying down obligations to protect and preserve the marine environment and prevent, reduce and control pollution thereof also as regards the deleterious effects of climate change caused by anthropogenic GHG emissions.
93. The Advisory Opinion should further consider the Paris Agreement as the most relevant instrument to inform the due diligence obligation set out in Articles 192 and 194 of UNCLOS and, on the other hand, as the most relevant source of internationally agreed rules, standards, recommended practices and procedures to be taken into account, established and implemented in relation to land-based and atmospheric pollution for the purposes of Articles 207, 212, 213 and 222 of UNCLOS.
94. Finally, the Advisory Opinion should also clarify that such references to internationally agreed rules require to consider the Paris Agreement as the most relevant standard necessary and appropriate to comply with Part XII of UNCLOS as regards the deleterious effects of climate change, without imposing more stringent obligations than those already agreed thereunder.

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<sup>104</sup> See for instance: EU submissions proposing a revision of the Initial IMO Strategy on reduction of GHG emissions from ships to increase its level of ambition (ISWG-GHG 13/3/1) (**Annex 29**) and on technical measures to support the uptake of sustainable ship fuels (Proposal for a GHG Fuel Standard - ISWG-GHG 12/3/3) (**Annex 30**); Council Decision (EU) 2022/2078 of 24 October 2022 on the position to be taken on behalf of the European Union within the International Maritime Organization's Maritime Safety Committee during its 106th session and within the International Maritime Organization's Marine Environment Protection Committee during its 79th session as regards the amendment of the International Convention for the Safety of Life at Sea (SOLAS), of the International Code on the Enhanced Programme of Inspections during Surveys of Bulk Carriers and Oil Tankers, 2011 (the '2011 ESP Code') and of Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL), OJ L 280, 28.10.2022, (**Annex 31**).

**CHAPTER IV**

**SUMMARY AND CONCLUSION**

95. In sum, the European Union respectfully proposes to answer the questions referred by the COSIS along the lines set out above.

The European Commission, on behalf of the European Union



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