

International Tribunal for
the Law of the Sea



Tribunal international du
droit de la mer



**Durham Law School – Centre for Sustainable Development Law and Policy
Inaugural Lecture**

**Request for an Advisory Opinion submitted by COSIS, Advisory Opinion 21 May 2024
Ida Caracciolo**

Outline



1. The request by COSIS
2. Relationship between UNCLOS and external rules on climate change
3. Pollution from GHGs as a form of marine pollution (Art. 1(1)(4) UNCLOS)
4. The obligation to prevent, reduce and control pollution of the marine environment from GHG emissions (Art. 194(1) UNCLOS)
5. The obligation to ensure that activities under States' jurisdiction or control do not cause damage by GHGs pollution to other States and their environment (Art. 194(2) UNCLOS)
6. The obligations to cooperate to protect the marine environment from GHGs (Art. 197 UNCLOS)
7. The obligation to conduct EIA (Art. 206 UNCLOS)
8. The obligations to protect and preserve the marine environment and rare and fragile ecosystems from the negative effects (Arts. 192 and 194(5) UNCLOS)
9. ITLOS AO vis-à-vis 2025 ICJ AO concerning UNCLOS interpretation



The Request by COSIS

Questions submitted to the ITLOS by COSIS:

*“What are the **specific obligations** of State Parties to the United Nations Convention on the Law of the Sea (‘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?”*

Issues:

- Meaning of «**specific obligations**» under the UNCLOS
- **Responsability** included or not
- **Sea level rise** included or not



UNCLOS and external rules

Existence of sets of international rules on climate change
Delicate issue of their legal relationship with UNCLOS

Applicable law (Art. 293, 1 UNCLOS)

“A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention”

Interpretative mechanisms

- Article 31, 3(c) VCLT (general rule on interpretation of treaties) requires *inter alia* that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties. Treaty rules must not be interpreted in isolation.
- Rules of reference in the UNCLOS referring to external rules. These rules of reference employ different terms and have both a different scope and legal effect.



UNCLOS and external rules

- **Article 237 UNCLOS** that clarifies the relationship of Part XII of UNCLOS with other treaties relating to the protection and preservation of the marine environment. It reflects the need for consistency and mutual supportiveness between the applicable rules. Part XII **is without prejudice** to the specific obligations of States under special conventions and agreements concluded previously in this field and to agreements which may be concluded in furtherance of the general principles of UNCLOS. Such specific obligations **should be carried out in a manner consistent** with the general principles and objectives of UNCLOS.

ITLOS position: UNCLOS openness and its provisions and external rules should, to the extent possible, be interpreted consistently and Paris Agreement no *lex specialis*

Pollution to the marine environment by GHGs is pollution under UNCLOS

Article 1(1)(4) UNCLOS

“For the purposes of this Convention ... “pollution of the marine environment” means 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.”

ITLOS position on GHGs pollution and meaning of:

- Introduction
- By man
- Directly/indirectly
- Substances/Energy
- Deleterious effects



Obligation to prevent, reduce and control pollution of the marine environment from GHGs (Art. 194, 1)

Article 194(1) *Measures to prevent, reduce and control pollution of the marine environment*

*“1. States shall take, individually or jointly as appropriate, **all measures** consistent with this Convention that are **necessary** to prevent, reduce and control pollution of the marine environment **from any source**, using for this purpose the **best practicable means at their disposal and in accordance with their capabilities**, and they shall endeavour to harmonize their policies in this connection. (...)”*

ITLOS position:

Obligation to prevent, reduce and be appreciated on the basis of the scientific assessment that, even if anthropogenic GHG emissions were to cease, the deleterious effects on the marine environment would nevertheless continue owing to the extent of GHGs already accumulated in the atmosphere.



Obligation to prevent, reduce and control pollution of the marine environment from GHGs (Art. 194, 1)

Contents of the obligation

Adoption of all necessary measures with a view to

- reducing and controlling existing marine pollution from such emissions
- and eventually preventing such pollution from occurring at all
- not the immediate cessation of marine pollution from anthropogenic GHG emissions

Individually or jointly as appropriate.

- No priority between an individual action and a joint action.
- Given the global and transboundary nature of GHGs pollution, joint actions should be actively pursued

Necessary as indispensable measures and also other measures which make it possible to achieve the objective



Obligation to prevent, reduce and control pollution of the marine environment from GHGs (Art. 194, 1)

Measures to be determined **objectively**, considering:

- The science. However, scientific certainty is not required and relevant role of the precautionary approach
- Relevant international rules and standards and specifically global temperature goal and the timeline for emission pathways in the Paris Agreement. However the obligation under article 194, 1, would not be satisfied simply by complying with the obligations and commitments under the Paris Agreement
- Other factors relevant “**the best practicable means at their disposal**” and “**in accordance with their capabilities**”.



Obligation to prevent, reduce and control pollution of the marine environment from GHGs (Art. 194, 1)

Relationship with the principle of common but differentiated responsibilities and respective capabilities in the UNFCCC and the Paris Agreement.

ITLOS position:

Article 194, 1 contains some elements common to this principle.

Those measures to reduce anthropogenic GHG emissions causing marine pollution may differ between developed States and developing States.

It is not only for developed States to take action, even if they should “continue taking the lead”

All States must make mitigation efforts

Objective of the obligation: not to guarantee the prevention, reduction and control of marine pollution at all times but to **make their best efforts to achieve such result**

Obligation to prevent, reduce and control pollution of the marine environment from GHGs (Art. 194, 1)



Obligation of conduct interconnected with that of **due diligence**, namely to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective (para. 235).

Standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies.

- **Several factors** to be considered, such as scientific and technological information, relevant international rules and standards, the risk of harm and the urgency
- It **may change** over time, given that those factors constantly evolve
- **Standard stringent.** However, its implementation may vary according to States' capabilities and available resources. Nonetheless, implementing the obligation of due diligence requires even the latter State to do whatever it can in accordance with its capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions



Obligation to ensure that activities under States' jurisdiction/control do not to cause damage by GHGs to other States (Art. 194, 2)

Article 194 *Measures to prevent, reduce and control pollution of the marine environment*

“(...) 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.(...)”



Obligation to ensure that activities under States' jurisdiction/control do not to cause damage by GHGs to other States (Art. 194, 2)

Obligation close to that of «[harm prevention](#)»

Obligation with respect to activities carried out by [both public and private actors](#)

Broad concept of «jurisdiction and control»

Inclusion of actual and potential pollution.

Possibility of differences between the scope and content of necessary measures in accordance with the [availability of means and capabilities](#).

Implementation may vary in relation to several factors, including the capabilities of each State

[Obligation of conduct](#) and strict standard of due diligence which varies according to certain factors

The obligations to cooperate to protect the marine environment from GHGs (Art. 197)



Article 197 Cooperation on a global or regional basis

*“States shall **cooperate** on a **global basis** and, as appropriate, on a **regional basis**, **directly or through competent international organizations**, in **formulating and elaborating international rules, standards and recommended practices and procedures** consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”*

- Obligation aimed at the formulation and elaboration of rules, standards and practices and procedures for the protection and preservation of the marine environment,
- Large degree of **flexibility**
- Broad meaning of «**competent international organizations**»
- Obligation **of conduct and relevance of due diligence** to be assessed by reference to the efforts made by States to formulate and elaborate international rules, standards and recommended practices and procedures
- **Ongoing nature** of the obligation
- **Customary** in nature



The obligation to conduct EIA (Art. 206)

Article 206 Assessment of potential effects of activities

«When 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, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.»

Obligation

- requiring States to assess the potentially harmful effects of a planned activity prior to its execution and to disseminate the obtained results thereafter
- essential part of a comprehensive environmental management system
- procedural in nature
- customary in nature
- encompasses the duty of vigilance and prevention



The obligation to conduct EIA (Art. 206)

Art. 206 indicates some components of the obligation

- “**planned activities**”, term implying that EIA is to be conducted prior to the implementation of a project
- project by **private or public entities**
- upon State having within its **jurisdiction or under its control** the planned activity
- the term “ **reasonable grounds for believing**” implicate some discretion by State. However, limited by the fact that it is required to determine whether an activity under its jurisdiction or control “may cause substantial pollution of or significant and harmful changes to the marine environment” (matter of objective determination)
- **two alternative thresholds** for subjecting a planned activity to an environmental impact assessment: one for “substantial pollution” and another for “significant and harmful changes”



The obligation to conduct EIA (Art. 206)

Content and procedure of an EIA are to be determined by each State in its legislation

- **broad wording of Art. 206** not precluding EIA from embracing not only the specific effects of the planned activities but also the cumulative impacts of these and other activities on the environment.
- In the context of pollution of the marine environment from GHGs planned activities may not be environmentally significant if taken in isolation, whereas they may produce **significant effects if evaluated in interaction with other activities**
- Not precluded the EIA from including the **socio-economic impacts** of the activities concerned
- take note to the **BBNJ**

Other obligations in UNCLOS to monitor ongoing activities (Art. 204)

Obligations to protect and preserve the marine environment from GHGs (Art. 192)



Article 192 *General obligation*

*“States have the obligation to **protect** and **preserve** the marine environment.”*

2 Elements:

- Obligation linked to the duty to prevent, or at least mitigate, environmental harm
- Obligation to preserve the marine environment, which entails maintaining ecosystem health and the natural balance of the marine environment

Open-ended nature of the obligation that can be invoked to combat any form of degradation of the marine environment

No indication of how the marine environment must be protected and preserved against present and future harms.

- Need to refer to other provisions of the UNCLOS and external rules (eg. FSA)
- Importance of the international instruments on climate change

Obligation **of conduct and relevance of due diligence**. Stringent standard



Obligations to protect and preserve the marine environment from GHGs (Art. 192)

Measures are aimed at

- **preservation**, including restoring marine habitats and ecosystems where the process of reversing degraded ecosystems is necessary in order to regain ecological balance
- **conservation** including **mitigation, adaptation and resilience building** and **maintaining living resources**
- No definition of adaptation in UNCLOS. Reference to Paris Agreement. Conformity of relevant rules in the Paris Agreement with UNCLOS



Obligations to protect and preserve rare or fragile ecosystems (etc.) from GHGs (Art. 194, 5)

Article 194

“(...) 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”

- The process of identifying “rare or fragile ecosystems” requires a case-by-case review.
- Under article 2 of CBD: “habitat” is “the place or type of site where an organism or population naturally occurs.”
- The classification of species in the appendices to CITES provides guidance in interpreting the term “depleted, threatened or endangered species”
- No full State discretion in the adoption of measures to implement the obligation but necessity to take into account the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole

ICJ Advisory Opinion of 23 July 2025 on obligations of States with respect to climate change



UNCLOS as one of the instruments **most directly relevant** to the questions submitted

To ascribe “**great weight to the interpretation adopted by the Tribunal**”

Anthropogenic greenhouse gas emissions fall within the **definition of marine pollution** under Article 1, 1, 4, of UNCLOS, which means that Part XII of UNCLOS on the protection of the marine environment is applicable to climate governance

States have both positive and negative obligations under UNCLOS: they must take active steps to protect and preserve the marine environment (Article 192) and avoid degrading it. This includes taking all necessary measures to prevent, reduce, and control marine pollution (Article 194), even if complete prevention is not immediately achievable.

Stringent standard of due diligence, requiring States to act based on the best available science and their capabilities. It also underscored States’ obligations to cooperate under Article 197, to conduct environmental impact assessments when planned activities pose significant risks under Article 206, and to support research and data sharing under Articles 200-201

ICJ Advisory Opinion of 23 July 2025 on obligations of States with respect to climate change



Sea level rise:

- No obligation under UNCLOS upon States “to update their charts or lists of geographical co-ordinates that show the baselines and outer limit lines of their maritime zones once they have been duly established in conformity with the Convention”
- Once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood”
- Obligation of cooperation to take “appropriate measures to address the adverse effects”
- Obligation to achieve equitable solutions, taking into account the rights of affected States and those of their populations



Thank you