INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

(CASE NO. 31)

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

16 JUNE 2023

1. Introduction

1.1 In its Decision 2022/4, adopted on 26 August 2022, the Commission of Small Island States on Climate Change and International Law ('the Commission') decided to request the International Tribunal for the Law of the Sea ('Tribunal') to render an advisory opinion on the following questions ('Request'):

> *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?*

1.2 In its Order 2022/4 of 16 December 2022, the Tribunal invited, in accordance with article 133, paragraph 3, of the Rules of the Tribunal ('Rules'), the Parties to the United Nations Convention on the Law of the Sea ('Convention') to present written statements on the questions submitted to the Tribunal for an advisory opinion.

1.3 As the Kingdom of the Netherlands ('the Netherlands') is a State Party to the Convention, it wishes to avail itself of the opportunity afforded by the Tribunal to make a written statement pertaining to the questions in the Request.

1.4 The purpose of this written statement is only to address the substance of the Request. For the purposes of the present advisory proceedings, the Netherlands leaves it to the discretion of the Tribunal to satisfy itself that it has advisory jurisdiction and that it may exercise this jurisdiction with respect to the present Request, in accordance with article 21 of the Statute of the International Tribunal for the Law of the Sea ('the Statute') and article 138 of the Rules.

2. Climate change, ocean acidification and the marine environment

2.1 The Netherlands recognizes climate change as one of the three planetary crises, in addition to air pollution and biodiversity loss, including through ocean acidification. The Netherlands believes that these three crises and their deleterious effects need to be addressed in a holistic and integrated manner. This should be the general framework for all international efforts to address these planetary crises.

2.2 The questions posed by the Commission revolve around climate change, ocean acidification and the marine environment. The Commission refers 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".

2.3 With respect to climate change science, the Netherlands takes the work of the Intergovernmental Panel on Climate Change ('IPCC') as the basis for this written statement. On the basis of the IPCC's work, the Netherlands understands the relation between the three ocean threats outlined in the Request as follows.

2.4 The absorption by the oceans of significant amounts of the increase in energy flux forcing in the atmosphere resulting from greenhouse gases ('GHG') emissions has mitigated the deleterious effects of climate change at a global level. According to the IPCC, "ocean warming dominates the increase in energy stored in the climate system".[1]

2.5 The oceans are an important carbon sink, having absorbed 20-30 percent of total anthropogenic carbon dioxide (CO_2) emissions.[2] The absorption of CO_2 by the oceans changes the chemistry of the seawater resulting in ocean deoxygenation. As a result, seawater contains more dissolved CO_2, causing ocean acidification.[3] This also impacts the ability of the ocean to absorb CO_2 and regulate climate systems.

2.6 Both these processes, i.e. the absorption of energy leading to ocean warming (see paragraph 2.4 above) as well as the process of the absorption of CO_2 resulting in ocean acidification (see paragraph 2.5 above), negatively impact marine ecosystem structures, biomass production and species composition. For example, both processes result in coral bleaching, impacting the species relying on coral for food and habitat. More specifically, in relation to the warming of the ocean, species are forced to move to cooler water at higher latitudes where they are prone to fishing and predation.[4] Furthermore, ocean warming results in thermal expansion, increased stratification,[5] deoxygenation, and the melting of sea ice.[6]

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[1] IPCC, 2013, 'Summary for Policymakers' in T.F. Stocker, D. Qin, G.-K Plattner et al. (eds), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 8.
[2] IPCC, 2019, 'Summary for Policymakers' in H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte et al. (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (hereafter: 'IPCC, 2019'), p. 9.
[3] IPCC, 2014, O Hoegh-Guldberg, R. Cai, E.S. Poloczanska, et al. (eds) *The Ocean. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 1673.
[4] IPCC, 2019, p. 52.
[5] IPCC, 2019, p. 9.
[6] IPCC, 2019, p. 52.

2.7 Climate change induced sea level rise is caused by thermal expansion of ocean water and ocean mass gain, together with land and polar ice sheet melt.[7] The combination of the change of the sea level and extreme sea level events, such as tides, surges and waves, causes coastal impacts, such as erosion, leading to the degradation of water quality and the reduction of light penetration necessary for photosynthesis as well as the increase of sedimentation that smothers and stresses coral animals.[8] Sea level rise therefore poses a significant threat to coastal systems and to low-lying areas around the world through inundations, the erosion of coastlines and the contamination of freshwater reserves and food crops.[9]

2.8 Climate change itself is defined in the United Nations Framework Convention on Climate Change ('UNFCCC') as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".[10] This relates to "changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare".[11] This would include changes in the marine environment and marine biota.

2.9 Key here is that it is human activity that directly or indirectly causes the climate to change. Such activities relate mainly to GHG emissions. Even though many of the GHG emissions occur naturally, observed increases in well-mixed GHG concentrations since around 1750 are unequivocally caused by human activities. Since 2011, concentrations have continued to increase in the atmosphere, reaching annual averages of 410 parts per million (ppm) for CO_2, 1866 parts per billion (ppb) for methane, and 332 ppb for nitrous oxide in 2019.[12] As such, human activities significantly contribute to the increase of concentrations of, in particular, CO_2, methane, nitrous oxide, and fluorinated gases, in the atmosphere.[13] Other findings of the IPCC demonstrate that "emissions of greenhouse gases from human activities are responsible for approximately 1.1°C of warming since 1850-1900" and that, averaged over the next 20

[7] *Brief on the Second World Ocean Assessment and Climate Change in the Ocean, Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects* (2022), para. 8.
[8] Report by the PEW Center on Global Climate Change Law, 'Coastal and Marine Ecosystems & Global Climate Change: Potential effects on U.S. Resources' (August 2002), p. 5.
[9] *Brief on the Second World Ocean Assessment and Climate Change in the Ocean, Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects* (2022), para. 10.
[10] Article 1(2) of the United Nations Framework Convention on Climate Change (1992) (hereafter: 'UNFCCC').
[11] Article 1(1) of the UNFCCC.
[12] IPCC, 2021, 'Summary for Policymakers' in V. Masson-Delmotte et al. (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (AR6)* (hereafter: 'IPCC, 2021, 'Summary for Policymakers'), p. 4.
[13] ibid.

years, global temperature is expected to reach or exceed 1.5°C of warming.[14] Several human activities, particularly the use of fossil fuels in energy, industry and transport, land use and land use change (including agriculture and deforestation), cause these concentrations to increase.[15] These human activities also, but certainly not exclusively, relate to the maritime and aviation sector.[16] Many of these activities are internationally regulated by legal instruments and frameworks and global, regional, subregional and sectoral bodies.

3. The open and integrative character of the Convention

3.1 The Convention has been designed as a 'living treaty' with a 'framework' nature.[17] The intention of the drafters was to ensure coordination and harmonization between the Convention and other relevant (existing or future) legal instruments and frameworks, including integrating these different legal regimes to substantiate its own provisions. This open and integrative character of the Convention, including the general obligation to protect and preserve the marine environment, and the ensuing relationship between the Convention and relevant legal instruments and frameworks, should be the point of departure when considering the questions in the present Request.

3.2 The open and integrative character of the Convention and its provisions is also reflected in Part XII of the Convention, which deals with the protection and preservation of the marine environment. This is expressed, in particular, through the following three (sets of) provisions. First, articles 192 and 194 of the Convention are 'general' provisions that are characterised by their broad formulations and due diligence nature. Article 192 "is informed by the other provisions of Part XII and other applicable rules of international law".[18] Second, Section 5 of Part XII of the Convention includes various provisions that refer to external rules, i.e. commitments outside the Convention concerning the protection and preservation of the marine environment, including the prevention, reduction and control of pollution. Through these various provisions external rules and standards are incorporated into the Convention. These provisions may be described as 'rules of reference'. As such, they constitute another mechanism for establishing a relationship between the Convention concerning the protection and preservation of the marine environment and external rules. Third and finally, article 237

[14] IPCC, 2021, 'Summary for Policymakers', p. 3-31.
[15] IPCC, 2022, 'Summary for Policymakers' in H.-O. Pörtner, D.C. Roberts, M. Tignor et al. (eds), *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, section B2.
[16] ibid.
[17] See for example *Virginia Commentary on the United Nations Convention on the Law of the Sea* (1982) (hereafter 'Virginia Commentary), Volume IV, p. 36-37.
[18] *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCCA Case No. 2013-19, Award (12 July 2016) (hereafter: '*South China Sea Arbitration*'), para. 941.

of the Convention deals more generally with the relationship between Part XII of the Convention and external rules. It has been noted that this provision "provides a mechanism for integrating the detailed substantive provisions of other legal instruments into the general law of the sea, within the overall framework of Part XII".[19]

4. Articles 192 and 194 of the Convention

4.1 The obligations of all Parties with respect to the protection and preservation of the marine environment are embedded in Part XII of the Convention. Article 192 of the Convention establishes the general obligation of Parties to protect and preserve the marine environment. The Netherlands notes that the Arbitral Tribunal in the *South China Sea Arbitration* has elaborated on and clarified articles 192 and 194, including the relation of these provisions to other provisions, such as article 237 of the Convention. As explained by the Arbitral Tribunal in the *South China Sea Arbitration*, article 192 "imposes a duty on Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law".[20] As such, article 192 of the Convention is an essential component of the comprehensive approach in Part XII to the protection and preservation of the marine environment. In this respect, article 192 of the Convention has been described as "the binding element or organic link between the general treaty and particular treaties or national measures dealing with individual aspects of marine pollution, [that helps] to establish a general commitment to the elaboration of and adherence to such particular treaties".[21] This includes providing an 'environmentally-oriented basis' for the work of other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

4.2 The general obligation of article 192 of the Convention, which reflects customary international law in the view of the Netherlands, applies to all marine areas, that is, both within and beyond national jurisdiction. In this respect, the Netherlands notes that the Arbitral Tribunal in the *Iron Rhine Arbitration* found that where significant harm to the environment may be caused, "there is a duty to prevent, or at least mitigate, such harm".[22] In the context of the *Iron Rhine Arbitration*, this duty applies to areas within the national jurisdiction of States and, hence, to marine areas within the national jurisdiction of States.[23] In the context of the

[19] *Virginia Commentary*, Volume IV, p. 423.
[20] *South China Sea Arbitration,* para. 941.
[21] Working paper of Canada introduced in Sub-Committee III at the 1972 session of the Sea-Bed Committee, M.H. Nordquist, S. Rosenne and S.N. Nandan, *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV* (Martinus Nijhoff 1985), p. 37.
[22] *In the Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway (the Kingdom of Belgium v. the Kingdom of the Netherlands)* PCA Case No. 2003-02, Award (24 May 2005), paras. 59.
[23] ibid., paras. 222, 223.

marine environment beyond national jurisdiction, the Arbitral Tribunal in the *South China Sea Arbitration*[24] noted that

> the corpus of international law relating to the environment, which informs the content of article 192 of the Convention, requires that States 'ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control'.[25]

The Arbitral Tribunal further noted that article 192 of the Convention sets forth various obligations that can be characterized as due diligence obligations.[26]

4.3 The Arbitral Tribunal in the *South China Sea Arbitration* clarified that the general obligation enshrined in article 192 of the Convention includes both positive and negative obligations. It noted that this provision "extends both to 'protection' of the marine environment from future damage and 'preservation' in the sense of maintaining or improving its present condition".[27] Article 192 thus entails the positive obligation to "take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment".[28] It follows that the content of the general obligation of article 192 is informed by the relevant, more specific, applicable corpus of international environmental law, including, but not limited to, the precautionary principle and the obligation to conduct environmental impact assessments.

4.4 As stated by the Arbitral Tribunal in the *South China Sea Arbitration*, "the 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".[29]

4.5 Article 194 of the Convention establishes the obligation for Parties to – individually or collectively – take measures to prevent, reduce and control pollution of the marine environment. Article 194 of the Convention in general does not differentiate between different sources of pollution. Rather, it refers to pollution "from any source". On the basis of article 194, paragraph 2, of the Convention, Parties are obliged to take all measures that are necessary

[24] *South China Sea Arbitration*, para. 941.
[25] *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, pp. 241-242, para. 29.
[26] See for example *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCCA Case No. 2013-19, Award (12 July 2016), paras. 956, 959, 964, 971, 974.
[27] ibid., para. 941.
[28] *South China Sea Arbitration,* para. 941.
[29] ibid., para. 942.

to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other States and their environment. Furthermore, when pollution does occur, Parties need to ensure that such pollution does not spread beyond the areas where they exercise sovereign rights in accordance with the Convention. Lastly, article 194, paragraph 3, of the Convention stipulates what such measures shall entail. This paragraph relates to pollution from specific sources, such as pollution from vessels and from installations and devices, which will be addressed below.

4.6 The pollution of the marine environment as referred to in article 194 of the Convention is defined in article 1, paragraph 4, of the Convention 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.

4.7 The relevant elements in the above definition with respect to the present Request are the references to the direct or indirect introduction by man of energy (referred to in paragraph 2.4 of this written statement) and of substances (referred to in paragraph 2.5 of this written statement) into the marine environment which results *or* is likely to result in such deleterious effects as harm to living resources and marine life (as described in paragraph 2.6 of this written statement). It follows from this definition that the deleterious effects of climate change and ocean acidification, as well as the harm resulting from such effects, fall within the ambit of "pollution to the marine environment" as defined in article 1, paragraph 4, of the Convention. As such, the Netherlands submits that climate change, including through ocean warming and sea level rise, and ocean acidification resulting from GHG emissions are drivers of the pollution of the marine environment.

4.8 In the context of climate change and ocean acidification, the obligations as enshrined in articles 192 and 194 of the Convention involve the adoption of mitigation and adaptation measures. Whereas mitigation of climate change seeks to control global warming through the regulation of the concentrations of GHG in the atmosphere that have an anthropogenic origin and measures are thus aimed to address this, adaptation is defined as an adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities. While mitigation measures are of a more general nature in relation to climate change, in the context of this Request, adaptation

measures focus specifically on the marine environment. Examples of such measures include the construction of sea barriers against coastal erosion.

4.9 The need for, and obligation of, taking mitigation and adaptation measures flow from climate change law, in particular the 1992 United Nations Framework on Climate Change ('UNFCCC') and related instruments, such as the 2015 Paris Agreement. More specific measures in terms of adaptation or addressing injurious consequences of climate change, not addressed through mitigation or adaptation measures, can be found in other environmental law instruments. The Convention on Biological Diversity ('CBD'), for instance, includes an obligation for Parties to rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies.[30]

4.10 Protecting and preserving the marine environment under article 192 of the Convention requires that the marine environment is made resilient against the deleterious effects of climate change and ocean acidification. This requires the adoption of mitigation measures as well as adaptation measures. Making the marine environment resilient against the deleterious effects of climate change and ocean acidification would also contribute to preventing further and future damage,[31] as required by article 194 of the Convention.

5. Specific obligations as embedded in Part XII of the Convention relating to sources of pollution

Introduction

5.1 The obligations relating to the different sources of pollution are set out in different provisions of Section 5 of Part XII of the Convention (in particular in articles 207-221) and operationalize the general obligations laid down in article 194 of the Convention. Several of the provisions in Section 5 allow for the incorporation into the Convention of external rules. These provisions are thus drafted in a manner that allows for the development of more detailed regulations outside of the Convention. The legal effects of these 'rules of reference' in the Convention manifest themselves in two ways. The first category of provisions requires the Parties to the Convention to 'take into account' external rules and standards. As such, "[t]his formulation of the rule of reference does not result in the external rules and standards automatically becoming binding on UNCLOS state parties".[32] The second category of provisions, albeit

[30] Article 8, under f, of the 1992 Convention on Biological Diversity.
[31] *South China Sea Arbitration,* para. 941.
[32] Lan Ngoc Nguyen, 'Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits' (2021) 52(4) Ocean Development and International Law, p. 419-444.

with different formulations, would have the effect of rendering the external rules binding on Parties to the Convention. There would be merit in more precise guidance as to the scope and nature of the rules of reference. It is for this reason that the Netherlands respectfully requests the Tribunal to consider providing guidance on this matter.

5.2 The Convention lists the following sources of pollution: pollution from land-based sources, pollution from or through the atmosphere, pollution by dumping, pollution from vessels, and pollution from installations and devices in the exploitation of the natural resources of the seabed and subsoil. In general, it can be observed that with respect to these different sources of pollution, States are under the obligation to adopt laws and regulations in elaboration of these provisions, and shall take other necessary measures on this matter. Furthermore, to harmonize their policies at the appropriate regional or global level, Parties shall also, taking into account internationally agreed rules, standards and recommended practices, endeavor to establish global and regional rules, practices, standards and procedures through the competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from the specific source of pollution.

Pollution from land-based sources

5.3 Pollution of the marine environment arising from land-based sources is a specific type of pollution that is one of the principal causes of ocean pollution. This type of pollution may result from substances and energy entering the marine environment by run-off from land, rivers and pipelines. It may also arise from or through the atmosphere, resulting from land-based activities or from ships and aircraft. Article 194, paragraph 3(a), in conjunction with articles 207 and 213 of the Convention require Parties to prevent, reduce and control pollution of the marine environment from land-based sources. The Convention on the Protection of the Marine Environment of the North East Atlantic of 1992 ('OSPAR Convention') and the Protocol concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ('LBS Protocol to the Cartagena Convention') are two examples of legal instruments that also expand on this source of pollution and that accordingly can be considered to contain external rules that further elaborate the provisions of the Convention. Annex I of the OSPAR Convention focuses on the prevention and elimination of pollution from land-based sources. Article 1 of Annex I of the OSPAR Convention recalls that Contracting Parties shall require the use of best available techniques for point sources and best environmental practices for point and diffuse sources including, where appropriate, clean technology. This is in line with the more general approach underlying the OSPAR Convention, which regulates different sources of pollution in the North East Atlantic Ocean and aims to extend cooperation on

human activities that might adversely affect the marine environment to safeguard human health, to conserve marine ecosystems and, when practicable, to restore marine areas which have been adversely affected.[33] The LBS Protocol to the Cartagena Convention, recalling the relevant rules as reflected in the Convention and in particular its Part XII,[34] consists of obligations to reduce the negative environmental and human health impacts of land-based pollution in the Wider Caribbean Region.[35]

Pollution from or through the atmosphere

5.4 Another specific source of pollution of the marine environment is the pollution from or through the atmosphere. According to article 194, paragraph 3(a), in conjunction with articles 212 and 222 of the Convention, "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation". These provisions cover both air pollution produced by activities carried out within the territory of a State Party, as well as air pollution from, for example, ships and aircrafts of its nationality. General examples of relevant internationally agreed rules, standards or recommended practices and procedures that regulate GHG emissions resulting from pollution from or through the atmosphere would be those laid down in the climate change law regime of the UNFCCC and related instruments, such as the Paris Agreement, which specifically aim to minimize and control GHG emissions to limit climate change impacts. These legal instruments also recognize the importance of protecting the ocean and its ecosystems. Whereas in the UNFCCC, Parties agreed to protect the climate system, defined as the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions,[36] the Paris Agreement highlights the importance of all ecosystems, including the oceans, as well as the protection of biodiversity of these ecosystems.[37]

Pollution by dumping

5.5 Pollution by dumping is a specific source of pollution that refers to the deliberate disposal of wastes and other matters from non-land-based sources, such as vessels or aircraft. Based on article 194, paragraph (3)(a), in conjunction with articles 210 and 216 of the Convention,

[33] Preamble to the Convention on the Protection of the Marine Environment of the North East Atlantic of 1992.
[34] Preamble to the Protocol concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region of 1999 (hereafter: 'LBS Protocol to the Cartagena Convention').
[35] Article 3 of the LBS Protocol to the Cartagena Convention.
[36] Article 2 and article 1(3) of the UNFCCC.
[37] See for example the Preamble of the Paris Agreement to the United Nations Framework Convention on Climate Change (2015).

Parties shall adopt laws and regulations or take other measures as may be necessary to prevent, reduce and control the pollution of the marine environment by dumping. The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ('London Convention') and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 ('London Protocol') provide a framework for Contracting Parties to effectively prevent pollution of the sea "by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea".[38] In relation to climate change, the 2013 amendment to the London Protocol to Regulate the Placement of Matter for Ocean Fertilization and Other Marine Geoengineering Activities is an example of an instrument which recalls that in efforts to minimize the deleterious effects of climate change by way of marine geoengineering, which can be defined as the deliberate intervention in the marine environment to, among others, counteract climate change and its potential deleterious effects,[39] the marine environment has to be protected.

Pollution from vessels

5.6 A significant impact of shipping is the pollution of the marine environment resulting from vessels, caused by discharges from ships, such as the cleaning of tanks or de-ballasting. Pollution by vessels is a specific source of pollution that, according to article 194, paragraph (3)(b), in conjunction with articles 211 and 221 of the Convention, shall be prevented, reduced and controlled by States. In this regard, States shall adopt laws and regulations with respect to vessels flying their flag or of their registry and shall establish international rules and standards through the competent international organization or diplomatic conference as well as particular requirements for, amongst others, the entry of foreign vessels into their ports or internal waters. With respect to air pollution from ships, Annex VI of the International Convention for the Prevention of Pollution from Ships ('MARPOL') is one example of an instrument that expands on this by limiting the main airborne pollutants released into the environment from ocean-going ships and by prohibiting deliberate emissions of ozone depleting substances from ships. Chapter 4 of Annex VI of MARPOL specifically regulates the energy efficiency of ships and sets rules for reducing the carbon intensity of ships per ton cargo carried, with the aim to reduce GHG emissions from international shipping.

[38] Article 1 of the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; Article 2 of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972.
[39] Article 1 of the Amendment to the London Protocol to Regulate the Placement of Matter for Ocean Fertilization and Other Marine Geoengineering Activities, Resolution 4(8), adopted on 18 October 2013.

Pollution from seabed activities

5.7 The final type of source-specific pollution that is covered by the Convention is pollution from seabed activities caused by the release of harmful substances resulting directly from the exploration, exploitation and processing of seabed minerals. Pollution from seabed activities is addressed in article 194, paragraph (3)(c), in conjunction with articles 208-209 and 214-215 of the Convention. According to these provisions, States shall prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction or in the Area. These provisions of the Convention and the 1994 Agreement provide the general legal framework in respect of the Area, including article 145 of the Convention which establishes the general requirement in relation to the effective protection of the marine environment from harmful effects arising from activities in the Area. The relevant provisions in the Convention are further elaborated in the "Mining Code". The regulations on the exploitation of mineral resources that are currently being developed should include rules, regulations and procedures ensuring that, where necessary, mitigation and adaptation measures are taken into account, which may for example consist of the use of sustainable technologies.[40]

6. Relationship between the Convention and other relevant legal instruments, frameworks and bodies

6.1 At the international level, a number of other legal instruments and frameworks and global, regional, subregional and sectoral bodies are mandated to regulate (human) activities that contribute to climate change. As addressed above, it was the intention of the drafters of the Convention to ensure the coordination and harmonization between the Convention and other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies. According to the Netherlands this relationship – or connection – has its foundation in the Convention on the basis of at least three means or mechanisms: through informing the content of its general obligation to protect and preserve the marine environment and to prevent, reduce and control pollution as laid down in articles 192 and 194 of the Convention; through the use of the so-called 'rules of reference'; and through the mechanism for integration set out in article 237 of the Convention (see paragraph 3.2 of this written statement). The relationship of the Convention with other relevant legal instruments, frameworks and bodies is further strengthened by the various provisions requiring international cooperation, such as article 197 of the Convention.

[40] In this context, see also the Dutch Working Paper on the 'Development of environmentally responsible mining technologies: towards an approval process for mining equipment', ISBA/23/C/5 (1 June 2017).

6.2 As stated above, the deleterious effects of climate change and ocean acidification, as well as the harm resulting from such effects, fall within the ambit of "pollution to the marine environment" as defined in article 1, paragraph 4, of the Convention. It follows that the obligation to protect and preserve the marine environment also extends to combatting the deleterious effects of climate change and ocean acidification. The Netherlands would like to emphasize that, consequently, other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies that regulate the impact of human activities on the climate system play, within their competence, a pivotal role in combatting climate change and ocean acidification and their deleterious effects on the marine environment. Through these other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, Parties can establish rules, standards, practices and procedures that contribute to the protection of the marine environment against the deleterious effects of climate change and ocean acidification.

6.3 Without prejudice to other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies that can establish rules, standards, practices and procedures that contribute to the protection of the marine environment against the deleterious effects of climate change and ocean acidification, the Netherlands would like to specifically mention some of the bodies that have the mandate to regulate human activities that relate to specific sources of pollution that may affect the marine environment through climate change and ocean acidification as set out in Section 5 of this written statement.

6.4 The international bodies that the Netherlands considers to be particularly relevant in relation to combatting climate change and ocean acidification as well as their deleterious effects on the marine environment include the institutional frameworks established under the United Nations Framework Convention on Climate Change ('COP UNFCCC') and related legal instruments, the International Maritime Organisation ('IMO'), the International Civil Aviation Organization ('ICAO'), the International Seabed Authority ('ISA'); the institutional framework yet to be operationalized under 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 ('BBNJ Agreement'); and, taking into account the regional context, the OSPAR Commission and the Conference of the Parties to the LBS Protocol to the Cartagena Convention. On the basis of the open and integrative character of the Convention including it being described as a 'living treaty' with a 'framework nature' (see paragraphs 3.1 and 3.2), the Netherlands would like to encourage the Tribunal to raise the awareness of and provide guidance to these institutional frameworks so as to enable

them, in the governance of human activities within their competence, to respect the obligations enshrined in the Convention related to the deleterious effects of climate change and ocean acidification on the marine environment.

7. Conclusion

7.1 The Tribunal is requested to clarify the obligations under the Convention in relation to climate change and ocean acidification as well as their deleterious effects on the marine environment. In light of the open and integrative character of the Convention, it follows that the Tribunal is also requested to clarify the relationship between the Convention and other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies mandated to regulate human activities that contribute to climate change and ocean acidification. The Netherlands considers that, through its advisory opinion, the Tribunal could raise awareness and provide guidance on the protection and preservation of the marine environment and/or the prevention, reduction and control of pollution of the marine environment. In this manner, the advisory opinion could contribute to the interpretation and application of the obligations arising from the Convention, in particular the obligations arising from Part XII of the Convention. This would also contribute to the advancement of the holistic implementation, in a coherent and cooperative manner, of the obligations under the Convention and the obligations under other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

René Lefeber
Representative of the Kingdom of the Netherlands

The Hague, 16 June 2023