International Court of Justice

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

REQUEST FOR ADVISORY OPINION

Written Comments of the EUROPEAN UNION

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INTRODUCTION

1. Upon its request the European Union has been invited by letter of 20 June 2023 ([1]) to submit its written observations on the Advisory Opinion request of the General Assembly on *Obligations of States in respect of Climate Change*, and on 22 March 2024 the European Union filed its written statement with annexes. The Registry acknowledged receipt on 26 March 2024 ([2]).

2. In accordance with the Court's Order of 15 December 2023, as confirmed in the Court's Note Verbale of 28 March 2024 ([3]) to States and International Organisations having presented written statements, the European Union is therefore entitled to make written comments on the other written statements received by the Court ([4]).

3. In the context of its comments on those other written statements, the European Union will also briefly mention certain recent judicial developments which may be relevant for the present proceedings.

4. At the outset, the European Union would wish to reiterate its firm political intention to work towards decisive international cooperation in order to reinforce the remediation and adaptation measures and thereby the ambition of the international community as a whole in its fight against climate change.

5. At the 28th United Nations Climate Change Conference (COP28) in Dubai in 2023, the European Union strongly advocated for significantly increasing global ambition to keep within reach the

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([1]) Letter 159618 of 20 June 2023.
([2]) Letter 161769 of 26 March 2024.
([3]) Note Verbale 161808 of 28 March 2024.
([4]) According to the Note Verbale, the following States and entities have filed their written statements within the time limit: Portugal, Democratic Republic of the Congo, Colombia, Palau, Tonga, Organization of the Petroleum Exporting Countries, International Union for Conservation of Nature, Singapore, Peru, Solomon Islands, Canada, Cook Islands, Seychelles, Kenya, jointly Denmark, Finland, Iceland, Norway and Sweden, Melanesian Spearhead Group, Philippines, Albania, Vanuatu, Federated States of Micronesia, Saudi Arabia, Sierra Leone, Switzerland, Liechtenstein, Grenada, Saint Lucia, Saint Vincent and the Grenadines, Belize, United Kingdom of Great Britain and Northern Ireland, Kingdom of the Netherlands, Bahamas, United Arab Emirates, Marshall Islands, Parties to the Nauru Agreement Office, Pacific Islands Forum, France, New Zealand, Slovenia, Kiribati, Pacific Islands Forum Fisheries Agency, China, Timor-Leste, Republic of Korea, India, Japan, Samoa, Alliance of Small Island States, Islamic Republic of Iran, Latvia, Mexico, South Africa, Ecuador, Cameroon, Spain, Barbados, African Union, Sri Lanka, Organisation of African, Caribbean and Pacific States, Madagascar, Uruguay, Egypt, Chile, Namibia, Tuvalu, Romania, United States of America, Bangladesh, European Union, Kuwait, Argentina, Mauritius, Nauru, World Health Organization, Costa Rica, Indonesia, Pakistan, Russian Federation, Antigua and Barbuda, Commission of Small Island States on Climate Change and International Law, El Salvador, Plurinational State of Bolivia, Australia, Brazil, Viet Nam, Dominican Republic, Ghana, Thailand and Germany. In addition, the Court authorised, on an exceptional basis, the late filing of the written statements of Nepal, Burkina Faso, and The Gambia. By order of the Court the deadline for the written comments has been extended to 15 August 2024.

goal enshrined in the Paris Agreement of limiting the global average temperature increase to 1.5 °C above pre-industrial levels. The European Union also helped secure an agreement to accelerate the global transition away from fossil fuels, to triple renewable energy capacity globally, and to double the global average annual rate of energy efficiency improvements during this decade. ([5]) Moreover, the European Union and its Member States are together the biggest contributors of public climate finance to developing economies and led the efforts at COP27 and COP28 to launch and capitalise the first dedicated global fund to assist particularly vulnerable countries respond to loss and damage associated with climate change.

6. In the legal order of the European Union and its Member States, the European Climate Law ([6]) has set a legally binding obligation to reach climate neutrality by 2050, and to reduce the European Union's net greenhouse gas (GHG) emissions by at least 55% by 2030. The 'Fit for 55' legislation, now fully adopted, has set the European Union securely on this pathway. As a further step, the European Commission has recommended that the European Union reduce its net GHG emissions by 90% by 2040 compared to 1990 levels, which is in line with recent scientific advice and the Union's commitments under the Paris Agreement. ([7]) This will inform the next European Commission making the legislative proposal to include the 2040 target in the European Climate Law and designing an appropriate post-2030 policy framework.

GENERAL OBSERVATIONS ON THE WRITTEN STATEMENTS

7. The European Union would wish to observe in general that the written statements submitted to the Court in these advisory opinion proceedings reflect several points of common acceptance across the international community.

8. It appears to be common ground that the commitments Parties have undertaken to achieve the purpose and long-term goals of the Paris Agreement for the most part are obligations of conduct governed by standards of due diligence. In particular, this is the case regarding the precise levels of GHG emissions to be contained in nationally determined contributions ('NDC') and the mitigation and adaptation efforts to be undertaken.

([5]) Decision/CMA.5 Outcome of the first global stocktake, point 28, https://unfccc.int/sites/default/files/resource/cma5_auv_4_gst.pdf.

([6]) 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, OJ L 243, 9.7.2021, p. 1.

([7]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society, COM(2024)63 final.

9. However, certain provisions of the Paris Agreement may be properly characterised as establishing obligations of result. These are primarily obligations of a procedural nature, requiring parties to provide specific information at specified intervals and to adhere to reporting and accounting standards. These obligations include the procedural obligations to prepare, communicate and maintain successive NDCs.

10. Furthermore, there appears to be a shared understanding, *inter alia*, on the following points:

    a. that climate change is a common concern of humankind implying the need for a collective response;

    b. that there is a scientific basis, as it results from the work of the Intergovernmental Panel on Climate Change (IPCC), that climate change is induced by anthropogenic GHG emissions and that there is a need to reduce such emissions to a level whereby temperature increase is maintained below a certain limit compared to pre-industrial times;

    c. that there are norms of international law that impose obligations on States to protect the climate system from GHG emissions, primarily established by the United Nations Framework Convention on Climate Change ('UNFCCC') and the Paris Agreement. Whilst there are different positions as to whether these obligations are exclusively or only partially defined therein, the Paris Agreement is accepted to be the main and central instrument and therefore to form an important element of the interpretative task the Court is requested to undertake.

11. The European Union also notes convergence on the nature of most substantive treaty and customary international law obligations that may be applicable alongside the Paris Agreement being understood as obligations of conduct subject to a standard of due diligence, rather than as obligations of result. This being so, important differences exist as to the precise interpretation of these obligations and as to the consequences thereof ([8]). In addition, the European Union notes that the International Tribunal on the Law of the Sea (ITLOS) has found that the standard of due diligence with respect to transboundary pollution affecting the environment of other States *"can be even more stringent"* than the due diligence required when taking the necessary measures to prevent, reduce and control pollution of the marine environment from anthropogenic GHG

([8]) If ever a collective obligation of result were envisaged under international law, this would not allow for individual attribution and hence would in effect amount to a bundle of obligations of conduct.

emissions under Article 194(1) of the United Nations Convention on the Law of the Sea (UNCLOS) ([9]) because of the nature of transboundary pollution.

12. Finally, the European Union also notes that certain written statements contain observations on alleged breaches by certain (groups of) States, and on the consequences resulting therefrom. In this respect the European Union firmly recalls the non-adversarial nature of advisory opinion proceedings before the Court. Since no State or international organisation has consented to submitting a dispute to the Court in the given context, the European Union invites the Court to address the second question in such a way as to avoid making any suggestions of breaches by certain (groups of) States, bearing in mind the very nature of an advisory opinion procedure, which does not contemplate findings of breaches or imposing remedies.

SPECIFIC COMMENTS ON THE WRITTEN STATEMENTS

I.1. On the applicable law

13. In its written statement, the European Union has addressed the instruments and customary international law obligations and principles cited in the *chapeau* of the questions (and which were included in the file provided to the Court by the Secretary-General of the UN).

14. The European Union notes that a number of further instruments have been invoked in certain written statements, such as the Convention on Biodiversity and instruments of the International Maritime Organisation (IMO), which were not addressed in the European Union's statement. In this context, the European Union considers that, while certain of these instruments may indeed be of some relevance on specific sectorial aspects of climate change and may thus be appropriately addressed in the advisory opinion, they are not such as to change the legal analysis. Therefore, it refrains from further commenting on them.

I.2. On the obligations of States in respect of Climate Change (addressed in question (a))

15. As explained above, the European Union will focus on selected topics, and would refer the Court for the remainder to the positions expressed in the written statement.

([9]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 256.

I.2.1. On the duty to prevent significant transboundary harm

16. The European Union observes that multiple written statements address the duty to prevent significant transboundary harm (hereinafter: "duty of prevention"). ([10]) Several written statements further address the duty of international cooperation. In the following, the European Union addresses the link between these duties.

17. The European Union notes that, while most States and International Organisations converge in considering the duty of prevention as an obligation of conduct and of due diligence, there are divergent views on whether evidence that significant harm has occurred is a sufficient basis for liability.

18. Equally, while most States and International Organisations converge in considering the duty of prevention as a principle of customary international law, some differences exist in conceptualising its relationship with the relevant treaty-based regimes for the protection of the environment and the climate system. Various written statements also posit that, in this context, the duty of prevention entails a procedural duty to cooperate internationally.

19. The European Union will address these points in turn. At the same time, the European Union recalls its understanding that issues of causality and of attribution of internationally wrongful acts *in concreto* are outside the scope of the present proceedings, which are advisory and thus not adversarial in nature ([11]).

I.2.1.1. Substantive and procedural aspects of the duty of prevention

20. The duty of prevention of transboundary harm has been interpreted to consist in duties to act with a degree of due diligence commensurate to the level of risk and harm entailed by the activity concerned, as well as the capacity of the State concerned, and to take the necessary regulatory measures to this effect ([12]). It has also been interpreted as having procedural aspects, namely requiring States to cooperate internationally ([13]).

([10]) As regards the normative nature and the constituent elements of this duty, the European Union refers to its Written Statement, in particular Section 4.6.4. thereof.

([11]) See in this regard *infra*, section I.3 below.

([12]) ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, Commentary to Article 3.

([13]) According to Article 4 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *"States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof"*. Specific forms of cooperation are then stipulated in the subsequent ILC articles, and include the requirements: for the State of origin to give prior authorization

21. The European Union considers that the duty to cooperate, at least in the context of the prevention of transboundary harm, should be understood as a self-standing principle of customary international law. ([14]) Without prejudice to its specific meaning in the contexts of the treaty-based climate change ([15]), law of the sea ([16]) and environmental law regimes, it lays down an obligation of conduct, including procedural aspects ([17]).

22. This Court has not previously ruled on the specific issue of whether there is, as a matter of general international law, a duty to cooperate to protect the climate system. Nevertheless, since the protection of the climate system has been acknowledged as a common concern of humankind, by extension of the principles previously articulated both by this Court and other international jurisdictions, the European Union is of the view that States have a duty to cooperate to both prevent significant damage to that system from occurring and enforce rules adopted with the aim of preventing further harm.

23. The European Union considers that the duty to cooperate in this context requires States to act with due diligence and in good faith ([18]). This interpretation is supported notably by the International Law Commission's (ILC) Articles on the Prevention of Transboundary Harm

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of activities involving a risk of causing significant transboundary harm (Article 6); to carry out an environmental impact assessment of the possible transboundary harm caused by the activity at stake (Article 7); to inform the State(s) likely to be affected of the risk and the assessment thereof (Article 8); and to consult with other States concerned with a view to achieving acceptable solutions to prevent significant transboundary harm (Article 9). The duty to cooperate has been articulated as applying both to the prevention of damage to a shared resource, and to the enforcement of norms taken to prevent such damage arising. For instance, this Court has recognised, in the context of a bilateral dispute, that where there are shared resources, cooperation between states may be necessary to *'jointly manage the risks of damage to the environment' through plans implemented by one or other of them* (*Pulp Mills on the River Uruguay (Argentina v. Uruguay*) Judgment, I.C.J. Reports 2010, pp. 55-56, para. 77).

([14]) Reflected in the ILC Articles on Prevention of Transboundary Harm from Hazardous Activities, in Principle 24 of the Stockholm Declaration and in Principle 7 of the Rio Declaration and recognised in ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, paragraph 296; and ITLOS, *MOX Plant (Ireland v UK)*, Order, 3 December 2001, p. 110, para. 82. In this regard see further section I.2.3 below.

([15]) See in this regard *infra*, section I.2.3 below.

([16]) See in particular UNCLOS, Article 300 and ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 296 (*"The Tribunal recalls its finding in the MOX Plant Case that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"*)-and 297 *("the duty to cooperate is reflected in and permeates the entirety of Part XII of the Convention. This duty is given concrete form in a wide range of specific obligations of States Parties, which are central to countering marine pollution from anthropogenic GHG emissions at the global level."*)

([17]) See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, paragraph 77: *"it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute".*

([18]) In this regard see further section I.2.3 below.

through Hazardous Activities, according to which States must *"cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof"* ([19]). Likewise, both this Court and ITLOS have developed on the duty to cooperate in the prevention of transboundary environmental harm ([20]).

I.2.1.2. On the relevance of 'significant harm' under customary international law

24. The European Union understands certain written statements to argue that the past or ongoing occurrence of significant harm would automatically entail the responsibility of all States which might be said to have contributed to its occurrence, regardless of their individual course of conduct ([21]).

25. If endorsed, such an interpretation would transform the duty of prevention into an obligation of result and give to the occurrence of significant transboundary harm an autonomous legal relevance under international law. Such an approach is not supported by the relevant case-law nor by State practice.

26. First, as seen above, it emerges clearly from the ILC Articles on Prevention of Significant Transboundary Harm, that the duty of prevention is not an obligation of result but one of conduct, in respect of which the requisite standard of due diligence is to be determined notably based on the level of risk and of the significance of the harm potentially entailed by the activity at stake.

27. According to the ILC, it is therefore *"the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The due diligence involved in the duty of prevention, however, is not intended to guarantee that significant harm be*

([19]) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Article 4 and commentary thereto.

([20]) See for instance ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, paragraph 77; and ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraphs 296-297.

([21]) See for instance Written Statement of Chile, paragraph 92 and Written Statement of Antigua and Barbuda, paragraph 584.

totally prevented, if it is not possible to do so ([22]). Rather, it requires States to 'minimize' the risk of environmental harm where it is not possible to completely avoid it ([23]).

28. The nature of the duty of prevention as an obligation of conduct has been confirmed by ITLOS in its Advisory Opinion on the *'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law'*. As referred to above, according to ITLOS, the standard of due diligence with respect to transboundary pollution affecting the environment of other States *"can be even more stringent"* than the due diligence required when taking the necessary measures to prevent, reduce and control pollution of the marine environment under Article 194(1) of UNCLOS ([24]).

29. The European Union thus considers that the ILC Articles – which most States and International Organisations recognise as customary international law – and relevant case-law confirm that the duty of prevention does not imply an obligation of result consisting in the avoidance of any 'significant environmental harm'.

30. However, this does not mean that the degree of 'significance' of the harm has no relevance whatsoever. As made explicit by the ILC, the significance of environmental harm has a bearing on the level of due diligence required: the more significant the potential harm is, the more stringent is the level of due diligence required by States ([25]). Further, once the causal link between the conduct of a State and the harm occurred has been established and the wrongful act has been attributed to that State, the significance of the harm impacts the severity of the legal consequences resulting from that wrongful act ([26]).

31. Second, the European Union underscores that arguments espousing a theory of State liability based on the mere existence of significant environmental harm (sometimes called 'strict State liability' ([27]) have not resulted in legally binding obligations for States. Notably, the work of the

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([22]) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, Commentary to Article 3, paragraph (7).

([23]) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, Article 3.

([24]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 256.

([25]) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, Commentary to Article 3, paragraphs (11) and (18).

([26]) Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, Article 31 and commentary thereto, in particular paragraph (7); and Article 37 and commentary thereto, in particular paragraph (8). In this regard see also section I.3 below.

([27]) Foster, C. (2005), *The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?*. Review of European Community & International Environmental Law, 14: 265-282. https://doi.org/10.1111/j.1467-9388.2005.00447.x, page 273.

ILC on the 'Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities' ([28]), which are understood as only applying to private operators, has shown that a regime of State liability based on the harm produced by an activity rather than on the demonstration of an internationally wrongful act is clearly not accepted by the international community.

32. Indeed, those 'Principles' did not translate into a binding instrument and were never intended, as such, to create any binding obligations. The ILC itself considered them to be *"of a general and residual character, as a non-binding declaration"* ([29]).

33. Consequently, even if the standard of due diligence is very stringent, this does not mean that the occurrence of significant environmental harm alone would suffice to trigger State responsibility for an internationally wrongful act ([30]). Rather, the responsibility of States is to be determined based on the content of the primary obligation at stake ([31]).

34. The triggering of legal consequences for a given State presupposes that a causal link between its conduct and the harm is established ([32]), and that the breach of the due diligence obligation (i.e. the internationally wrongful act) is attributable to the State ([33]).

35. The assessment of the existence of these conditions *in concreto* is – as the European Union has submitted in its written statement – beyond the scope of the present request for an advisory opinion ([34]).

([28]) Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006, Annex to Resolution adopted by the General Assembly on 4 December 2006, 61/36. Allocation of loss in the case of transboundary harm arising out of hazardous activities (A/RES/61/36).

([29]) Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm. Compilation of decisions of international courts, tribunals and other bodies. Report of the Secretary-General, (A/77/147), paragraph 5.

([30]) See in this sense for instance also the Written Statement of Slovenia at 14.

([31]) ARSIWA, page 34 paragraph (3) and page 36(9): *"It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract."*

([32]) ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, page 148 paragraph (2).

([33]) See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, Article 2(a).

([34]) In this regard see also *infra*, section I.3 below.

I.2.1.3. The applicability of the duty of prevention in the climate change context

36. The European Union recalls its position that the duty of prevention applies to the protection of the international climate system and needs to be interpreted together with the treaty-based regime on climate change in an integrated and harmonious manner ([35]).

37. Unlike the position expressed in certain other written statements ([36]), the European Union is of the view that the Paris Agreement is not *lex specialis* as regards the duty of prevention. Rather, the obligations under the Paris Agreement and the duty of prevention under general international law mutually reinforce and *"shed light on"* ([37]) each other.

I.2.2. On the relevance of a remaining global carbon budget and of a specific duty of due diligence based on States' emissions

38. In this section, the European Union will briefly comment on the duty of due diligence arising from Article 194(1) of UNCLOS, as recently interpreted by ITLOS in Case No. 31, before discussing the impact of the issue of remaining global carbon budgets on the requisite standard of due diligence arising under the Paris Agreement.

39. In Case No. 31, ITLOS stated that it *"does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement"* ([38]). While an interpretation of this finding in isolation could suggest that compliance with the Paris Agreement could never be sufficient to comply with UNCLOS, the European Union would rather understand ITLOS to mean that, because of the stringent character of the relevant UNCLOS obligations, compliance with the Paris Agreement by itself does not necessarily mean that the measures adopted by a State Party also comply with UNCLOS. However, where States Parties, when formulating their NDCs under the Paris Agreement, exercise due diligence, deploy their best efforts and maximise their contributions to bolster the global endeavour to combat climate change, ([39]) compliance with Article 194(1) and (2) of UNCLOS which require States Parties to take "all measures necessary" would appear to be perfectly possible. This interpretation is supported by the fact that ITLOS underlines the need for consistent interpretation of UNCLOS with "external rules" such as the UNFCCC and the Paris

([35]) See paragraphs 319-321 of the written statement of the European Union.
([36]) See for instance the Written Statement of Australia, paragraph 4.11.
([37]) On the relationship between the customary and the conventional obligation of prevention more generally, see also the Written Statement of Antigua and Barbuda, paragraph 128.
([38]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 223.
([39]) See Written Statement of the European Union, paragraph 153.

Agreement ([40]) and that the latter treaties, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying UNCLOS with respect to marine pollution from GHG emissions ([41]). Moreover, ITLOS emphasises the autonomous and separate character of the obligations in UNCLOS and the Paris Agreement, without the Paris Agreement modifying or limiting the obligations under UNCLOS ([42]). It follows that ITLOS interprets the relationship between the obligations of UNCLOS (which are specific to the protection of the marine environment), on one hand, and the UNFCCC and the Paris Agreement, on the other. The European Union therefore does not understand Article 194(1) of UNCLOS to the effect of imposing general substantive requirements regarding the limiting of GHG emission on States Parties, additional to those flowing from the UNFCCC and Paris Agreement, but rather as setting an exacting and stringent standard.

40. Turning to the relevance of remaining global carbon budgets for determining the content of States' duty of conduct to take mitigation measures, the European Union notes that several written statements refer to concepts of 'fair share' in the given context.

41. The European Union understands certain written statements to argue that the notion of 'fair share' should play a decisive role in determining the extent of States' obligations to take mitigation measures ([43]). Some written statements more specifically posit that developed countries would be required to go significantly beyond collective targets in line with the 1.5°C pathway to allow developing countries a 'fair share' of the remaining global carbon budget. ([44]) Other written statements have noted that the Common but Differentiated Responsibilities and Respective Capabilities ('CBDR-RC') principle gives expression to conceptions of fairness and equity. ([45])

42. The European Union submits that, as a matter of existing obligations of States under international law, the Paris Agreement and the UNFCCC do neither refer to any notion of 'fair share' nor, *a fortiori*, determine the calculation or allocation of a specific State's 'fair share' of a notional remaining global carbon budget. While the Paris Agreement is underpinned by the twin principles of 'CBDR-RC' and equity, the application of these principles to the design of each

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([40]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraphs 128-137.

([41]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 222.

([42]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraphs 223-224.

([43]) See, for instance, the written statements of the Solomon Islands, Vanuatu, Sierra Leone, Kiribati, African Union.

([44]) See, for instance, the written statements of Antigua and Barbuda and India.

([45]) See, for instance, the written statements of Timor-Leste and Egypt.

Party's NDC has been left to the judgment of each Party. The notion of fairness is thus operationalised by these principles.

43. Subsequent decisions by the Conference of the parties serving as the meeting of the Parties to the Paris Agreement (CMA) have required each Party to clarify, in the context of communicating its NDC, "how the Party considers that its nationally determined contribution is fair and ambitious, in the light of its national circumstances" ([46]), but that does not suggest that each State would have a specific 'fair share' of the global carbon budget ([47]).

44. In any event, the European Union observes that there is no agreed definition of what a State's 'fair share' is and based on what criteria and methodologies it should be determined ([48]). There are many different approaches to concepts of 'fair share', yielding very different outcomes. Also for this reason and given the current state of development of international law, references to 'fair share' could not serve as reliable yardsticks to determine precisely the standard of conduct owed by States.

45. Neither do the works of the IPCC which ITLOS has recently considered as "*authoritative scientific works*" ([49]) and "*the best available science ... which reflect the scientific consensus*" ([50])

([46]) See preambular clause 9 of COP Decision 4/CMA.1: "*9. Recalls determined contributions, including those communicated or updated by 2020, pursuant to paragraph 24 of the same decision, in which the Conference of the Parties agreed that the information to be provided by Parties communicating their nationally determined contributions, in order to facilitate clarity, transparency and understanding, may include, as appropriate, inter alia, quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches, including those for estimating and accounting for anthropogenic greenhouse gas emissions and, as appropriate, removals, and how the Party considers that its nationally determined contribution is fair and ambitious, in the light of its national circumstances, and how it contributes towards achieving the objective of the Convention as set out in its Article 2;*" (emphasis added); see also Decision 1/CP.21 to the same effect.

([47]) See moreover Annex I to COP Decision 4/CMA.1, entitled 'Information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21, paragraph 28'. Section 6 of Annex I provides:
"*6. How the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances:*
(a) How the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances;
(b) Fairness considerations, including reflecting on equity;
(c) How the Party has addressed Article 4, paragraph 3, of the Paris Agreement;
(d) How the Party has addressed Article 4, paragraph 4, of the Paris Agreement;
(e) How the Party has addressed Article 4, paragraph 6, of the Paris Agreement."

([48]) Lavanya Rajamani, Louise Jeffery, Niklas Höhne, Frederic Hans, Alyssa Glass, Gaurav Ganti & Andreas Geiges (2021) *National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law*, Climate Policy, 21:8, p. 984.

([49]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 157.

([50]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 208.

come to any conclusion on how to allocate 'fair shares'. While those works estimate the remaining global carbon budget and make clear what States should do collectively to limit global warming to 1.5°C or 2°C ([51]), they neither set out any specific 'fair shares', nor, more broadly, indicate what States should do individually to reach the goals defined in the Paris Agreement. Instead the IPCC acknowledges that "[e]quity remains a central element in the UN climate regime, notwithstanding shifts in differentiation between states over time and challenges in assessing fair shares." (emphasis added).

46. In this context, it is noteworthy that in its recent judgment in *KlimaSeniorinnen,* the European Court of Human Rights (ECtHR) did not assess the respondent State's mitigation obligations in terms of 'fair share', even though the applicants had explicitly submitted that Switzerland fell short of a 'fair share' standard ([52]). Instead, the ECtHR underscored the importance of carbon budgets or other methods of quantification of future GHG emissions in relation to mitigation measures adopted by States Parties to the European Convention on Human Rights (ECHR) and, in the absence of any measure by the respondent State attempting to quantify its remaining carbon budget, found a breach of the right to respect for private and family life ([53]). Whilst the ECtHR stresses the need for attempts to quantify national GHG emissions limitations through a carbon budget or otherwise and recalls the principles of 'CBDR-RC' and equity, ([54]) it does not further indicate how these principles should be translated into specific GHG emission limitations, let alone by reference to 'fair shares'. Moreover, the ECtHR acknowledges that the measures and methods determining the details of a State's climate policy fall within that State's wide margin of appreciation. ([55]) The ECtHR thereby confirms the absence of any agreed understanding of how to calculate or allocate a State's 'fair share'.

47. Accordingly, and as submitted by the European Union in its written statement, the Paris Agreement requires Parties to attain the highest possible level of ambition, but does not prescribe a specific level of ambition for any party. As held by ITLOS, all States must make mitigation efforts and it is not only for developed States to take action, even if the latter States should

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([51]) See, most recently, IPCC, AR6 Synthesis Report 2023, pp. 82 and 87.

([52]) ECtHR (Grand Chamber), *Case of Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, Application no. 53600/20, Judgment of 9 April 2024, paragraphs 303, 304 and 320, among others.

([53]) ECtHR (Grand Chamber), *Case of Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, Application no. 53600/20, Judgment of 9 April 2024, paragraphs 550 and 572-573.

([54]) In the given context, the ECtHR found in para. 571 of the judgment that "[t]*his principle* [the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement] *requires the States to act on the basis of equity and in accordance with their own respective capabilities. Thus, for instance, it is instructive for comparative purposes that the European Climate Law provides for the establishment of indicative GHG budgets*".

([55]) ECtHR (Grand Chamber), *Case of Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, Application no. 53600/20, Judgment of 9 April 2024, paragraph 572.

"continue to take the lead" ([56]). Against that backdrop, both equity and the 'CBDR-RC' principle inform the understanding of the measures that a specific party is bound to take. ([57]) At the same time, the reference to available means and capabilities cannot be an excuse for States to unduly postpone, or even be exempt from, the implementation of mitigation measures ([58]).

I.2.3. On the duty of cooperation

48. The European Union observes that various written statements address the existence and scope of a duty of cooperation in international law, and in particular, the implications of such duty for the interpretation of the obligations of States to protect the climate system from GHGs.

49. As set out in Article 1(3) of the United Nations Charter, States have committed to achieve international cooperation in 'solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'. ([59])

50. In the specific context of addressing climate change, which is widely acknowledged to be a global problem of common concern to humankind, ([60]) the importance of cooperation between States has been identified in United Nations Resolutions ([61]), and has been affirmed in declarations, including the Rio Declaration. ([62])

51. A duty to cooperate has been accorded a specific normative status in various treaty regimes, including in the international climate regime which provides a framework for delimiting the scope of States' obligations in the specific context of protecting the climate system from anthropogenic GHG emissions. ([63]) For instance, in its Advisory Opinion on Climate Change and

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([56]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 229.

([57]) See Written Statement of the European Union, paragraphs 208-208 and 213.

([58]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 226.

([59]) See in this respect, *inter alia* the Written Statements submitted on behalf of the Bahamas, COSIS, the Federal Republic of Germany, Portugal, Uruguay, Vanuatu, and Viet Nam.

([60]) See for instance the IPCC Climate Change 2023 Synthesis Report, Section 4.8.2.

([61]) See Resolution 76/300 adopted 28 July 2022 which calls upon States to enhance international cooperation in order to increase efforts to ensure a "clean, healthy and sustainable environment for all", Resolution 61/222 adopted on 20 December 2006 which calls upon States to "cooperate and take measures" consistent with UNCLOS to protect and preserve the marine environment. See also United Nations General Assembly Resolution 43/53 on Protection of Global Climate for Present and Future Generations of Mankind [UNGA]) UN Doc A/RES/43/53.

([62]) See for instance, Principle 7 of the Rio Declaration and Principle 24 of the Stockholm Declaration.

([63]) The preamble to the UNFCCC states: "*Recognizing that the global nature of climate change requires the widest possible cooperation of all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions"*. For another example, see the Convention on Biological Diversity. As regards the central role to be accorded to the UNFCCC and

International Law, ITLOS acknowledges that *"[t]he UNFCCC and the Paris Agreement stand out in this regard as primary treaties addressing climate change."* ([64]) The Tribunal also recalls that *"[m]ost multilateral climate change treaties, including the UNFCCC and the Paris Agreement, contemplate and variously give substance to the duty to cooperate on the assumption, as indicated in the preamble of the UNFCCC, that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response"*. ([65])

52. Consequently, 'cooperation' can be described as a cornerstone of contemporary international law in respect to the protection of the climate system from the consequences of anthropogenic GHGs. ([66])

53. The European Union considers that the duty to cooperate should be understood as an obligation of conduct, the precise scope and content of which depends on the context and normative framework in which it is invoked. Moreover, as an obligation of conduct, within a given treaty context, that duty may be fulfilled in various ways by different States.

54. Since the Paris Agreement constitutes the contemporary, shared understanding of the parties to the UNFCCC, it is the primary reference point for interpreting the scope of the duty to cooperate in respect to addressing climate change.([67]) The European Union further agrees with those States who have submitted that the duty to cooperate to mitigate and adapt to climate change should also be understood to form part of the duty of prevention under customary international law. ([68])

Paris Agreement, see also Written Statement of China, paragraph 20, Written Statement of India, paragraph 105.

([64]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 214.

([65]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 298.

([66]) Laurence Boisson De Chazournes, Jason Rudall, *"Co-Operation" in The UN Friendly Relation Declaration at 50 - An assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020), p. 105–132.

([67]) Written Statement of the European Union, paragraph 90. See also the subsequent decisions of the COP which reaffirm the role of cooperation, e.g. Decision -/CP.27 Sharm el-Sheikh Implementation Plan, Preamble: "*Also reaffirming the critical role of multilateralism based on United Nations values and principles, including in the context of the implementation of the Convention and the Paris Agreement, and the importance of international cooperation for addressing global issues, including climate change, in the context of sustainable development and efforts to eradicate poverty*."

([68]) See the Separate Opinion of Judge Wolfrum in the *Mox Plant Case:* "*the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake*". *MOX Plant (Ireland v UK)*, Provisional Measures Order of 3 December 2001, ITLOS Reports 2001, p. 135. See further section I.2.1 above.

I.2.3.1. The duty to cooperate under the Paris Agreement

55. Cooperation between parties underpins the entire architecture of the legal framework established by the UNFCCC and the Paris Agreement. The European Union takes this opportunity to present its point of view as regards the manner in which the duty to cooperate is articulated and what it implies, in normative terms, under the Paris Agreement.

56. In the first place, since cooperation has been institutionalised by the Paris Agreement through decision-making processes which build on the framework established under the UNFCCC, the European Union affirms that the duty to cooperate implies a specific obligation for the parties to the Paris Agreement to continue to engage meaningfully in discussions and on-going processes within the framework of the UNFCCC. ([69])

57. Whilst the European Union does not consider that there is an obligation to secure a specific normative outcome, the obligation referred to in the previous paragraph reflects the importance of meaningful participation in the formulation and elaboration of rules, standards and recommended practices and procedures for the protection and preservation of the climate system. ([70]) The transparency and accounting mechanisms laid down in the Paris Agreement should be understood as tools that facilitate the implementation by States of this obligation. ([71])

58. In the second place, as acknowledged in a considerable number of written statements, addressing climate change requires States to cooperate on a continuous basis, in order to ensure that the temperature goal laid down in Article 2(1) of the Paris Agreement can be met. ([72]) Indeed, it is precisely because the actions of one party would not be sufficient to address the effects of climate change that 'collective efforts' are required. ([73])

59. The need for continued and sustained cooperation underpins the obligations requiring the preparation and communication of 'successive' and progressively ambitious NDCs as interpreted in the light of subsequent decisions of the UNFCCC Conference of the Parties (COP). ([74]) In particular, as set out in the European Union's written statement, each party must apply their 'highest possible level of ambition' and measures taken should be progressive. ([75]) Nevertheless,

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([69]) See Written Statement of the Republic of the Marshall Islands, paragraph 38.
([70]) See by analogy, ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 307.
([71]) See for instance, Article 4 (8) of the Paris Agreement.
([72]) See for instance, Written Statement of Ecuador, paragraph 3.53.
([73]) See in this respect, the Preamble to the UNFCCC.
([74]) See Article 4 (2) of the Paris Agreement.
([75]) See Written Statement of Antigua and Barbuda, paragraphs 257 and 258: "*the meaning of the word "highest" is also free from doubt. "Highest" is a superlative, here denoting the greatest emissions reduction target that can be achieved ("possible"). The term "highest ambition possible" must be*

parties may design their individual pathway to contributing towards the attainment of the temperature goal. ([76])

60. Given the margin of discretion States enjoy when designing their NDCs, the European Union does not share the view expressed in certain written statements that the duty to cooperate in the framework of the Paris Agreement should be interpreted as implying that the approval of other parties to the Paris Agreement must be secured before or after introducing specific climate-mitigation or adaptation measures. If 'international coordination' or multilateral consensus were to be treated as a condition for a 'pioneering' measure to be lawfully adopted, this could undermine the objective of the Paris Agreement to incentivise and indeed require States to adopt progressive measures in line with their national circumstances. ([77])

61. Rather, the European Union agrees that *'the duty to cooperate does not take precedence over or supplant other principles of international law that are relevant to addressing the anthropogenic emissions of greenhouse gases, including the principle to prevent transboundary harm as well as the precautionary principle.'* ([78]) Nevertheless, where parties adopt measures that, whilst furthering the objectives of the Paris Agreement, may have impacts on other parties, the European Union considers that these measures should be adopted in a transparent manner. ([79]) Moreover, parties must implement their obligations in good faith.

62. In the third place, the Paris Agreement establishes mechanisms designed to strengthen cooperation to protect the climate system through the provision of financial and technical assistance as regards climate change mitigation and adaptation. In that sense:

    a. Article 4 (5) of the Paris Agreement reflects the understanding that developing countries may require support to implement their obligations under Article 4 (2) and (3) to communicate and maintain successive and progressive NDCs;

    b. Article 6 (1) recognises that some parties choose to pursue voluntary cooperation in the implementation of their NDCs and Article 6 (4) establishes a mechanism for use by the Parties wishing to participate in that cooperation;

    c. Article 7 (6) and 7 (7) recognise the importance of international cooperation on adaptation efforts and the need to *'strengthen … cooperation on enhancing action on adaptation'*;

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shaped by the purpose of an NDC, which is to contribute to the Paris temperature goal and prevent dangerous anthropogenic interference with the climate system."

([76]) Multiple written statements recall that parties have freedom to determine the nature of the measures in their respective NDCs.

([77]) See *Case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, paragraph 547.

([78]) See Written Statement of Micronesia, paragraph 66.

([79]) See Written Statement of the European Union, section 4.4.3.2.

d. Article 9 (1) states that '*Developed country Parties shall provide financial resources to assist developing country parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention'*; and

e. Article 10 (2) provides that cooperative action on technology development and deployment '*shall be strengthened'.*

63. The European Union notes that certain written statements express the view that the duty to cooperate as articulated in the Paris Agreement should be interpreted as meaning that developed countries have an enforceable legal obligation to provide finance and other technical assistance to developing countries. ([80]) It has also been submitted that the due diligence obligations under the Paris Agreement only become binding on developing countries on the proviso that such financial and technical assistance has been duly provided.

64. The European Union is of the view, firstly, that whilst numerous provisions in the Paris Agreement reflect the shared understanding that certain parties may require support from others to implement their obligations as regards NDCs ([81]), the obligations relating to the preparation and notification of a NDC, which bind all parties to the Paris Agreement, are not conditional, as far as developing countries are concerned, on a specific level of financial assistance being provided by developed countries. Any party which does not 'prepare, communicate and maintain' an NDC will violate Article 4 (2) of the Paris Agreement. ([82])

65. Second, the terms of the provisions of the Paris Agreement on financing and technical assistance, and in particular Article 9 thereof, indicate the clear intention of the parties to establish mechanisms in which the level of participation remains voluntary. It follows that whilst the duty to cooperate is given expression through commitments on the part of 'developed country parties' to provide financial and technical assistance, this does not give rise to an enforceable right under international law that may be invoked by developing countries against developed countries to receive a specified quantum of such financial or technical assistance.

66. This interpretation is supported by the express terms and architecture of the Paris Agreement, including the structure of the financing mechanisms established under it, and is also consistent with subsequent practice as reflected in decisions of the COP or of the CMA. ([83]) In particular,

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([80]) See for instance, Written Statement of Barbados and Written Statement of RDC.
([81]) See for instance Article 4 (5) of the Paris Agreement.
([82]) See also Written Statement of Antigua and Barbuda, paragraph 233.
([83]) See in particular, Decision 4/CP.28 Long-term climate finance, FCCC/CP/2023/11/Add.1 33, Decision 18/CMA.4 Matters relating to the Adaptation Fund, FCCC/PA/CMA/2022/10/Add.3, Decision 1/CP.28 Operationalization of the new funding arrangements, including a fund, for responding to loss and damage and Decision 1/CMA.5 Outcome of the first global stocktake FCCC/PA/CMA/2023/16/Add.1 2.

the amount of financial resources to be mobilised for mitigation and adaptation has consistently been referred to in aspirational terms, as a 'goal'. ([84]) Equally, whilst the importance of the operating entities of the Financial Mechanism and the Adaptation Fund in the climate finance architecture has also been recognised, all these structures rely on pledges as to the level of contribution that will be provided. ([85])

67. For instance, the two financial mechanisms referred to in the Paris Agreement through which financial assistance is provided, namely the Global Environment Facility (GEF) and the Green Climate Fund, are structured in such a way as to reflect the voluntary nature of the level of participation. ([86]) The financing framework for the GEF is agreed between participants. ([87]) As to the Green Climate Fund, as is reflected in decisions of the COP/CMA, the financial resources that have been made available through that mechanism have contributed to averting, minimising and addressing loss and damage in developing countries. Those financial resources are based on pledges and contributions determined by the participants themselves. ([88]) Equally, a Fund for responding to loss and damage was operationalised at COP28. ([89]) The purpose of the Fund is 'to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events'. ([90]) The recitals recall the understanding of the COP and the CMA that funding arrangements, including a fund, for responding to loss and damage are based on cooperation and facilitation and do not involve liability or compensation.

68. The European Union wishes to underscore that although the commitments to provide financial support reflected in Article 9 of the Paris Agreement cannot be understood as enforceable obligations under international law to provide a specific quantum of financial or technical resources, this does not imply that those mechanisms should be considered ineffective. The 'support' provisions are being implemented. For instance, the replenishments of the GEF have grown significantly since its pilot period (1991-1994), with USD 5.33 billion in confirmed

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([84]) See for instance Decision 4/CP.28 Long-term climate finance, FCCC/CP/2023/11/Add.1 33.

([85]) See for instance, Decision 1/CMA.5, para.82.

([86]) Paris Agreement, recital (58). The GEF has a formal mandate as a financing mechanism under several multilateral environmental agreements, including the CBD, UNCCD, UNFCCC, the Minamata Convention, the Stockholm Convention and the Montreal Protocol.

([87]) Summary of negotiations of the Eighth Replenishment of the GEF Trust Fund, GEF/C.62/03 (June 15, 2022), 268.

([88]) See for instance, Decision 6/CMA.2 Guidance to the Green Climate Fund, FCCC/PA/CMA/2019/6/Add.1, para 8.

([89]) See 1/CP.28 Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4.

([90]) See 1/CP.28 Operationalization of the new funding arrangements, including a fund, for responding to loss and damage, point 2.

pledges for the 8th replenishment period (2022-2026), an increase of more than 30% from the period before. ([91]) On 29 May 2024, the OECD's seventh assessment of progress towards the UNFCCC goal found that in 2022 developed countries provided and mobilised a total of USD 115.9 billion in climate finance for developing countries, exceeding the annual USD 100 billion goal for the first time ([92]). Whilst the European Union acknowledges that additional cooperation is required to ensure that the adaptation financing gap does not continue to widen, ([93]) the need for such cooperation does not imply that the clear terms and architecture of the Paris Agreement should be interpreted as imposing obligations to which the parties did not consent.

I.2.3.2. Relationship between the duty to cooperate and the principle of CBDR-RC

69. The European Union takes note that certain written statements address the relationship between the principle of CBDR-RC and the duty to cooperate.

70. The European Union refers generally to section 4.5.3 of its Written Statement as regards the nature and implications of the CBDR-RC principle when interpreting the obligations of States to protect the climate system. In particular, the European Union recalls that the principle of CBDR-RC, as a treaty-based principle, must be interpreted in the specific normative framework in which it is invoked.

71. Given the diverging views expressed in the various written statements, the European Union observes, firstly, that the principle of CBDR-RC as articulated in the Paris Agreement should not be interpreted as meaning that the duty to cooperate is only applicable to certain parties.

72. All parties to the Paris Agreement are bound by an obligation of result to prepare, communicate and maintain successive NDCs and by common due diligence obligations to ensure that each NDC reflects, on a dynamic basis, their highest-possible level of ambition. ([94]) Similarly, the duty to cooperate to achieve the aim of the temperature goal is common to all parties and, therefore, core obligations, such as to continue to participate in the dialogues and structures established by the UNFCCC and the Paris Agreement, bind all parties in the same way.

73. Equally, Article 11(3) of the Paris Agreement sets out that '*all parties should cooperate*' to improve the capacity of developing countries to implement the agreement. ([95]) That obligation is

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([91]) Report on the Seventh Replenishment of the GEF Trust Fund, GEF/A.6/05/Rev.01 (June 27, 2018), 178.

([92]) OECD (2024), Climate Finance Provided and Mobilised by Developed Countries in 2013-2022.

([93]) Decision 1/CMA.5 Outcome of the first global stocktake FCCC/PA/CMA/2023/16/Add.1, para 81.

([94]) See Written Statement of the European Union, paragraphs 147 and 159. See also Written Statement of Kenya, paragraph 5.38, Written Statement of the United States.

([95]) The European Union concurs with the Republic of Kenya that '*Ultimately, all States must cooperate to combat climate change. As noted by the President of the Court, "there is no solution to climate change*

not delimited to a specific category of States. This is consistent with the collective endeavour that addressing climate change implies. Equally, whilst Article 9 (3) of the Paris Agreement requires developed country parties to continue to *'take the lead in mobilizing climate finance'*, this commitment does not exclude efforts from all parties, irrespective of their economic status, in the light of their respective capabilities, to contribute to this goal.

74. Nevertheless, the European Union agrees that the means through which parties may fulfil their duty to cooperate may vary in the light of the CBDR-RC principle, since not all parties enjoy the same resources and capacities.

75. This is reflected in specific provisions under the Paris Agreement, including those laying down commitments to ensure that sufficient financial means are available for net GHG emissions to be effectively reduced. Indeed, as reflected in the Advisory Opinion of ITLOS on Climate Change, scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change is a means of ensuring that the specific needs and special circumstances of those developing countries that are particularly vulnerable to the adverse effects of climate change can be taken in to account. ([96])

76. The European Union also observes that certain written statements address the role of international trade law in this context. ([97])

77. The European Union considers that there is no inherent conflict between the disciplines established under the Marrakech Agreement establishing the World Trade Organization ('WTO') and the obligations on States to protect the climate system from anthropogenic greenhouse gas emissions established under the Paris Agreement.

78. In particular, neither the duty to cooperate, nor the principle of CBDR-RC set down in the Paris Agreement can be interpreted as imposing additional obligations under the framework established by the WTO, since those agreements provide a comprehensive framework for assessing measures which may have implications for international trade and which pursue environmental and/or climate change mitigation objectives. International trade law both may and should, and so far in all cases has been interpreted so as to, reinforce rather than undermine the

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but through greater international cooperation" – Written Statement of the Republic of Kenya at paragraph 5.21 citing N. Salam, "*Reflections on International Law in Changing Times*", p. 205.

([96]) ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, paragraph 327.

([97]) See for example the Written Statements of Argentina, Antigua and Barbuda, Brazil and the RDC.

efforts of parties to the Paris Agreement to give effect to the objective of addressing climate change. ([98])

79. Consequently, and as a corollary to this, parties may, without breaching the duty to cooperate, adopt measures regulating access to their markets that are designed to encourage a shift towards the consumption of goods that do not exacerbate GHG emissions. These may include measures that also seek to promote greater global ambition as regards climate change mitigation, precisely because the Paris Agreement establishes a minimum standard of conduct. Indeed, the Preamble to the Paris Agreement reflects that that *'sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change.'* ([99])

I.2.4. On human rights

80. The European Union notes that there is a broadly shared understanding that climate change negatively impacts the enjoyment of human rights ([100]).

81. Various written statements share the European Union's position that the international climate and human rights law regimes are to be interpreted in a harmonious and integrated manner ([101]). However, the European Union observes that certain written statements suggest that in the climate change context, the obligations derived from international human rights law would be applicable only to the extent that the provisions of international human rights law are compatible with those of the UNFCCC ([102]).

82. In this regard the European Union would recall ([103]) that Article 31(3)(c) of the Vienna Convention on Law of Treaties (VCLT) and the 'principle of harmonization' apply to the relationship between the international climate change regime and the international customary law human rights norms, such that the two legal regimes give rise to a single set of harmonious, compatible obligations.

([98]) See Written Statement of the RDC, paragraph 250: «*De manière analogue, le droit international du commerce doit être interprété et appliqué de manière, non pas à faire obstacle aux mesures prises par les États et les organisations régionales en vue de lutter contre les changements climatiques et leurs conséquences, mais au contraire de manière à les renforcer.*»

([99]) See also Written Statement of the European Union, section 4.5.3.4.

([100]) See Written Statement of Antigua and Barbuda, paragraph 186; Written Statement of IUCN, paragraph 463; Written Statement of Australia, paragraph 3.56; Written statement of the USA, paragraph 4.38; Written Statement of Singapore, paragraph 3.86.

([101]) See Written Statement of Australia, paragraph 195; Written Statement of Colombia, paragraph 3.71; Written Statement of IUCN, paragraph 528; Written Statement of Singapore, paragraph 3.87.

([102]) See Written Statement of China, paragraph 123; Written Statement of OPEC, paragraph 92.

([103]) Written statement of the European Union, paragraph 229.

83. It is the European Union's consistent position ([104]) that States are obliged to take mitigation as well as adaptation measures, and this also as a matter of international human rights law. Various written statements share the European Union's view in this respect ([105]). The European Union underscores that a corresponding conclusion has also recently been confirmed by the ECtHR in the *KlimaSeniorinnen* case ([106]), interpreting the regional human rights regime applicable to the States of the Council of Europe.

84. The European Union also notes that various written statements agree ([107]) that – in order to fulfil their international human rights obligations associated with climate change – States must adopt measures which are appropriate to achieve the temperature goal laid down in Article 2 of the Paris Agreement. ([108])

85. The European Union notes a certain convergence on the recognition that the human right to a clean and healthy environment is an autonomous human right ([109]). In this regard, the European Union reiterates its position that this right is emerging as a matter of customary international law ([110]), and invites the Court to confirm this proposition ([111]).

86. The European Union also notes that various written statements have addressed the issue of the territorial scope of States' human rights obligations associated with climate change, reaching often different conclusions in that regard ([112]).

87. The European Union notes that, in the regional context of the Council of Europe, the ECtHR recently found in the *Duarte Agostinho* case, that, while there may be certain causal relationships between activities within a State emitting GHG and the adverse impact on the rights and well-

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([104]) Written statement of the European Union, paragraph 274.
([105]) See Written Statement of Australia, paragraph 190; Written Statement of Uruguay, paragraph 110; Written Statement of Singapore, paragraph 3.73; Written Statement of Antigua and Barbuda, paragraph 356 and 377.
([106]) See *Case of Verein KlimaSeniorinnen Schweiz and Others V. Switzerland*, Application no. 53600/20, Paragraph 519 and 545.
([107]) See for instance Written Statement of IUCN, paragraph 516; Written Statement of Antigua and Barbuda, paragraph 361; Statement of Australia, paragraph 3.67.
([108]) See Written Statement of the European Union, paragraph 272 and 274.
([109]) Written statement of IUCN, paragraph 481; Written statement of Mexico, paragraph 86. Written statement of Antigua and Barbuda, paragraphs 182 and 196; Written Statement of the Malaysian Spearhead Group, paragraph 283; Written statement of Costa Rica, paragraph 82; Written Statement of Vanuatu, paragraph 484.
([110]) See Written Statement of the European Union, paragraph 258.
([111]) See Written Statement of the European Union, paragraph 263. In this regard see also Written statement of Costa Rica, paragraph 82.
([112]) See for instance Written Statement of Australia, paragraph 3.64, Written Statement of Chile, paragraph 69, Written Statement of Vanuatu, paragraph 334, Written Statement of MSG, paragraph 257, Written Statement of DRC, paragraph 183.

being of people outside its borders ([113]), these characteristics alone cannot justify creating new, or expand existing, grounds for extraterritorial jurisdiction under the ECHR ([114]).

I.3. On the consequences for vulnerable States and people (addressed in question (b))

88. The European Union notes that many written statements have sought to focus the second question on alleged breaches of obligations, and on consequential findings of liability or responsibility of certain States or groups of States, including potential remedies, notably compensation.

89. First and foremost, the European Union reiterates that following such an approach risks transforming the advisory proceedings into adversarial proceedings which would require the consent of all States affected. Therefore, the European Union would invite the Court to refrain from findings of breaches or grounds for compensation.

90. If ever the Court would wish to address the legal framework for secondary obligations in general terms, the European Union would underline the following.

91. The European Union recalls the limited scope of application of the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) ([115]). In particular, the climate change regime of the UNFCCC and the Paris Agreement, as well as the regional human rights protection systems such as the ECHR, can be seen as "special rules of international law" within the meaning of Article 55 ARSIWA, rendering the provisions of the ARSIWA in principle inapplicable ([116]).

92. Consequently, the ARSIWA could at best have a very subsidiary role for determining the legal consequences of emissions causing significant harm in respect of climate change.

93. It is with these important limitations in mind that the European Union will briefly consider the provisions of the ARSIWA.

([113]) *Case of Duarte Agostinho and others against Portugal and 32 others*, Application no. 39371/20, Decision of 9 April 2024, paragraph 193.
([114]) *Case of Duarte Agostinho and others against Portugal and 32 others*, Application no. 39371/20, Decision of 9 April 2024, paragraph 195.
([115]) See Written Statement of the European Union, paragraphs 348 to 354.
([116]) See Written Statement of the European Union, paragraphs 351 to 355.

94. While Article 1 ARSIWA ([117]) encapsulates the basic principle underlying the ARSIWA as a whole, Article 2 ARSIWA addresses the elements of an internationally wrongful act, namely attribution to a State under international law and breach of an international obligation of the States. ([118])

95. In terms of the content of the international responsibility of a State, the cessation of the wrongful conduct and its non-repetition (Article 30 ARSIWA), i.e. in the present case to comply with the procedural and due diligence obligations, would be the first general obligation of a State responsible for an internationally wrongful act. With regard to reparation, which is the second general obligation of a State responsible for an internationally wrongful act, restitution is mentioned as the first form of reparation, followed by full compensation (when reparation is not possible) and finally by satisfaction (Articles 34 to 37 ARSIWA). This may be read as implying that the primary form of reparation for breaches of obligations regarding climate change would be to re-establish the situation which existed before the breach of these obligations, including by own mitigation as well as adaptation measures, or by assisting victim States in their mitigation and adaptation measures. As all the forms of reparation are subject to certain conditions (no material impossibility, proportionality, no humiliation), it would appear that in the end there would be no unconditional duty of reparation in case an internationally wrongful act can be attributed to a State. In any event, there would be no duty to provide a specific form of reparation such as financial compensation. Finally, also the conduct of the alleged victim States would have to be taken into account in the assessment of reparation (Article 39 ARSIWA). Thus, where compensation would be demanded by States which are themselves in breach to observe their own obligations account would have to be taken of the effects of these breaches.

96. Two further specific points should be underlined.

97. First, as explained in the European Union's written statement and as generally shared by most States, States' substantive obligations regarding the limiting of GHG emissions are obligations of conduct and due diligence ([119]). Consequently, the non-achievement of certain quantified aims of the Paris Agreement such as the limit of 1.5 °C or well below 2 °C compared to pre-industrial times cannot, on its own, establish the commission of an internationally wrongful act (by action or by omission). Indeed, the State concerned would still be able to claim and demonstrate that it

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([117]) Article 1 ARSIWA provides: "*Every internationally wrongful act of a State entails the international responsibility of that State.*"

([118]) Article 4 ARSIWA considers the attribution of the conduct of organs of a State to the State.

([119]) In its Advisory Opinion on climate change, the ITLOS qualified this as a "stringent" obligation of conduct.

made all its best efforts to achieve the aims of the Paris Agreement, and this even if these efforts may not have actually achieved the stated aim.

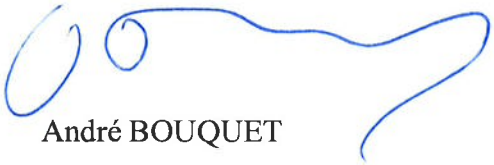
98. Second, and relatedly, States' substantive obligations regarding the limiting of GHG emissions are for the States collectively. Therefore, in order to establish an internationally wrongful act by a certain State, it would be necessary to establish causation and attribute specific actions or omissions (e.g. by undertakings, or by local or central government authorities) to that State, and to that State individually, before the commission of an internationally wrongful act would be established, and consequently the individual responsibility of that State may be engaged.

99. These points can clearly not be appropriately addressed in the context of an advisory opinion procedure such as the present one, as they would require an in-depth adversarial debate. Therefore, the European Union will refrain from a more in-depth assessment of wrongfulness and of attribution.

CONCLUSION

100. The European Union maintains its conclusions as set out in its Written Statement of 22 March 2024.

The European Commission, on behalf of the European Union



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