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DIVING INTO CLIMATE CHANGE: ITLOS' ADVISORY OPINION IN CASE NO. 31

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1. On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered its [Advisory Opinion](#) on the Request submitted by the Commission of Small Island States on Climate Change and International Law (COSIS) (Case No. 31). The present work aims at briefly outlining the main takeaways of the Tribunal's analysis.

2. The proceedings at stake stemmed from the [Request](#) of 12 December 2022 submitted by the COSIS, consistently with its mandate under the [Agreement](#) of 31 October 2021 to "promote and contribute to the definition, implementation and progressive development of rules and principles of international law concerning climate change". Through said Request, the COSIS referred the following issues to the ITLOS:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:

- 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?
- to protect and preserve the marine environment in relation to

climate change impacts, including ocean warming and sea level rise, and ocean acidification?

3. With a ground-breaking unanimous ruling, the ITLOS found that States Parties to the [UNCLOS](#) are under a “stringent” due diligence obligation to prevent, reduce and control the pollution of the marine environment by anthropogenic greenhouse gases (GHG) emissions.

4. In its Opinion, the Tribunal clarified that in the interpretation of the Convention “external rules”, *e.*, the other relevant rules of international law, must be taken into account in an effort of coordination and harmonization, ensuring the “living instrument” nature of the UNCLOS. In this sense, the ITLOS framed the international treaties addressing climate change as relevant external rules and paid special attention to the [UN Framework Convention on Climate Change](#) (UNFCCC), to the [Paris Agreement](#) and to the work of the [Intergovernmental Panel on Climate Change](#) (IPCC).

5. More in detail, as a first step in its analysis, the Tribunal assessed whether the emission of anthropogenic GHG constitutes “pollution of the maritime environment” under Article 1.1.4 UNCLOS. In accordance with such provision, “‘pollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities”. Subsequently, the Tribunal pointed out the three following cumulative criteria set forth by Article 1.1.4 UNCLOS: (i) the identification of a substance or energy, (ii) the direct or indirect introduction of said substance or energy into the marine environment by humans, and (iii) that such introduction results, or is likely to result, in deleterious effects.

6. As for the first criterion, the ITLOS noted that, in light of the “ordinary meaning of the word ‘gas’ and from the UNFCCC and IPCC definitions of the term ‘greenhouse gases’”, GHG indeed constitute “substances”.

Turning to the second criterion, its subjective element posed no difficulties, since anthropogenic emissions, as such, are produced by man. In turn, to verify whether GHG emissions imply an introduction into the marine environment, the Tribunal firstly clarified that the broad scope of the term “marine environment” entails the inclusion of spaces beyond the maritime zones established under the Convention. Next, considering that, according to scientific data, the carbon dioxide contained in GHG dissolves in sea water and mixes into the ocean, the ITLOS found that GHG emissions do amount to a direct introduction of substances in the marine environment. In analyzing the third criterion, the ITLOS relied on the IPCC findings, which establish that the accumulation of GHG in the atmosphere causes ocean warming, sea level rise and ocean acidification, producing “multiple deleterious effects on the marine environment and beyond”.

Therefore, given the fulfillment of all three above criteria, the Tribunal concluded that anthropogenic GHG emissions constitute marine pollution pursuant to Article 1.1.4 UNCLOS, thus setting an unprecedented ground for addressing climate change under the Convention.

7. On such basis, the ITLOS was able to turn its analysis to the specific obligations stemming from Part XII of the Convention, which governs the protection and preservation of the marine environment. In particular, a general obligation “to protect and preserve the marine environment” is posed by Article 192 UNCLOS. The same obligation is restated in Article 193 UNCLOS in relation to the right to exploit natural resources. Article 194 UNCLOS provides more detailed guidance on the content of such obligation, by requiring States Parties to take all measures necessary to prevent, reduce and control marine pollution “from any source”. As outlined by the Tribunal, Article 194 UNCLOS sets forth three main obligations of States Parties: (i) the obligation to take all necessary measures to “prevent, reduce and control pollution of the marine environment”, (ii) the obligation to take all necessary measures “to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment” and to avoid the spreading of pollution beyond the areas where they exercise

sovereign rights, (iii) the obligation to “protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

8. When it comes to GHG emissions, the Tribunal noted that the obligation to prevent, reduce and control marine pollution should be understood, in light of Article 4.1 of the Paris Agreement, as entailing “rapid reductions” of GHG emissions “in accordance with best available science”. In this sense, the related necessary measures shall be taken by States both jointly and individually and “as appropriate” according to the particular circumstances. A particularly relevant role is played by joint action and good faith cooperation between States due to the global and transboundary nature of pollution from GHG emissions. However, the Tribunal clarified that the participation to global efforts and initiatives is not by itself sufficient to discharge the obligations under Part XII UNCLOS.

9. In the Tribunal’s view, the necessary measures to be adopted by States should be determined objectively and in accordance with scientific findings and international rules and standards on climate change. The ITLOS also underlined that in the related assessment scientific certainty is not required, as the “precautionary approach”, should be adopted. Another relevant principle is found in the “principle of common but differentiated responsibilities”, according to which the measures to reduce GHG emissions may differ between developed and developing States.

10. Turning to the scope of State Parties’ obligations, the Tribunal clarified that the “activities under their jurisdiction or control” (Article 194, paragraph 2 UNCLOS) include the activities of both public and private actors and their transboundary reach, as well as the related actual and potential damages by pollution.

11. The Tribunal stressed the relevance of the UNFCCC and the Paris Agreement and, in particular, of the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels, in the interpretation and application of the Convention. However, the Opinion rejected the argument of the *lex specialis* nature of such instruments and

clarified that the mere compliance with the obligations set therein is not sufficient to satisfy the duties under Part XII UNCLOS. In particular, States Parties' obligation to adopt all necessary measures using "the best practicable means at their disposal" and "in accordance with their capabilities" is not modified or limited by the UNFCCC and the Paris Agreement.

12. Moreover, the ITLOS stated that States Parties are under an obligation to adopt specific national legislation and to establish international rules and standards through good faith cooperation on an ongoing basis. Additionally, the Convention also imposes specific obligations to monitor the risks and effects of pollution, to publish reports and to conduct and environmental impact assessments of any planned activity, either public or private, which may cause marine pollution by GHG emissions.

13. As specified in the Opinion, the obligations outlined by the ITLOS constitute obligations of conduct and not of result. As such, they require States to act with due diligence in the adoption of necessary measures to prevent, reduce and control marine pollution by GHG emissions caused by public and private activities. In the Tribunal's view, "given the high risks of serious and irreversible harm to the marine environment" the applicable standard of due diligence shall be "stringent".

14. The ITLOS' Opinion comes at a very peculiar time for climate change litigation. The cases against States and corporations for their alleged contribution or insufficient response to climate change is constantly increasing, and, as of 31 May 2023 amounted to the significant number of [2,341](#). Notably, in a [recent judgement](#), the European Court of Human Rights ruled that States' insufficient response to climate change amounts to a [human rights violation](#). Additionally, two other advisory cases on climate change are currently pending before the [International Court of Justice](#) and the [Inter-American Court of Human Rights](#) and their outcome is expected in the next months.

The present Advisory Opinion, although non-binding, provides fundamental guidance in the interpretation and application of international law and contributes to its development. In line with current

trends, ITLOS' Opinion importantly paves the way for the advancement of climate change litigation by setting new grounds to invoke States' responsibility *vis-à-vis* climate change in light of their international obligations.