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Legal Briefing Note, ITLOS Case No. 31 – The ITLOS Advisory Opinion on States Obligations with Respect to The Marine Environment in The Context of Climate Change

Relevance of the ITLOS Advisory Opinion for the Request for an Advisory Opinion on Climate Change from the International Court of Justice

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Executive Summary

This briefing note outlines key legal findings from the advisory opinion on climate change of the International Tribunal for the Law of the Sea (ITLOS), also referred to as "Case No. 31", requested by the Commission of Small Island States on Climate Change and International Law (COSIS) and delivered on 21 May 2024.[1] In its Opinion, ITLOS's twenty-one judges decided unanimously that UNCLOS imposes robust obligations on its 169 States Parties to mitigate climate change and assist developing States in adapting to its effects.

The advisory opinion contains important guidance relevant to States Parties' compliance with their obligations under the United Nations Convention on the Law of the Sea (UNCLOS) in the context of the climate change caused by anthropogenic greenhouse gas (GHG) emissions. It

[1] ITLOS, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion (21 May 2024).

also contains useful and timely guidance for the advisory proceedings on climate change before the International Court of Justice (ICJ).

1. Role of Science

Crucial Role of Climate Science ● The Tribunal began by placing science at the heart of its analysis, writing that "[t]he phenomenon of climate change is central to the Request and the questions contained therein necessarily have scientific aspects." (¶ 46) ITLOS found that the best available plays a "crucial role" in determining States Parties' obligations regarding climate change, "as it is key to understanding the causes, effects and dynamics" of marine pollution through GHG emissions "and thus providing the effective response." (¶ 212.)

Source of the best available science ● The Tribunal recognized the reports of the Intergovernmental Panel on Climate Change (IPCC) "as authoritative assessments of the scientific knowledge on climate change" and as reflecting the "scientific consensus." ¶ 208 It further emphasized the broad consensus underpinning its conclusion, noting that "none of the participants [in the proceedings] challenged" the IPCC's status as the source of the best available science on climate change. ¶ 51

Role of science in the qualification of GHGs as marine pollution ● The Tribunal concluded that GHG emissions constitute pollution of the marine environment within the meaning of Article 1(1)(4) of UNCLOS on the basis of key scientific conclusions around the anthropogenic source of such emissions, the means of their introduction into the marine environment, and the deleterious effects on that environment. ¶ 179

Role of science in determining the drivers, impacts, and necessary mitigation pathways of climate change ● The Tribunal acknowledged that scientific consensus on the drivers, impacts, and necessary mitigation pathways of climate change is indisputable. Relying on the IPCC, it noted that human activities, principally through GHG emissions, "have unequivocally caused" climate change. ¶ 54

- The Tribunal further acknowledged the critical role of the ocean to the climate system and the "devastating consequences" on small island States, which are "among the most vulnerable to such impacts." ¶ 122

- The Tribunal cited to the IPCC to identify "a high risk of a much worse outcome if temperature increases exceed 1.5°C above pre-industrial levels." ¶ 209 ITLOS thus recognized the imperative of reaching net zero emissions globally around 2050 in order to stay within that temperature threshold. ¶ 210

2. Relationship Between UNCLOS and the Paris Agreement

Relevance of the Paris Agreement ● The Tribunal agreed that the Paris Agreement is "relevant to the assessment of necessary measures." ¶ 215 The Tribunal considered that "the global temperature goal and the timeline for emission pathways set forth in the Paris Agreement particularly relevant" because they "are based upon the best available science." ¶ 215

Furthermore, for the Tribunal, "[t]he dual temperature goal stipulated in the Paris Agreement has been further strengthened by the successive decisions of the Parties to the Paris Agreement." ¶ 216

Paris Agreement does not displace ● The Tribunal agreed that, "while the Paris Agreement complements [UNCLOS] in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter." ¶ 223 It found that they are "separate agreements, with separate sets of obligations." ¶ 223 The Tribunal thus concluded that States Parties' UNCLOS obligations to mitigate marine pollution by GHG emissions would not be satisfied "simply by complying with the obligations and commitments under the Paris Agreement." ¶ 223

3. Obligations to Mitigate Climate Change

States Parties' mitigation obligations ● The Tribunal found that, under Article 194 of UNCLOS, "States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection." ¶ 243 The Tribunal acknowledged that Article 194 of UNCLOS requires States parties to act with diligence to prevent, reduce, and control marine pollution through GHG emissions. ¶ 234

Necessary measures are determined objectively ● ITLOS concluded that the content of such obligations must be determined objectively, taking into account the best available science and the Paris Agreement—"in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal." ¶ 234

Stringent standard of due diligence ● ITLOS stressed that "an obligation of due diligence can be highly demanding." ¶ 257.

- In the context of climate change, the Tribunal concluded that given the high risk of severe harm that anthropogenic GHG emissions pose to the marine environment, "the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent." ¶ 241 Accordingly, States "are required to take measures as far-reaching and efficacious as possible" to mitigate climate change. ¶ 399

- The Tribunal confirmed that States' due diligence obligation requires them to regulate the conduct of private parties under their jurisdiction or control. ¶¶ 236, 247

Common but differentiated responsibilities ● The Tribunal determined that States Parties must comply with their mitigation obligations consistent with the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC).

- Specifically, the Tribunal found that "States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities." ¶ 227

- ITLOS emphasized, however, that this principle is not a pretext to justify non-compliance with States Parties' mitigation obligations. The Tribunal stressed that "the reference to available means and capabilities should not be used as an excuse to unduly postpone, or even be exempt from, the implementation of the obligation to take all necessary measures" to prevent, reduce, and control marine pollution through GHG emissions. ¶ 226 The Tribunal underscored that "all States must make mitigation efforts." ¶ 229

Environmental impact assessment • ITLOS found that UNCLOS requires States Parties to conduct and publish environmental impact assessments of "[a]ny planned activity, either public or private, which may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions, including cumulative effects." ¶ 367 This obligation falls on the "State Party under whose jurisdiction or control the planned activity will be undertaken." ¶ 367

4. Obligations to Assist Developing States

Technical assistance • ITLOS found that developed States Parties must provide "scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change," and that doing so would be "a means of addressing [the] inequitable situation" of climate change. ¶ 327 The Tribunal acknowledged that, "[a]lthough they contribute less to anthropogenic GHG emissions, such States suffer more severely from their effects." ¶ 327

Adaptation • ITLOS found that UNCLOS requires developed States Parties to assist developing States in efforts to adapt to climate change. ¶¶ 75–76, 391 This would include small island States, which ITLOS acknowledged are "considered to be among the most vulnerable" to climate change. ¶122

5. State responsibility for violations of their obligations.

State responsibility • ITLOS found that if a State "fails to comply" with its obligations under UNCLOS, "international responsibility would be engaged for that State." ¶ 223

Causation • The Tribunal noted that the "diffused and cumulative causes and global effects of climate change" would make it "difficult to specify how . . . GHG emissions . . . of one State cause damage to other States," but it emphasized that this "has more to do with establishing the causation" for purposes of States responsibility than with "the applicability of an obligation." ¶ 252

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