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**PACIFIC ISLANDS
STUDENTS FIGHTING
CLIMATE CHANGE**



Legal Memorandum

**Advisory Opinion on Climate Change Delivered by the
International Tribunal for the Law of the Sea:**

***Relevance for the International Court of Justice Climate Advisory
Proceedings***

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I. Background

On May 21, 2024, the International Tribunal for the Law of the Sea (“ITLOS”) issued a historic advisory opinion clarifying States’ obligations to protect oceans from the drivers and impacts of climate change (the “ITLOS AO”).¹ This memorandum sets forth a few critical aspects of the ITLOS AO which may be relevant for the ongoing climate advisory proceedings before the International Court of Justice (ICJ), particularly for the comments period and upcoming hearings.

The ocean, as a critical component of the climate system and the environment, is clearly within the questions before the ICJ. Notably, the resolution requesting the ICJ for an advisory opinion on climate change expressly refers to the UN Convention on the Law of the Sea (UNCLOS) and the duty to protect and preserve the marine environment.

¹ The request for an advisory opinion specified that the question sought clarification on the obligations of States Parties to UNCLOS and while the advisory opinion is addressed to them, it is worth noting that UNCLOS enjoys wide ratification; that some of its provisions – specifically those on the protection of the marine environment – form part of customary international law; and that some of the principles and obligations at issue before ITLOS are also relevant to the advisory proceedings before the IACtHR and the ICJ and cross-fertilisation is therefore to be expected.

As the preeminent authority on the law of the sea – and one of the first international courts/tribunals to pronounce on State obligations in relation to climate change – ITLOS will in all likelihood influence the advisory opinion process before the ICJ. The advisory opinion from ITLOS, and its interpretation of States’ climate-related legal obligations under UNCLOS, read in light of other relevant sources of international law, may well inform State’s submissions to the ICJ in the second round of written proceedings, as well as the oral phase, and subsequently how the ICJ will define States’ international duties to protect the oceans in the context of climate change, and more broadly how it will define States’ obligations in respect of climate change.

The ITLOS AO unequivocally provides that the law of the sea applies in determining the content and scope of States’ obligations in respect of climate change. This was clarified on the basis of the vast scientific evidence compiled by the Intergovernmental Panel on Climate Change (IPCC) that categorically establishes the harmful effects of anthropogenic greenhouse gas emissions on the marine environment.

II. The Foundational Elements of the Opinion²

i. Anthropogenic GHG Emissions Into the Atmosphere Constitute Pollution of the Marine Environment

The definition of “*pollution of the marine environment*,” under UNCLOS Article 1(1) (4) consists of three cumulative criteria: “(1) *there must be a substance or energy; (2) this substance or energy must be introduced by humans, directly or indirectly, into the marine environment; and (3) such introduction must result or be likely to result in deleterious effects*” (ITLOS AO, para. 161).

Analyzing all three criteria (paras. 161-179), the Tribunal concludes that anthropogenic GHG emissions into the atmosphere constitute “*pollution of the marine environment*” as defined under UNCLOS. This finding underscores State obligations under UNCLOS, as the Convention requires States to protect and preserve the marine environment (Article 192), which includes the “*key*” (para. 188) obligation to take all measures necessary to prevent, reduce and control pollution (Article 194). These core obligations are then “*operationalised*” through the subsequent provisions included in Part XII of UNCLOS.³

ii. The Obligation to Protect and Preserve the Marine Environment – Article 192

Under Article 192 of the Convention, States Parties have the obligation to protect and preserve the marine environment from climate change impacts and ocean acidification that include resilience and adaptation actions (para. 391). Where the marine environment has been degraded, this obligation may call for measures to restore marine habitats and ecosystems (paras 441 (4)(b)).

Article 192 of UNCLOS is both a statement of principle upon which the legal order for the protection and preservation of the marine environment is based, as well as a legal obligation “*to protect and preserve the marine environment*” (para. 184).

The obligation included in Article 192 must be interpreted to encompass “*any type of harm or threat to the marine environment.*” (para. 385). The same, closely linked with the principle of prevention, is an

² Throughout this document, authors have put quotations in italics and these italics are not from the original document, the ITLOS Advisory Opinion. Unless otherwise noted, all paragraph references are to the ITLOS AO.

³ I. Papanicolopoulou, *The climate change advisory opinion request at the ITLOS*, in *Questions of International Law* (2023).

obligation to use “*due diligence*” in taking all necessary measures to protect and preserve the marine environment (para. 396). The Tribunal determined that such a due diligence standard, given the high risks of serious and irreversible harm to the marine environment by climate change impacts and acidification is “*stringent*” (para. 399).

Article 192 of UNCLOS unequivocally applies to all maritime areas and can be invoked to combat any form of degradation of the marine environment (para. 400).

iii. The Obligation to Prevent, Reduce and Control Marine Pollution – Article 194

Under Article 194 of the Convention, States Parties to the Convention have the specific obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavor to harmonize their policies in this connection (para. 441 (3) (b)).

Article 194 of UNCLOS represents “*the main component*” of the obligation “*to protect and preserve the marine environment*” (para. 188). This provision requires States, *inter alia*, to take all necessary measures to prevent, reduce and control pollution of the marine environment from “*any source*” (para. 189).

Article 194 provides that the measures shall be taken by States “*individually or jointly as appropriate.*” In this regard, the Tribunal did not assign priority to either form of action. Whilst noting the importance of joint action due to the global and transboundary nature of anthropogenic GHG pollution, this does not mean that: (1) the obligation under Article 194(1) could be discharged by simply participating in the global efforts to address and curb climate change; or that (2) States have no obligation to take individual action. Rather, States, in accordance with the “*due diligence*” character of the obligations under Article 194(1) (again of a “*stringent*” standard due to the nature of the threat), must take “*all necessary measures*” to prevent, reduce and control pollution through GHG emissions (para. 202).

Central to “*all necessary measures*” that are essential for States to meet their obligations under Article 194 are those measures aimed at minimizing, to the fullest extent possible, the release of toxic, harmful or noxious substances (as required under Article 194(3)(a)). In the context of climate change this means the “*reduction of anthropogenic GHG emissions into the atmosphere*” (para. 205).

The content of such measures must be determined objectively, with reference to, amongst other factors, the best available science (which is “*key to understanding the causes, effects and dynamics of such pollution and thus to providing the effective response*” (para. 212)), international rules and standards (which are found in climate-related treaties and instruments (para. 214)), as well as by reference to the temperature goal and the timeline for emissions pathways as determined under the Paris Agreement (para. 222).

However, simply complying with requirements under the Paris Agreement is not sufficient to comply with obligations under Article 194(1), as measures to reduce emissions are just one element of the requirement that States take all necessary measures to prevent, reduce and control pollution of the marine environment from anthropogenic GHG emissions (para. 223). This finding is relevant for the considerations on the applicable law, discussed further below.

Finally, attention is dedicated to Article 194(2) of UNCLOS, which specifies the obligations of States to prevent transboundary damage by pollution and the transboundary spread of pollution (arguably intrinsic risks with marine pollution), and may require an even higher standard of “*due diligence*” than Article 194 (1) given the nature of transboundary pollution (para. 258).

iv. Further Relevant Obligations Contained in Part XII of UNCLOS

Articles 192 and 194 of UNCLOS, as the overarching obligations of UNCLOS's Part XII, are then further complemented and elaborated on through Articles 207 to 212, which address pollution from specific sources with a focus on adoption of national legislation and the establishment of international rules and standards to regulate marine pollution from such sources (para. 190). These provisions are then supported by specific rules in Section 6 (Articles 213 *et seq.*) concerning enforcement obligations.

Part XII of UNCLOS also contains relevant provisions around procedural obligations (*e.g.* around cooperation, environmental impact assessment (EIA) procedures or monitoring), which are analyzed in detail in the ITLOS AO. Particularly significant (para. 365) is the recognition that EIA procedures shall embrace also the cumulative impacts of relevant activities on the environment (in this regard, also see below).

II. Cross-cutting issues addressed in the ITLOS AO and of particular relevance for the ICJ AO comments period and upcoming oral arguments

i. Applicable Law

A key contentious issue in relation to defining the scope and content of State obligations as regards climate change is the issue of applicable law: whether the climate agreements, including the Paris Agreement and the United Nations Framework Convention on Climate Change, exclusively guide the interpretation of State duties in the climate context, or rather multiple sources of international law define and inform the scope of State duties in relation to climate change.

Immediately relevant in the ITLOS AO is the central role given to the concept of systemic integration of international law. In paragraphs 128 *et seq.*, the Tribunal explains the relationship between the obligations under Part XII of the UNCLOS and external rules. Focusing on Article 237 of UNCLOS and on Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, the Tribunal clearly validates the current trends towards an ever more integrated international legal order, where treaties do not apply in isolation but are “*interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation*” (para. 135, quoting *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res. 276, Advisory Opinion*, 1971 I.C.J. Rep. 16, para. 53).

In line with this, in clarifying the obligations under Article 194(1) of UNCLOS, the Tribunal concludes that obligations in relation to climate change may arise under various international legal regimes. As the Tribunal put it: “*the Convention [UNCLOS] and the Paris Agreement are separate agreements, with separate sets of obligations*” (para. 223). Thereby, what is required under UNCLOS to protect and preserve the marine environment from anthropogenic GHG emissions may go beyond the obligations under the UNFCCC and Paris Agreement. This determination clarifies that the Paris Agreement is not *lex specialis*, and while the Paris Agreement complements UNCLOS in relation to regulating marine pollution from anthropogenic GHG emissions, it does not supersede the Convention. Particularly, as the protection and preservation of the marine environment is at the core of UNCLOS, the Paris Agreement cannot be applied in a manner that frustrates that goal (para. 224).

The Tribunal, based on a close reading of the question presented, “confine[d] itself” to States’ primary obligations under UNCLOS, but noted that it “may have to refer to responsibility and liability” in doing

so (para. 148). Indeed the opinion clarifies that the failure of a State to comply with the obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, which it was confirmed includes mitigation measures, would engage the international responsibility of that State (para. 223). This finding paves the way for the application of the law of State responsibility to the context of climate change. The Tribunal's brief reference to international responsibility has potential relevance for Question (b) before the ICJ in relation to its climate advisory proceedings as it acknowledges that legal consequences could arise for breach of relevant obligations, including failure to take measures to reduce climate harms.

ii. Best Available Science

The ITLOS AO clearly affirms that measures States adopt to meet their legal obligations in respect of climate change should be in line with the best available science, which is crucial in meeting the standard of "*due diligence*" States are held to. The Tribunal alludes to the general acceptance by States of the findings of climate science, noting that the "*effects of climate change and ocean acidification are observed and explained by the science and widely acknowledged by States*" (para. 175). Notably, the opinion emphasizes that with regard to climate change and ocean acidification, "*the best available science is found in the works of the IPCC which reflect the scientific consensus.*" (para. 208).

As mentioned above, the ITLOS AO concludes that all necessary measures to be taken to prevent, reduce, and control marine pollution from greenhouse gas emissions must be determined objectively, taking into account, *inter alia*, the best available science. This makes clear that State measures, including legislative, administrative, and policy measures, and the margin of appreciation afforded to States as regards the means chosen, is bounded by considerations of the best available scientific evidence.

Additionally, in meeting their obligations to protect and preserve the marine environment, in particular, in taking measures necessary to conserve the living marine resources threatened by climate change impacts and ocean acidification, the Tribunal held that States Parties shall take into account, *inter alia*, the best available science (paras. 414, 418).

iii. Equity

The ITLOS AO clarifies that in relation to marine pollution from anthropogenic GHG emissions, States with "*greater means and capabilities must do more to reduce such emissions than States with less means and capabilities*" [referencing the principle of common but differentiated responsibilities and respective capabilities rooted in the climate agreements] (paras. 225-227). Importantly, the Tribunal, however, emphasized 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*" (para. 226), and that "*it is not only for developed States to take action, even if they should 'continue taking the lead'. All States must make mitigation efforts*" (para. 229).

The opinion also holds that States Parties have the specific obligation to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions (paras. 322-339).

Additionally, according to the opinion, measures of adaptation and resilience-building frequently require significant resources. The Tribunal notes, in this context, that it has already addressed Convention obligations on the provision of technical assistance to developing States (para. 394).

iv. Due Diligence

The ITLOS AO clarifies that States must act with due diligence in taking all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, as well as to protect and preserve the marine environment from climate change impacts and ocean acidification. Across obligations, the Tribunal emphasizes that the standard of due diligence is “*stringent*” (and even more in a transboundary context). The Tribunal bases this conclusion on the best available science, which provides that exceeding temperatures of 1.5°C would entail severe negative and often irreversible consequences for the marine environment placing a higher standard on States.

Relevant ITLOS AO excerpts on due diligence:

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

Due diligence is an obligation “*to do the utmost*” to obtain the intended result (para. 233).

“*This obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities*” (para. 236).

Drawing on its past jurisprudence the Tribunal clarifies that the standard may vary depending on several factors, and thus “*may change over time, given that those factors [inter alia scientific and technological information] constantly evolve*”. Further, “[t]he standard of due diligence has to be more severe for the riskier activities.” Finally, “[t]he notion of risk [...] should be appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude” (para. 239). Importantly, according to the opinion, “*best available science informs that anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment. [...] In light of such information, the Tribunal considers that the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent*” (para. 241).

“*[T]he implementation of the obligation of due diligence may vary according to States’ capabilities and available resources*” (para. 243).

“*The obligation of due diligence is also closely linked with the precautionary approach (...). Therefore, States would not meet their obligation of due diligence under article 194, paragraph 1, of the Convention if they disregarded or did not adequately account for the risks involved in the activities under their jurisdiction or control*” (para. 242).

The Tribunal emphasizes “*that an obligation of due diligence should not be understood as an obligation which depends largely on the discretion of a State or necessarily requires a lesser degree of effort to achieve the intended result. The content of an obligation of due diligence should be determined objectively under the circumstances, taking into account relevant factors. In many instances, an obligation of due diligence can be highly demanding*” (para. 257).

v. Duty Not to Cause Transboundary Harm

The ITLOS AO strongly reaffirms the longstanding duty to not cause (*rectius*, to prevent) transboundary harm, and applies this duty in the context of climate change.

The opinion clarifies that States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage by pollution to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. This obligation applies to a transboundary setting.

Notably the opinion holds that “[G]iven that the notion of pollution involves both actual and potential deleterious effects on the marine environment, the obligation in the former situation should be understood as requiring the prevention of actual damage by pollution, whereas the obligation in the latter situation extends not only to damage that actually occurred but also to damage that is likely to occur. In this sense...the Convention (UNCLOS) imposes a more stringent obligation by requiring States to prevent the “spread” of pollution than the principle laid down in the Stockholm Declaration and the Rio Declaration which refers to “damage” to the environment of other States and of areas beyond the limits of national jurisdiction” (para. 248).

vi. Adopting a Precautionary Approach

The ITLOS AO emphasizes the importance of adopting a precautionary approach to measures adopted in compliance with legal obligations in respect of climate change.

Specifically ITLOS holds that “*in determining necessary measures, scientific certainty is not required. In the absence of such certainty, States must apply the precautionary approach in regulating marine pollution from anthropogenic GHGs. While the precautionary approach is not explicitly referred to in the Convention, such approach is implicit in the very notion of pollution of the marine environment, which encompasses potential deleterious effects*” (para. 213).

Additionally, according to the ITLOS AO, in taking measures to meet their obligations to protect and preserve the marine environment from climate change impacts, in particular, measures necessary to conserve living marine resources threatened by climate change impacts and ocean acidification, “*States Parties are required to take into account relevant environmental and economic factors, including the impact of climate change and ocean acidification. This entails the application of the precautionary approach and an ecosystem approach*” (para. 418).

vii. The Content of the Obligation to Conduct Environmental Impact Assessments

The ITLOS AO provides substantive guidance on the obligation to conduct environmental impact assessments (EIAs), which the Tribunal considers customary international law.

Concerning the content of an environmental impact assessment, the Tribunal considers “*that the broad wording of [...] the Convention does not preclude such assessment from embracing not only the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment. In the context of pollution of the marine environment from anthropogenic GHG emissions, planned activities may not be environmentally significant if taken in isolation, whereas they may produce significant effects if evaluated in interaction with other activities. Moreover, the broad wording of article 206 does not preclude the assessment from including the socio-economic impacts of the activities concerned*” (para. 365).

The Tribunal further emphasizes that “[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, shall be subjected to an environmental

impact assessment. Such assessment shall be conducted by the State Party under whose jurisdiction or control the planned activity will be undertaken with a view to mitigating and adapting to the adverse effects of those emissions on the marine environment” (para. 367).

This finding implies that States must conduct EIAs on the basis of the cumulative impacts of the proposed emissions of greenhouse gases and their contribution to global climate change - in contrast to current practice in many jurisdictions. The wording of paragraph 365 also implies that the downstream (or scope 3) emissions from projects, including most significantly fossil fuel projects, need to be analyzed in the EIA, and must be taken into account by States in project approvals, affirming a higher standard of environmental protection for many States.

viii. Duty Not to Transfer Damage or Hazards or Transform Pollution, and the Use of Technologies

The ITLOS AO sounds a note of caution in relation to risky, speculative, and unproven technologies detailing the kind of obligations that may be engaged in the context of the use of such technologies.

The ITLOS AO clarifies that States are required “*in taking measures to prevent, reduce and control pollution of the marine environment, not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. In this context, some participants raised the issue of marine geoengineering. Marine geoengineering would be contrary to article 195 (of UNCLOS) if it has the consequence of transforming one type of pollution into another. It may further be subject to article 196 of the Convention which requires States, inter alia, to take all measures necessary to prevent, reduce and control marine pollution resulting from the use of technologies under their jurisdiction or control” (para. 231).*

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