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The Implications of the ITLOS Advisory Opinion on Climate Change: The Specific Obligations on UNCLOS States Parties

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Climate change is one of the primary concerns currently facing the international community. As acknowledged in the Preamble of the Paris Agreement, 'climate change is a common concern of humankind,' which entails crucial challenges and issues of international governance of a highly diverse nature that undoubtedly exceed the scope of the law of the sea and even that of international environmental law.

The International Tribunal for the Law of the Sea (ITLOS) rendered its advisory opinion on 21 May 2024 answering the request submitted by the Commission of Small Island States on Climate Change and International Law (COSIS).

COSIS presented two distinct questions to the Tribunal:

First, what are the specific obligations of States Parties to the UN Convention on the Law of the Sea (UNCLOS) to prevent, reduce and control pollution of the marine environment in relation to the harmful impacts of climate change?

Second, what are the specific obligations of States Parties to UNCLOS to protect and preserve the marine environment in relation to climate change impacts, including ocean warming, sea level rise and ocean acidification?

Throughout its advisory opinion, the Tribunal devoted greater attention to the substantive issues than to the resolution of jurisdictional questions. First and foremost, ITLOS addressed the interpretation of the United Nations Convention on the Law of the Sea (UNCLOS) and the link between this treaty and other norms of international law, declaring that the rules contained in Part XII (concerning the protection and

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preservation of the marine environment) and Article 237 demonstrate the openness of UNCLOS to legal regimes established by other treaties.

Accordingly, the Tribunal held that, 'subject to article 293 of the Convention, the provisions of the Convention and external rules should, to the extent possible, be interpreted consistently.' In this sense, the Tribunal affirmed that 'there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment' and that, 'in the present case, relevant external rules may be found, in particular, in those agreements., with respect to climate change, include the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Montreal Protocol.'

Moreover, when addressing the substantive issues raised by COSIS, the Tribunal declared that anthropogenic emissions of greenhouse gases into the atmosphere constitute marine pollution within the meaning of the Convention. Furthermore, it held that the States Parties have specific obligations, pursuant to Article 194, paragraph 1, of the Convention, to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions.

In a very interesting approach, the Tribunal affirmed that such measures must be determined objectively, taking into account, among other aspects, the best available science and the relevant international standards and rules contained in treaties on climate change, such as the United Nations Framework Convention on Climate Change and the Paris Agreement, particularly the goal of limiting the temperature increase to 1.5°C above pre-industrial levels (para. 441 (3)(b)).

In addition, the Tribunal expressed its view that the scope and ambition of the necessary measures may vary in accordance with the resources available to the States Parties and their capacities, and include, in particular, the reduction of greenhouse gas emissions. Furthermore, the obligation 'under article 194, paragraph 1, of the Convention to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence.' Such 'standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions,' although 'the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.' (para. 441 (3)(c)).

In this regard, ITLOS stated that, pursuant to Article 194, paragraph 2, of the Convention, States Parties have a specific obligation to take all necessary measures to ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States and their environment, and that pollution resulting from such emissions under their jurisdiction or control does not extend beyond areas where they exercise sovereign rights. Even though the Tribunal also concluded that this is a due diligence obligation, it considered that the standard of due diligence

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could be even more stringent than that established in Article 194, paragraph 1 (para. 441 (3)(d)).

In a nutshell, among the specific obligations declared by the Tribunal in response to the first question submitted by COSIS, the following can be highlighted:

- Pursuant to Articles 207 and 212 of UNCLOS, States have a specific obligation to adopt laws and regulations to prevent, reduce, and control marine pollution caused by greenhouse gas emissions from land-based sources and atmospheric discharges.
- In accordance with Article 217, States have the specific obligation to ensure that ships flying their flag or registered under their jurisdiction comply with the applicable international rules and standards established by the competent international organization or through a general diplomatic conference, as well as with their own laws and regulations for the prevention, reduction, and control of marine pollution from greenhouse gas emissions originating from ships.
- Pursuant to Articles 197, 200, and 201, interpreted jointly with Articles 194 and 192, there is a specific obligation to cooperate, directly or indirectly through competent international organizations, in a continuous, meaningful, and good-faith manner to prevent, reduce, and control marine pollution caused by anthropogenic greenhouse gas emissions.
- Under Article 202, States have the specific obligation to assist developing States, particularly vulnerable developing States, in their efforts to address marine pollution resulting from greenhouse gas emissions.

On the other hand, in response to the second question posed by COSIS, ITLOS stated that the obligation under Article 192 of the Convention includes the duty to protect and preserve the marine environment from the impacts of climate change and ocean acidification. Further, the Tribunal clarified that this obligation is a due diligence obligation whose standard is stringent, 'given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification'. Pursuant to Article 194, paragraph five, UNCLOS States Parties have the specific 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 from climate change impacts and ocean acidification'.

According to ITLOS, pursuant to Articles 61 and 119 of the Convention, States Parties have a specific obligation to adopt the necessary measures to conserve living marine resources threatened by the impacts of climate change and ocean acidification, taking into account, among other factors, the best available science as well as relevant environmental and economic considerations. Similarly, the obligation to seek to reach an agreement under Article 63(1) and the obligation to cooperate under Article 64(1) of the Convention require States Parties, among other things, to consult

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with each other in good faith with the aim of adopting the effective measures necessary to coordinate and ensure the conservation and development of shared fish stocks.

Finally, the Tribunal declared that, pursuant to Article 196 of the Convention, States Parties have a specific obligation to 'take appropriate measures to prevent, reduce and control pollution from the introduction of non-indigenous species due to the effects of climate change and ocean acidification which may cause significant and harmful changes to the marine environment,' which requires the application of the precautionary approach.

The advisory nature of the Tribunal's decision should not be overlooked. Nonetheless, it is a decision grounded in law, rendered by the full bench of an international judicial body specializing in the law of the sea. In this regard, this advisory opinion should not be undervalued, especially taking into consideration that the decision has been reached unanimously by the 21 members of the Tribunal.

It is submitted that this advisory opinion undoubtedly makes a significant contribution in clarifying the meaning and determining the scope of the specific obligations of States Parties in the matter of climate change under UNCLOS. These obligations include, on the one hand, the prevention, reduction, and control of marine pollution in connection with the harmful effects that result from or are likely to result from climate change and, on the other hand, the protection and preservation of the marine environment from the impacts of climate change.

Nevertheless, in order to obtain a comprehensive understanding of States' obligations in the field of climate change, it is logically necessary to take into account the Advisory Opinion delivered by the International Court of Justice on 23 July 2025, concerning the obligations of States under general international law in this regard (see, in this respect, the other contributions included in this issue).

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