

A Commentary on ITLOS' Advisory Opinion on Climate Change

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On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) issued a [unanimous advisory opinion](#) on States' obligations to protect and preserve the world's oceans from climate change impacts, such as ocean warming, sea level rise and ocean acidification. This is the first time that an international court or tribunal has addressed States' obligations to combat climate change within the framework of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

ITLOS is also the first international judicial body to deliver a climate-related advisory opinion. The [Inter-American Court of Human Rights](#) (IACtHR) and the [International Court of Justice](#) (ICJ) are expected to issue advisory opinions on the obligations of States in respect of climate change in 2024 and 2025, respectively.

In its opinion, ITLOS found that anthropogenic greenhouse gas (GHG) emissions absorbed by the oceans constitute marine pollution due to their deleterious effects on the marine environment, including ocean acidification, ocean warming, and other harmful effects. Therefore, States are required to take 'all necessary measures', in line with the best available science, to reduce their GHG emissions, to the fullest possible extent, in accordance with UNCLOS and other relevant international legal obligations.

This post provides a brief legal background to ITLOS' opinion. It then comments on three key features of the opinion: a) the meaning of 'marine pollution'; b) States' obligation 'to take all necessary measures' to prevent, reduce, and control GHG emissions; and c) States' obligation to exercise 'stringent' due diligence. It concludes with some reflections on issues of general significance flowing from the opinion. For space constraints, we do not discuss other important aspects of the opinion such as the duty of States to regulate the conduct of private non-state actors within their jurisdiction or control, or the obligations related to international cooperation.

Background

Part XII of UNCLOS establishes an affirmative and overarching obligation to 'protect and preserve' the marine environment (Art 192). State parties must adopt measures to prevent, reduce, and control 'all sources of pollution' of the marine environment (Art 194(3)). UNCLOS defines pollution as the introduction of substances or energy by humans into the marine environment, which results or is likely to result in 'deleterious effects' on the marine environment (Art 1(1)(4)). UNCLOS specifically underscores the obligation to prevent marine pollution in relation to 'rare or fragile ecosystems', such as coral reefs (Art 194(5)).

Part XII of UNCLOS includes obligations to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from land-based sources (Arts 194, 207, and 213) and from or through the atmosphere in line with 'internationally agreed rules, standards and recommended practices' (Art 212). These measures must include 'those designed to minimize to the fullest possible extent' the 'release of toxic, harmful or noxious substances from land-based sources' and pollution from vessels or installations at sea (Art 194(3)).

UNCLOS does not explicitly identify GHG emissions as a specific pollutant. Nor are climate change and ocean acidification explicitly mentioned in UNCLOS. In fact, many climate change impacts on the oceans were not on the table during the negotiations which led to UNCLOS.

The science is of course now clear and undisputed: anthropogenic GHG emissions alter ocean chemistry which causes 'deleterious effects' for marine ecosystems, including ocean acidification and ocean warming. Ocean warming notably deoxygenates the waters, bleaches coral reefs, disrupts marine ecosystems, and results in sea level rise. The threat to marine ecosystems caused by climate change in the oceans, in turn, threatens the very existence of many communities, particularly in [low-lying island States](#). These island States are urgently seeking redress and protection under international law.

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS), composed of six

States from the Caribbean and Pacific, made a [request](#) to ITLOS to clarify, through an advisory opinion, the specific environmental obligations of State parties to UNCLOS concerning climate change impacts on oceans, including ocean warming, sea level rise, and ocean acidification. Notably, the request did not refer to the responsibility of State parties under UNCLOS for past international wrongdoing. Instead, the request focused on the task of clarifying what UNCLOS State parties are required to do now to mitigate the marine environmental harm resulting from climate change caused by GHG emissions.

The request was designed with two principal aims. **First**, to establish that the deleterious effects on the oceans that result - or are likely to result - from climate change due to anthropogenic GHG emissions into the atmosphere amount to 'marine pollution' under Part XII of UNCLOS. **Second**, to clarify the specific legal obligations of States parties under UNCLOS in addressing the impacts of climate change on the marine environment.

More than 50 States, intergovernmental organisations, and other groups made [written and oral submissions to ITLOS](#) to voice their views on these issues. Many submissions asserted that the intent of State parties to UNCLOS had never been to restrict the scope of UNCLOS to the world as it was in 1982. Rather, the obligations under Part XII of UNCLOS should be guided by today's scientific understanding and current threats to the marine environment.

The Advisory Opinion

ITLOS found that it had jurisdiction under Article 21 of its Statute and Article 138(1) of its Rules to give an advisory opinion, the request was admissible, and no compelling reasons existed for it to decline jurisdiction in this case. ITLOS acknowledged the unequivocal findings of the Intergovernmental Panel on Climate Change (IPCC) as 'authoritative assessments' of climate change science [para 208]. ITLOS further explained that while the term 'climate change' does not appear in UNCLOS [para 157], 'relevant external rules' addressing climate change do exist [para 137]. These include the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement. As noted by ITLOS, such 'external rules are important to clarify, and to inform the meaning of, the provisions of the Convention' (UNCLOS) [para 130]. ITLOS also endorsed the principle that UNCLOS obligations and 'internationally agreed rules, standards, and procedures' [paras 270-271, 277, 285] should, as far as possible, be interpreted and applied to create a coherent and compatible set of obligations.

This post will now comment on three specific aspects of the opinion: the meaning of marine pollution, the obligation to take all necessary measures, and the obligation to exercise 'stringent' due diligence.

Meaning of 'marine pollution'

In responding to the question on preventing, controlling, and reducing pollution caused by anthropogenic GHG emissions to the marine environment, ITLOS first addressed whether these emissions into the atmosphere fall under the definition of 'pollution of the marine environment' within UNCLOS. Relying on the wording of Article 1(1)(4), it found that GHG emissions are a) a 'substance or energy' which b) is 'introduced by humans, directly or indirectly, into the marine environment', and c) causes multiple 'deleterious effects', such as warming and ocean acidification, as well as harm to living resources and marine life. These effects are 'observed and explained by the science and are widely acknowledged by States' [para 75]. Thus, the accumulation of anthropogenic GHG into the marine environment through the atmosphere is 'pollution' under UNCLOS.

The significance of this finding should not be underestimated. It triggers States' international law obligation stipulated in Article 194 to take 'all necessary measures' with a view to reducing and controlling existing marine pollution from GHG emissions and 'eventually preventing such pollution from occurring at all' [para 199]. This means that all GHG emissions, introduced indirectly into the oceans, whether from CO₂-emitting industrial facilities, aeroplanes, or vessels, and whether land-based or ocean-based, are a form of marine pollution that must be mitigated, controlled, and eventually eliminated [see also paras 259-264].

Obligation to take all necessary measures

The obligation to take all necessary measures entails a margin of discretion. However, according to ITLOS, 'this [margin of discretion] does not mean that such measures are whatever measures States deem necessary to that end'. Rather, ITLOS stressed that 'necessary measures should be determined objectively' (emphasis added), taking into account relevant factors discussed below [paras 206-207]. Assessing compliance with Article 194 of UNCLOS requires a case-by-case assessment based on an objective evaluation of all relevant factors.

Thus, the margin of States' discretion is limited by the imposition of objective factors of assessment. According to ITLOS, factors that can be considered in determining 'necessary' measures include, but are not limited to, the following:

- 1. Best available science**, notably the findings of the IPCC which 'reflect the scientific consensus' in this area [para 208]. ITLOS noted, however, that in the absence of scientific certainty, States must apply the precautionary approach and an ecosystem approach. ITLOS confirmed its earlier jurisprudence in the Advisory Opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*

'towards making this approach part of customary international law' [para 213]. More significantly, it found that, for marine pollution arising from anthropogenic GHG emissions, the precautionary approach is 'all the more necessary given the serious and irreversible damage that may be caused to the marine environment by such pollution' [para 213].

2. International rules and standards, such as those contained in climate change treaties, such as the UNFCCC and the Paris Agreement, among others, which should guide States' decision-making. In particular, the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels in the Paris Agreement and the timeline for emission pathways to achieve that goal is a relevant factor. However, ITLOS noted that UNCLOS' obligations would be not satisfied 'simply by complying with the obligations and commitments under the Paris Agreement' [para 223]. UNCLOS and the Paris Agreement remain two separate agreements, with distinct sets of obligations. The protection of the marine environment is a key objective of UNCLOS and, thus, UNCLOS' obligations apply independently.

3. Available means and capabilities, as the specific obligation of States parties under Article 194 of UNCLOS is to take those necessary measures using the best practical means at their disposal and in accordance with their capabilities. ITLOS recognised that the 'principle of common but differentiated responsibilities', enshrined in the UNFCCC and the Paris Agreement, applies to the law of the sea regime under UNCLOS. ITLOS held that developing States have the same obligations regarding environmental protection as developed States and that '[a]ll States must make mitigation efforts' [para 229]. However, it considered that States parties 'with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities' [para 227]. In that regard, and in accordance with Articles 202 and 203 of UNCLOS, developed States have a specific duty to assist developing States, 'in particular those vulnerable to the adverse effects of climate change' their efforts to address marine pollution from anthropogenic GHG emissions [paras 338-339]. Such assistance can be done through 'capacity-building, scientific expertise, technology transfer' and other means [para 339].

Obligation to exercise 'stringent' due diligence

International environmental and human rights lawyers will welcome warmly parts of the advisory opinion on the due diligence obligation. ITLOS observed that the obligation under Article 194(1) - and even obligations under some other provisions of Part XII, including Article 194(2) - 'are formulated in such a way as to prescribe not only the required conduct of States but also the intended objective or result of such conduct' [para 238]. It recognised that due diligence may impose more rigorous requirements for riskier activities [para 239], because the 'standard of this obligation is determined by, among other factors, an assessment of the risk and level of harm combined' [para 397]. ITLOS then identified that due diligence under Article 194 requires not merely 'best efforts' [para 240] but instead demands a specific positive result: the State in question must put in place a national system, including legislation, administrative procedures, and an enforcement mechanism to regulate GHG emitting activities and to 'make such a system function efficiently, with a view to achieving the intended objective' [para 235]. ITLOS stressed that the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions 'needs to be stringent' [para 241, see also paras 243, 256-258]. Best available science is one of the factors informing due diligence over time [para 243].

This includes notably a positive obligation to adopt environmental impact assessment (EIA) regulations mandating that 'Any 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' [para 367]. The due diligence obligation and the obligation to perform an EIA are intimately intertwined as the due diligence obligation cannot be considered as met if an EIA is not first conducted. EIAs should consider both the specific and 'cumulative impacts' of the planned activities on the marine environment [para 365]. It would mean for instance that, if a State commissions a coal-powered cement plant which is likely to lead to GHG emissions with consequent harm to the environment, the relevant GHG figures must be assessed, quantified, and identified in terms of the likely carbon footprint on the ocean, and then published in accordance with Articles 204-206.

Conclusions

From an international environmental law as well as international climate change law perspective, this is a landmark ruling. ITLOS' unanimous advisory opinion has confirmed that climate change and its impacts are well within the environmental scope of UNCLOS. ITLOS has seized the opportunity to deliver a strong pronouncement that other courts, both national and international, can now refer to, and build upon, when making their own assessments on climate-related cases, including challenges to the legality of high-emitting activities due to their potential carbon footprint on the oceans.

ITLOS has made legal determinations on the impacts of climate change on oceans and States' legal obligations to address these - including through more stringent environmental due diligence and more robust GHG emission reduction policies and EIA regulations which include cumulative impacts on the oceans and publicly report on these. These determinations will likely be relied upon in future climate cases, including the climate advisory proceedings before the ICJ and the IACTHR. These pending advisory proceedings focus on the legal consequences notably for States that are particularly vulnerable to climate change and are expected

to address the issue within the general framework of international law, including human rights law (i.e., the American Convention on Human Rights) for the IACtHR. One would expect that the legal responses provided by various international courts and tribunals will be consistent and complement each other.

Some observers might be disappointed that ITLOS did not take the view that major GHG-emitting States are liable and bear international responsibility for ocean climate change. However, the wording of the questions posed to ITLOS weighed heavily against any such finding. Admittedly, COSIS' request only referred to primary obligations under UNCLOS. It did not invite ITLOS to consider legal consequences arising from the breach of these obligations. ITLOS did nevertheless emphasise that 'if a State fails to comply with this obligation [to take all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions under Article 194 of UNCLOS], international responsibility would be engaged for that State' [para 223]. This finding should serve as a wake-up call for all major CO2-emitting State parties to UNCLOS. Failure to react and comply could leave them vulnerable to environmental litigation that may lead to UNCLOS proceedings.

Looking ahead, one must now wait to see the extent to which ITLOS, or other international courts and tribunals exercising jurisdiction under UNCLOS, may be willing or prepared to assess and review whether climate-related decisions and other policies made by State parties' national authorities, including national courts, align with the 'necessary measures' requirement under Article 194 of UNCLOS. In the words of Judge Paik in the *M/V "Virginia G" Case (Panama/Guinea-Bissau)*, 'while the term "necessary" is employed in many different areas ... the assessment of necessity in a specific situation is fact-intensive and circumstance-dependent' [Sep Op Judge Paik para 16]. What triggers States' obligation to take all necessary measures is the objective, scientifically established, perception of the risk of marine environmental pollution or harm - not actual pollution or harm. States must assess all impacts in light of the specific circumstances at hand, before allowing potentially harmful projects to go ahead. It remains to be seen whether an international court or tribunal would go as far as to 'review' the adequacy of a national authority's approval process.

At any rate, ITLOS' advisory opinion has shown that the law of the sea regime established by UNCLOS can, and should, serve to evaluate States' actions and inactions, both domestically and internationally, against UNCLOS' environmental obligations. In turn, this advisory opinion may encourage further efforts to address the impacts of climate change, in line with the general obligation in UNCLOS to protect the marine environment from all sources of marine pollution.

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* A version of this blog is currently under consideration for publication in the *ESIL Reflection*, published by the European Society of International Law, www.esil-sedi.eu

Suggested citation: Constantinos Yiallourides and Surya Deva, 'A Commentary on ITLOS' Advisory Opinion on Climate Change' (BIICL, 24 May 2024).

URL: <https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change>