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# Integrating Climate Change into Global Ocean Governance: The ITLOS Advisory Opinion on the Specific Obligations of State Parties to the United Nations Convention on the Law of the Sea

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**Abstract:** Climate change is having a significant impact on small island states and the

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adaptation to climate change is likely to become increasingly critical as the phenomenon intensifies. Despite growing attention to the effects of climate change on small island states, substantive progress remains limited. In order to obtain more multi-dimensional solutions for the climate crisis, the Commission of Small Island States on Climate Change and International Law submitted a request for an Advisory Opinion from the International Tribunal for the Law of the Sea on 12 December 2022. After going through written proceedings, oral proceedings, etc., the tribunal delivered a unanimous Advisory Opinion in this Case on 21 May 2024. The replies to two questions may mark the beginning of a new era for incorporating climate change into global ocean governance.

**Keywords:** climate change; small island states; Advisory Opinion; ITLOS; UNCLOS; ocean governance; international law

## 1. Introduction

Climate change, a global problem, affects the condition of the world's oceans. Aquatic biodiversity and marine ecosystems are affected by rising sea temperatures, waves, and changes in oxygen and acidity in the sea [1]. The ocean and the climate share an inextricable link [2,3]. Several adverse effects of climate change are manifested in the ocean; yet, the ocean also plays a crucial role in combating climate change by using ocean-based climate solutions such as scaling ocean-based renewable energy, conserving and restoring coastal and marine ecosystems that are ready for action now could reduce the global emissions gap by up to 35 percent in 2050 if we follow a 1.5°C path [2,4–6].

As a social challenge, climate change poses a serious threat to human communities that depend on marine and coastal ecosystems for their sustainability, economic well-being, and way of life [7–9]. There is no doubt that small island states are among the communities that heavily rely on the ocean. Climate change adaptation urges various stakeholder actors to cooperate in finding solutions to mitigate its impacts. Implementing effective ocean governance is one solution [10]. In addition to conducting discussions, the international community has convened conferences and reached agreements on international cooperation to address climate change. Despite this, there remains limited scientific development in ocean governance specifically addressing in-depth climate change control. Globally, ocean governance can be advanced through the encouragement, formulation, and ratification of international laws aimed at mitigating the impacts of climate change. International law forms the foundation for the international order, and the study of the dynamic maritime order relies on the study of state practices relating to the law of the sea [11,12].

On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) in Hamburg rendered its *Request for an Advisory Opinion Submitted*

by the Commission of Small Island States on Climate Change and International Law (COSIS) [13,14]. The COSIS was established based on the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (the "Agreement"), signed by the Prime Ministers of Antigua and Barbuda and Tuvalu on the eve of COP26 [15,16]. As a multilateral organization registered with the United Nations [17], the COSIS submitted the following legal questions to ITLOS in December 2022:

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

(a) 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?

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[13,18,19]

The States concerned include Antigua & Barbuda, Vanuatu, Niue, and St Lucia, among others [20–26]. For the first time, an international judicial body has been asked to clarify the obligations of countries to protect oceans from climate change and reduce emissions of climate-damaging greenhouse gas (GHG), which threaten the very existence of many island nations [2,27,28]. As the first of three advisory opinions to be issued by an international court on climate change, this is of particular significance and unprecedented in the context of the law of the sea [27–31]. This article aims to examine the ITLOS interpretation—or potential lack thereof—of specific UNCLOS provisions that pertain to the role of states in mitigating climate change impacts, thus contributing further interpretive depth to ongoing debates.

## 2. Background

As reported, "many islands are slowly but surely being submerged" as a result of the climate crisis affecting the world [32]. Climate change is expected to have the greatest impact on Small Island Developing States (SIDS) in the short- and long-term [15]. There has been an increase in interest in addressing risks through international law as these risks continue to escalate [33,34]. Despite the lack of viable legal theories, capacity constraints, or structural power limitations, they are making efforts to do more in accordance with international law [35–37].

It is the responsibility of each country to take steps to minimize, reduce, and control marine challenges from all sources, either individually or jointly, as necessary. Consequently, using a legal agreement may enhance compliance and reduce violations of international law, thereby reducing the effects of climate change. Following the establishment of the COSIS in 2021 and subsequent memberships of Palau in 2021, Niue in 2022, Vanuatu in

2022, St. Lucia in 2022, St. Vincent and the Grenadines in 2023, and St. Kitts and Nevis in 2023, attention to the link between climate change and the law of the sea has significantly increased [38]. In addition, it is open to all members of the Alliance of Small Island States (AOSIS) to join the COSIS [2,15]. Under the Agreement, the COSIS possesses the express authority to request an advisory opinion from the ITLOS concerning international law and climate change within the jurisdiction of the ITLOS [39,40].

### 3. Jurisdiction and the Substantive Issues

#### 3.1 Jurisdiction

Article 2, paragraph 2 of the Agreement states:

*Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules [41].*

By providing for authorization of the COSIS to request advisory opinions from the ITLOS, the COSIS Agreement "confers jurisdiction on the Tribunal" in accordance with article 21 of the Statute of the International Tribunal for the Law of the Sea (the "Statute") (para. 88) [13,14,42]. In the SRFC Advisory Opinion, the legal basis of its advisory jurisdiction was found to be supported by most UNCLOS Parties, which is the same in this case as well (para. 90) [14,43]. The tribunal also found that it had jurisdiction to give the advisory opinion for the following reasons: (1) An advisory opinion has been requested by some States Parties to UNCLOS; (2) The opinion is given to the requesting entity; (3) Third States are not influenced in their rights or obligations; (4) The tribunal is aware of the importance of the questions in the Request for COSIS members; (5) Questions are clear enough and there is sufficient information and evidence to enable the tribunal to give an advisory opinion; (6) The Request is compatible with its judicial functions, as it is called upon to clarify and provide guidance concerning the specific obligations of UNCLOS States Parties by interpreting and applying the provisions of UNCLOS Part XII (para. 113 - 114, 116, 118 - 120) [14].

#### 3.2 Substantive Issues

##### 3.2.1 Marine Pollution and GHG Emissions

Part XII of UNCLOS establishes a positive and overarching obligation to "protect and preserve" the marine environment (Article 192) [28,44,45]. State parties are required to adopt measures to prevent, reduce, and control "all

sources of pollution” of the marine environment (Article 194(3)) [28,44]. As stated in UNCLOS Article 1(1)(4), "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, hindrances to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities [44].

GHG emissions are not explicitly identified as a specific pollutant in UNCLOS; indeed, many impacts of climate change on the oceans were not addressed during UNCLOS negotiations [28]. However, ITLOS agreed with the overwhelming majority of submissions that anthropogenic GHG emissions constitute "pollution of the marine environment" [2,18]. Several elements are necessary to meet the definition of UNCLOS (para. 161): (1) There must be a substance or energy (para. 163); (2) This substance or energy must be introduced by humans, directly or indirectly, into the marine environment (para. 176); and (3) Such introduction must result or be likely to result in deleterious effects (para. 178) [14]. The tribunal determined that anthropogenic GHG emissions met each of these criteria because, “through the introduction of carbon dioxide and heat (energy) into the marine environment, anthropogenic GHG emissions cause downstream climate change and ocean acidification, which results in the deleterious effects illustrated in the definition of pollution of the marine environment” (para. 178) [2,14].

This finding is of significant importance and should not be underestimated. As a result, it triggers States' obligation under international law, as stipulated in Article 194, to take “all necessary measures” with a view to reducing and controlling existing marine pollution caused by GHG emissions, and “eventually preventing such pollution occurring at all” (para. 199) [14,28].

### 3.2.2 More Obligations and its Nature

In accordance with UNCLOS Article 194, the tribunal concluded that “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 endeavor to harmonize their policies in this connection” (para. 243) [2,14]. Several factors are taken into account in defining "necessary" measures according to ITLOS, including, but not limited to the following: (1) Best available science; (2) International rules and standards; (3) Available means and capabilities [28].

UNCLOS imposes an obligation of conduct, requiring States to act with “due diligence” in taking necessary measures to prevent, reduce and control marine pollution (para. 234) [14]. An obligation to act with due diligence is an obligation that entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators (para. 197)

[46]. According to this opinion, it requires a State to 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) [28,29]. Due diligence involves two aspects. However, describing due diligence in general terms is challenging because its exact content depends on several factors, including “scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved” (para. 239) [14]. Regarding GHG emissions, the due diligence standard “is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions. However, the implementation of the obligation of due diligence may vary according to States’ capabilities and available resources” (para. 243) [14,29]. Environmental impact assessment (EIA) regulations are mandatory as a positive obligation [28]. According to the statement of opinion, “[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” (para. 367) [28].

As outlined in UNCLOS Article 192, States have a general obligation to protect and preserve the marine environment [44]. The tribunal further explained that this obligation “applies to all maritime areas and can be invoked to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Where the marine environment has been degraded, this may require restoring marine habitats and ecosystems” (para. 400) [2,14]. The tribunal is of the view that the term “preservation” may include restoring marine habitats and ecosystems. The term “restoration” is not used in article 192 of UNCLOS but flows from the obligation to preserve the marine environment where the process of reversing degraded ecosystems is necessary in order to regain ecological balance (para. 386) [14]. In addition, States ensure that non-State actors under their jurisdiction or control adhere to these measures to protect and preserve the marine environment mandates (para 396) [14].

### 3.2.3 UNCLOS, Climate Change Treaty and Related Rules

Since the due diligence standard may also vary in accordance with State capabilities and available resources, it is consistent with the principle of “common but differentiated responsibilities” in the United Nations Framework Convention on Climate Change (the “UNFCCC”) [2]. While such implementation requires a State that has greater capabilities and sufficient resources to accomplish more than a State that is less well placed, the tribunal noted that even a State with fewer capabilities and resources must “do whatever it can in accordance with its capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions” (para. 241) [2,14]. The tribunal is of the view

that Articles 202 and 203 of UNCLOS set out specific obligations to assist developing States, particularly vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions through assistance such as capacity-building, scientific expertise, technology transfer, and others (para. 339) [14,28].

Furthermore, climate change is a subject of the Paris Agreement, and UNCLOS imposes no additional obligations in this area as States were not aware of the deleterious effects of climate change on the marine environment at the time of UNCLOS III [32]. Nevertheless, the majority of submissions argued that the Paris Agreement did not amount to *lex specialis* and that UNCLOS imposed separate, specific obligations on States [2]. The tribunal did not consider that the obligation under UNCLOS would be satisfied simply by complying with the obligations and commitments under the Paris Agreement [28]. UNCLOS and the Paris Agreement are separate agreements, with separate sets of obligations (para. 223) [14]. The tribunal believes that coordination and harmonization between UNCLOS and relevant external rules, such as the UNFCCC, the Kyoto Protocol, and the Paris Agreement, will clarify the meaning of UNCLOS provisions and ensure that UNCLOS serves as a living instrument (para. 130) [14,28].

#### **4. Stakeholders and Future Paths**

##### *4.1 SIDS and AOSIS*

It has long been recognized that Small Island Developing States (SIDS) are particularly vulnerable to the impacts of climate change, both in terms of their environment and development [33,47]. SIDS have actively advocated for increased ambition in global efforts to combat climate change through the UNFCCC, highlighting their heightened vulnerability to its impacts [35,48]. World leaders adopted the "Antigua and Barbuda Agenda for SIDS: A Renewed Declaration for Resilient Prosperity" (ABAS) and emphasized that "the next 10 years are critical for SIDS" as the fourth International Conference on Small Island Developing States came to a close in May 2024 [49]. ABAS significantly amplifies climate action and bolsters support, aligning with the established commitments and obligations under the UNFCCC and the Paris Agreement [50]. Indeed, the complicated international regime on climate change has evolved over the past three decades [51]. It appears that the tribunal's opinion is a testament to what SIDS are capable of, contributing to the betterment of the world [52].

In the international climate change negotiations, SIDS have emerged as a credible group through the AOSIS and have advocated for limiting global temperature rise to 1.5°C above preindustrial levels [53]. The AOSIS has demonstrated strength as a negotiating bloc, even if its contributions to anthropogenic climate change are insignificant [33]. To the end of 2022, the AOSIS had focused primarily on issues related to climate change and sustainable development, including negotiations and processes [54]. The

AOSIS leadership was handed over from Antigua and Barbuda to Samoa in January, 2023 [55]. The Honourable Fiamē Naomi Mata‘afa, Prime Minister of Samoa, outlined the new vision for the AOSIS, focusing on Climate Change, Sustainable Development, and the Ocean [54]. More stories about oceans and climate change will emerge through international law.

In fact, SIDS and AOSIS have crafted the island narrative to raise awareness about the need for other developed countries to provide funding to mitigate and alleviate the impacts of climate change [56].

#### 4.2 COSIS

The COSIS has three goals, including: (1) Assist Small Island States in efforts to clarify international legal obligations to combat climate change and its effects; (2) Contribute to efforts to develop jurisprudence on climate change of international courts and tribunals, including through an International Court of Justice (ICJ) advisory opinion; and (3) Request an advisory opinion from the ITLOS on any legal question within the scope of UNCLOS, including with regard to States' obligations under that Convention to preserve and protect the marine environment [57]. In order to achieve these goals, 14 individuals (including Prof. Alan Boyle, who passed away in 2023) were appointed to the COSIS Committee of Legal Experts (CoLE) [58–60]. During the advisory proceeding, CoLE has provided a great deal of assistance to the COSIS [59,61]. The advisory opinion on the due diligence obligation will no doubt be well received by international environmental and human rights lawyers [15]. Based on the opinion, the COSIS “will continue its work to ‘protect and preserve’ the climate system by promoting the rules and principles of international law so these may be our guiding lights in the global effort to address climate change” [59]. Co-sponsored by COSIS members was Vanuatu's Resolution A/77/L.58 at the UN General Assembly, which requested the ICJ's first-ever climate advisory opinion [59,62]. As an inter-governmental organization, the COSIS announced its unanimous decision on 15 May 2023 to participate in the advisory proceedings on climate change before the Inter-American Court of Human Rights (IACtHR) and the ICJ [59,63].

#### 4.3 Future Paths

The obligations under Part XII of UNCLOS should be guided by current scientific understanding and threats to the marine environment [28]. Considering that the advisory opinion as such has no binding force (para. 114) [14,19], but from a climate change litigation perspective [64], “best available science” is an important contribution from the advisory opinion. There is also a reference to “best available science” in Article 4 of the Paris Agreement, which was considered by the tribunal to be consistent with Article 194 of UNCLOS (para. 200) [14]. The tribunal did not elaborate on the meaning of that term, but noted that “[w]ith regard to climate change and ocean acidification, the best available science is found in the works of the

Intergovernmental Panel on Climate Change (IPCC) which reflect the scientific consensus” (para. 208) [2,14]. Although other relevant factors should be considered and weighed along with the best available science, marine pollution due to anthropogenic GHG emissions is assessed by the best available science (para. 212 - 213) [14]. Anthropogenic GHG emissions pose a high risk to the marine environment, both in terms of foreseeability and severity of harm (para. 241) [14]. Consequently, legal measures are context-specific and require objectively reasonable approaches based on the best available science (para. 405) [14]. Additionally, the tribunal highlighted UNCLOS duty to cooperate in scientific research and that this duty also applies in the case of marine pollution caused by anthropogenic GHG emissions (para. 312 - 320) [2,14]. Currently, climate change and international law are at a crossroads [65]. More litigation based on rights related to climate change is expected [66]. Moreover, clarifying the relevant obligations of the States in the advisory opinion may just be the first step in a series of international litigations seeking compensation for the damages caused by climate change [19]. While climate litigation has its negative effects, the opinion could serve as leverage in future climate negotiations [19,67].

## 5. Conclusions

The ITLOS has taken this opportunity to deliver a strong pronouncement in this case [28]. These upcoming decisions are likely to be influenced by and draw from the ITLOS opinion, as well as the increasing consensus that States have a legal obligation to combat climate change [2]. ITLOS has made legal determinations, including more stringent environmental due diligence rules, more robust GHS emission reduction policies, and more robust environmental impact assessments that include cumulative impacts on oceans and publicly report them [28]. It is also relevant beyond the context of UNCLOS, and forms part of an expanding body of international and regional climate change law [2]. The opinion has the potential to bridge the gap between the negotiations of the climate regime and UNCLOS [19].

Although the advisory opinion mainly focuses on primary rules and does not meaningfully address the issue of State responsibility [13], it is a very smart way to leave room for future actions. Small island states prefer to integrate climate change and ocean governance into their foreign policy [68]. The international legal process, characterized by political claims and counter-claims in pursuit of foreign policy values and interests, presents both opportunities and challenges for the opinion [19,69]. This opinion and subsequent actions regarding climate change are expected to have a domino effect [19,70]. Sustainable reduction of GHG emissions is not a short-term objective; opinion or even climate litigation cannot provide a one-stop solution to climate governance [19].

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