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The Advisory Opinion of ITLOS on Climate Change: A Landmark Decision

By H.E. Judge Tomas Heidar

The Advisory Opinion on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, which was rendered unanimously by the International Tribunal for the Law of the Sea ("ITLOS" or "the Tribunal") on 21 May 2024, has been hailed as a landmark development in international law. Notably, it is the first time that an international court or tribunal has issued an advisory opinion addressing States Parties' obligations to combat climate change under the United Nations Convention on the Law of the Sea ("the Convention"). In so doing, the Tribunal was afforded an opportunity to shed light on crucial legal issues concerning the nexus between the ocean and climate change, a phenomenon which has aptly been described by the United Nations General Assembly as "one of the greatest challenges of our time".

It bears reiterating that on 12 December 2022, the Commission of Small Island States on Climate Change and International Law ("COSIS") submitted to the Tribunal a request for an advisory opinion on two questions.

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The first question was formulated as follows:

> What are the specific obligations of State[s] Parties to the [Convention}, 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?

The second question was phrased as follows:

> What are the specific obligations of State[s] Parties to the [Convention}, including under Part XII:
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

The importance that the international community attached to the case is evident from the high level of participation in the proceedings before the Tribunal. Written statements from 34 States Parties and nine intergovernmental organizations were submitted as part of the case file. Furthermore, 33 States Parties and four intergovernmental organizations made oral statements during the hearing. Never in the Tribunal's nearthirtyyearold history have there been so many participants in proceedings before it.

It is noteworthy that the Tribunal, before responding to the questions submitted by COSIS, engaged in a detailed examination of the precise scope of the request that it had received. The following observations made by the Tribunal in this respect may be highlighted: Firstly, the Tribunal was mindful that it was requested to render an advisory opinion on the specific obligations of States Parties under the Convention. In order to identify these obligations and clarify their content, it found that it would have to interpret the Convention and, in doing so, also take into account external rules, as appropriate. Secondly, the request was found to be limited to primary obligations of States Parties. However, the Tribunal explained that, to the extent necessary to clarify the scope and nature of primary obligations, it might have to refer to responsibility and liability. Thirdly, although the request mentions sea level rise in both questions, the Tribunal reached the conclusion that the relationship between sea level rise and

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existing maritime claims or entitlements was not included. Fourthly, the Tribunal found that the obligation to protect and preserve the marine environment, which is the focus of the second question, encompasses the obligation to prevent, reduce and control marine pollution, with which the first question is concerned. It would therefore first respond to the first question and, when answering the second question, it would address issues that had not already been dealt with under the first question.

The ITLOS Advisory Opinion is a decision of overwhelming breadth and remarkable depth. Therefore, rather than attempting to summarize it here, it is proposed to shed light on its distinctive nature by drawing attention to three points in particular.

The first notable aspect of the Advisory Opinion is the close attention paid to the science of climate change and its relationship with the ocean. In fact, science may be said to form a leitmotif throughout the Opinion. Given that the phenomenon of climate change was central to the questions submitted by COSIS and necessarily involved scientific aspects, the Tribunal decided to devote an entire section of the Advisory Opinion to the scientific background of the case. In these paragraphs, the Tribunal made ample use of the reports of the Intergovernmental Panel on Climate Change ("the IPCC"). Importantly, the Tribunal observed that most participants in the proceedings recognized these reports "as authoritative assessments of the scientific knowledge on climate change". In addressing the most relevant reports, the Tribunal not only summarized their content, but also explained methodological matters, such as their use of varying confidence levels, and how they are reviewed and subsequently endorsed by IPCC member countries. Moreover, it is worth mentioning that the notion of taking into account "the best available science" formed part of the legal analysis developed by the Tribunal in its replies to the two questions submitted by COSIS. On this topic, the Tribunal made an important connection between the latter notion and the IPCC by stating that "[w]ith regard to climate change and ocean acidification, the best available science is found in the works of the IPCC which reflect the scientific consensus."

Secondly, the Advisory Opinion offers a powerful illustration of the Convention's continued relevance in the face of contemporary challenges to the law of the sea. The Convention, as a constitutional framework, is often praised for its comprehensive scope as well as the general and open-ended terms found in many of its provisions. These features allow for the Convention to govern new ocean-related issues that were not necessarily in the minds of its drafters back in the 1970s and early 1980s. Climate change is an excellent case in point. Although terms such as "climate change", "greenhouse gas emissions" ("GHG emissions") and "ocean acidification" do not appear in the Convention, the Advisory Opinion makes clear that this does not place

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such phenomena beyond the scope of the Convention. This point may be demonstrated by referring to the Tribunal's interpretation of the notion of "pollution of the marine environment" and its application to anthropogenic GHGs.

The Tribunal observed that the first question submitted to it by COSIS concerns the specific obligations of States Parties to the Convention to prevent, reduce and control marine pollution in relation to the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions into the atmosphere. Noting that the first question is formulated on the premise that these obligations necessarily apply to climate change and ocean acidification, the Tribunal stated that the validity of this premise could not be presumed and therefore needed to be examined.

The Tribunal therefore considered whether anthropogenic GHG emissions meet the criteria of the definition of "pollution of the marine environment" in article 1, paragraph 1, subparagraph 4, of the Convention, which reads as follows:

> For the purposes of this Convention … "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, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities. (Emphasis added)

Following thorough examination, the Tribunal found 1) that anthropogenic GHGs are substances, 2) that their emissions are produced by humans and 3) that, by introducing carbon dioxide and heat (energy) into the marine environment, they cause climate change and ocean acidification resulting in "deleterious effects". On this basis, having determined that all three criteria of the definition were satisfied, the Tribunal concluded that anthropogenic GHG emissions into the atmosphere constitute "pollution of the marine environment" within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention. This, in turn, triggered the application of the Convention's pollution-related provisions also in the context of climate change.

The third and final aspect of the Advisory Opinion that will be highlighted is the Tribunal's approach to the interpretation of the Convention and the relationship between the Convention and other relevant rules of international law, referred to as "external rules". The Tribunal explicitly acknowledged the significance of coordination

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and harmonization between the Convention and external rules. Achieving this objective, in the view of the Tribunal, is important "to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument." The relationship between the provisions of Part XII of the Convention, entitled "Protection and Preservation of the Marine Environment", and external rules was found to be of particular relevance in this case. In the present case, relevant external rules may be found, in particular, in the extensive treaty regime addressing climate change, including the United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement. An entire section of the Advisory Opinion was devoted to the climate change treaty regime as background of the case.

The Tribunal offered another useful clarification by clearly categorizing three distinct mechanisms through which a relationship between the provisions of Part XII of the Convention and external rules is formed. These mechanisms are the rules of reference contained in Part XII of the Convention, article 237 of the Convention and the method of interpretation, as reflected in article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties, requiring that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties (systemic integration).

The Tribunal also went beyond mere categorization by either expounding the rationale underlying these mechanisms or explaining their scope. Accordingly, article 237 of the Convention, which clarifies the relationship of Part XII of the Convention with other treaties relating to the protection and preservation of the marine environment, was described as "reflect[ing] the need for consistency and mutual supportiveness between the applicable rules." Furthermore, the Tribunal noted that the rules of reference contained in Part XII of the Convention and article 237 of the Convention "demonstrate the openness of Part XII to other treaty regimes." With respect to the method of interpretation reflected in article 31, paragraph 3(c), of the Vienna Convention, the Tribunal specified that the term "any relevant rules of international law" includes both relevant rules of treaty law and customary law.

A prime example of how the relationship between the Convention and external rules operates in practice can be found in the Tribunal's assessment of the obligation to take necessary measures under article 194, paragraph 1, of the Convention, the primary provision in the marine pollution regime laid down in Part XII.

This provision reads as follows:

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> States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for that purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

The Tribunal stated that there are three factors States should consider in their objective assessment of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions. It is evident that the science is particularly relevant in this regard. International rules and standards relating to climate change, including the Paris Agreement, are another relevant factor. And there are other factors that may be considered, such as available means and capabilities of the State concerned.

It was contented by some participants in the proceedings before the Tribunal that the UNFCCC and the Paris Agreement are *lex specialis* in respect of the obligations of States Parties under the more general provisions of the Convention. In the same vein, several participants took the view that, as concerns obligations regarding the effect of climate change, the Convention does not by itself impose more stringent commitments than those laid down in the UNFCCC and the Paris Agreement.

The Tribunal reached different conclusions on these matters. In this regard, it is fitting to quote from a noteworthy passage of the Advisory Opinion, paragraph 223, which elucidates its reasoning in greater detail:

> The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.

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The value of the Tribunal's Advisory Opinion has already been acknowledged by a number of States and other actors, including international courts and tribunals, as they face the question of climate change. To name but one, the International Court of Justice delivered its own advisory opinion on climate change on 23 July 2025. In that opinion, the Court emphasized that "it should ascribe great weight to the interpretation [of the Convention] adopted by the Tribunal", in view of the Tribunal's considerable jurisprudence on the matter over the last three decades. Indeed, in so far as the Court was called to interpret the Convention, it followed the Tribunal's interpretative approach, which has been outlined above, and it echoed the Tribunal's conclusions.

The ITLOS Advisory Opinion on Climate Change marks a milestone in clarifying the obligations of States Parties under the Convention. By reaffirming the Convention as a living instrument capable of addressing evolving environmental threats, the Advisory Opinion provides much-needed legal precision regarding the obligations of States Parties to prevent, reduce, and control marine pollution caused by anthropogenic GHG emissions, as well as to protect and preserve the marine environment in the face of climate change impacts and ocean acidification. It may therefore be concluded that in its landmark decision, the Tribunal has brought climate change into the realm of the Convention.

Author:

H.E. Judge Tomas Heidar is President of the International Tribunal for the Law of the Sea (ITLOS) for the period 2023–2026. Judge Heidar has been a Judge of the Tribunal since 2014. Prior to his appointment as President, Judge Heidar served as Vice-President of the Tribunal for the period 2020–2023, and as President of the ITLOS Chamber for Fisheries Disputes for the period 2017–2020. He was also a Member of the ITLOS Special Chamber in the Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean.

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From 1996-2014, Judge Heidar served as Legal Adviser of the Ministry for Foreign Affairs of Iceland, attaining the rank of Ambassador. As such he was responsible for all matters of public international law and represented Iceland regularly at meetings on oceans and the law of the sea at the United Nations and in other international fora.

Judge Heidar is also Director of the Law of the Sea Institute of Iceland and Co-Director and Lecturer of the Rhodes Academy of Oceans Law and Policy. He has lectured at the University of Iceland and many other universities and institutions around the world, including the University of Oxford, Queen Mary University of London, University College London, the British Institute of International and Comparative Law, Leiden University, the University of Virginia, the IFLOS Summer Academy, the Yeosu Academy of the Law of the Sea and the Kadir Has International Law of the Sea Summer Academy. He has taught law of the sea at the United Nations Regional Course in International Law in Ethiopia.

Judge Heidar has published numerous books and articles on ocean affairs and the law of the sea, most recently *New Knowledge and Changing Circumstances in the Law of the Sea* (ed., Brill Nijhoff, 2020); "The Contribution of the International Tribunal for the Law of the Sea to the Protection of the Marine Environment" in the Korean Journal of International and Comparative Law (2021); and *International Fisheries Law: Persistent and Emerging Challenges* (co-ed., Routledge, 2025). He is also a Conciliator and Arbitrator under Annexes V and VII to the United Nations Convention on the Law of the Sea.

Judge Heidar is a longstanding friend of the British Institute of International and Comparative Law and supports the Institute in his capacity as an Honorary Senior Fellow.

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