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International Arbitration Update

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The International Tribunal for the Law of the Sea's Advisory Opinion on Climate Change and Its Implications

Gibson Dunn discusses the background of the Opinion, the key findings and our main takeaways for both States and private actors, including the potential influence of the Opinion on future climate change litigation.

On 21 May 2024, the International Tribunal for the Law of the Sea (“**ITLOS**” or “**Tribunal**”) became the first international court to issue an advisory opinion on States’ obligations in respect to climate change (“**Opinion**”). The Tribunal concluded that anthropogenic (i.e. human-caused) greenhouse gas emissions (“**GHGs**”) constitute “*pollution of the marine environment*” under the United Nations Convention on the Law of the Sea (“**UNCLOS**” or “**Convention**”), triggering certain positive obligations of States, including a duty to prevent, reduce and control both land- and sea-based anthropogenic GHGs.

The Opinion is the first in a trio of advisory opinions by international courts that will likely be issued within twelve months of each other. It is envisaged that next, the Inter-American Court of Human Rights (“**IACHR**”) will deliver its opinion regarding States’ obligations derived from human rights norms in relation to the climate emergency. The International Court of Justice (“**ICJ**”) will

then opine on the obligations of States under international law to ensure the protection of the climate system from anthropogenic GHGs for present and future generations, as well as the legal consequences for States where they, by their acts and omissions, have caused significant harm to the climate system. These opinions are expected in early- and mid- 2025, respectively.

Notably, the Opinion was issued just six weeks after the European Court of Human Rights' ("ECtHR's") judgment in *KlimaSeniorinnen v. Switzerland*, in which the ECtHR, for the first time in its history, prescribed the content of States' positive obligations under Article 8 of the European Convention on Human Rights ("ECHR") in the context of climate change. According to the ECtHR, States have a primary duty to adopt, and to effectively apply in practice, general measures for achieving carbon neutrality—and with a view to achieving neutrality within the next three decades. (We previously reported on *KlimaSeniorinnen* [here](#).)

In this Client Alert, we discuss the background and the potential implications of the Opinion for both States and private actors as well as offering our key takeaways.

Background

The Advisory Opinion was issued pursuant to a request ("**Request**") by the Commission of Small Island States on Climate Change and International Law ("**COSIS**"). COSIS was established in 2022 and comprises eight States, which are low emitters of GHGs, but highly vulnerable to the impacts of climate change.

On 12 December 2022, COSIS asked ITLOS to opine on the specific obligations of States Parties to UNCLOS, including under Part XII ("*Protection and Preservation of the Marine Environment*") to:

- a. **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 GHGs into the atmosphere; and
- b. **protect and preserve the marine environment** in relation to climate change impacts, including ocean warming and sea level rise and ocean acidification.

Part XII of the Convention sets out an affirmative and overarching general obligation "*to protect and preserve the marine environment*" (Article 192) followed by specific obligations—including to "*take ... all measures ... necessary*" to "*prevent, reduce and control pollution of the marine environment from any source*" (Article 194(1)) and "*ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment*" (Article 194(2)).

More than 50 States, inter-governmental and non-governmental organisations made written and oral submissions in the ITLOS proceedings, presenting a range of views as to how the questions in the Request should be answered.

ITLOS' Key Conclusions

(a) Anthropogenic GHGs constitute "*pollution of the marine environment*"

Importantly, the Tribunal found that anthropogenic GHGs in the atmosphere constitute "*pollution of the marine environment*" within the meaning of Article 1(1)(4) of the Convention as it satisfies the three criteria of: (i) there being a substance or energy; (ii) the substance or energy is introduced by humans, directly or indirectly, into the marine environment; and (iii) such introduction results, or is likely to result, in deleterious effects. This finding triggered certain obligations for States under UNCLOS Part XII (and other relevant UNCLOS provisions)—some of which are discussed below.

In coming to this conclusion, the Tribunal (similarly to the ECtHR) relied on reports from the Intergovernmental Panel on Climate Change ("**IPCC**") as authoritative assessments of the scientific knowledge on climate change. In this regard, the Tribunal noted that none of the participants had challenged the authoritative value of the IPCC reports.

(b) State Parties have an obligation to prevent, reduce and control pollution from anthropogenic GHGs

Article 194(1) of UNCLOS imposes an obligation upon States to take "*all necessary measures*" to **reduce and control marine pollution** from **any source** including anthropogenic GHGs—and eventually **prevent such pollution** from occurring at all. However, consistent with the Paris Agreement, this obligation does not require "*immediate cessation*" of marine pollution from anthropogenic GHGs.

Whilst the concept of "*all necessary measures*" is not defined in UNCLOS, the Tribunal considered that among such measures are those designed to reduce GHG emissions—commonly referred to as "*mitigation measures*" in the climate context. Similar to *KlimaSeniorinnen*, ITLOS explained that it is up to the State to determine what measures are necessary, but such measures must be determined "**objectively**": (i) first, on the basis of the "**best available science**"—in which context the IPCC reports "*deserve particular consideration*"; and second, with reference to **relevant international rules and standards**—where the United Nations Framework Convention on Climate Change ("**UNFCCC**") and the 2015 Paris Agreement "*stand out ... as primary treaties*", and in particular the objective in the Paris Agreement of limiting the temperature increase to 1.5° compared to pre-industrial levels.

(c) The nature of the obligation to prevent, reduce and control pollution (including transboundary pollution) is one of stringent due diligence, i.e. an obligation of conduct

The obligation to prevent, reduce and control pollution is an obligation of conduct. In other words, by this obligation, States are required to act with **due diligence** in taking necessary measures—and the level is **stringent** because of the high risks of serious and irreversible harm to the marine environment that anthropogenic GHGs present. The obligation of due diligence requires a State “*to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulation ... and to exercise adequate vigilance ... with a view to achieving the intended objective*”. The obligation is “*particularly relevant*” in a situation in which activities are mostly carried out by private actors. States must also apply the **precautionary approach** in their exercise of due diligence.

According to ITLOS, the standard of due diligence will vary according to scientific information, relevant international rules and standards, the risk of harm and the urgency involved. The implementation of the obligation may also vary according to the relevant States’ capabilities and resources.

(d) State Parties have an obligation to prevent, reduce and control transboundary pollution

Further, State Parties have a particular obligation with respect to **transboundary pollution**. States must “*take all necessary measures*” to ensure GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and pollution arising from such emissions does not spread beyond the areas where they exercise sovereign rights. The standard of due diligence in this context “*can be even more stringent*” because of the nature of transboundary pollution.

(e) State Parties have an obligation to implement laws and regulations to prevent, reduce and control marine pollution—including from land-based sources

As the Tribunal went on to discuss, there also exist complimentary obligations (Articles 207, 211 and 212), whereby State Parties must implement laws and regulations, to prevent, reduce and control marine pollution from land-based sources, as well as aircraft and vessels, taking account of treaties such as the UNFCCC and the Paris Agreement. The Tribunal explained that “*central to*” those laws and regulations is the reduction of anthropogenic GHG emissions, and measures “*can be wide-ranging, from the establishment of administrative procedures for the regulation of pollution to the monitoring of risks and effects of marine pollution*”.

(f) State Parties are required to undertake Environmental Impact Assessments (“EIAs”)

State Parties are, additionally, required to **conduct EIAs** under Article 206—which are “*an essential part of a comprehensive environmental management system*”. The EIA obligation is

triggered when there are “*reasonable grounds for believing*” that the activities “*may cause substantial pollution of or significant and harmful changes to the marine environment*”.

Article 206 does not prescribe the scope and content of EIAs and so the Tribunal proceeded to fill in the gaps. On scope, it explained that activities under assessment are those within a State’s jurisdiction or control and comprise those of both private and State entities. Further, both sea- and land-based activities are included. Concerning content, the Tribunal noted that EIAs should embrace not only the specific aspects of the planned activities but the **cumulative impacts** of these and other activities on the environment. The Tribunal observed that the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction contains detailed provisions on EIAs, implying that such provisions provide a suitable benchmark.

(g) State Parties must keep under surveillance the effects of activities that States have permitted, or in which they are engaged

State Parties must also keep under surveillance the effects of activities that States have permitted, or in which they are engaged. This obligation applies irrespective of the place where the activities are conducted or the nationality of the individuals or entities carrying out the activities.

(h) State Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification

Under Article 192 of UNCLOS, State Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification (which entails maintaining ecosystem health and the natural balance of the marine environment). This obligation has a broad scope, encompassing any type of harm or threat to the marine environment. Where the marine environment has been degraded, this obligation may call for measures to restore marine habitats and ecosystems. Again, the obligation is one of due diligence of a stringent standard.

Our Key Takeaways

The Opinion delivered by ITLOS is of considerable significance for many reasons. We have the following key takeaways:

First, while an advisory opinion from ITLOS does not create legally enforceable obligations on State Parties, they are nonetheless **highly persuasive authorities** for both international and domestic courts, in that an advisory opinion contributes to the clarification and development of international law.

The Opinion will, in our view, prove influential in the context of both pending and future climate change-related claims before international and domestic courts—particularly in cases against States^[1] and / or State actors where it is alleged that actions being taken to mitigate against the effects of climate change are insufficient. This may include claims that supervision of non-State actors is lacking—and, in that regard, the Opinion referred, at paragraph 396, to the obligation on States to “*ensure that non-State actors under their jurisdiction or control comply with such measures*”.

It is worth noting that the Tribunal emphasised that failure to comply with the obligation to “*take all necessary measures*” would engage State responsibility. This suggests that a failure by a State Party to act leaves it vulnerable to UNCLOS proceedings pursuant to Article 235(1) in future (“*States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment*”)—and/or claims that a State Party has failed to provide recourse to prompt and adequate compensation (or other relief) in respect of damage caused by marine pollution by juridical persons under their jurisdiction pursuant to Article 235(2).

Second, the Opinion is likely to have a “**cross-fertilisation**” effect. We expect that the IACHR and ICJ will seek to render advisory opinions that are consistent with the thrust of the ITLOS Opinion, albeit within their respective and somewhat different normative frameworks (and also to core elements of the ECtHR’s judgment in *KlimaSeniorinnen*). The task of the ICJ, however, will be a broader exercise since it will also deal with the question of “legal consequences” of State obligations in relation to climate change.

Third, the Opinion may prompt a regulatory response from States in terms of limiting GHG emissions from both sea- and land-based sources—though our view is that the ICJ advisory opinion may prove more influential in that regard to the extent that the ICJ opines on the substance of the Paris Agreement. Private actors should monitor changes to the regulatory landscape that may impact their operations.

Fourth, with respect to the Paris Agreement, the Opinion makes clear that UNCLOS exists alongside it (and the UNFCCC) as a legal basis for obligations to address climate change and its effects. Thus, the Opinion treats the **UNCLOS and Paris Agreement regimes as distinct** noting that States’ compliance with the Paris Agreement alone will not be sufficient to discharge the obligation to prevent, reduce and control pollution of the marine environment under UNCLOS. Likewise, ITLOS did not seek to tie “necessary measures” to the requirements under the Paris Agreement—such as the commitment in Article 4(2) to prepare, communicate and maintain successive nationally determined contributions that a State Party intends to achieve.

Fifth, the positive obligation to conduct EIAs where an activity may cause substantial pollution to the marine environment articulated in the Opinion is noteworthy. It may, for example, affect oil and gas licensing processes for exploration and production (both on- and offshore) as well as

other high GHG-emitting projects. Of course, EIAs are routinely carried out in any event in many States. However, as noted, the EIA contemplated by the Tribunal includes “*continuing surveillance*” and an assessment of the “*cumulative impact*” of a project. EIAs will also now (in theory) have to be conducted in the context of the Tribunal’s clarification that anthropogenic GHGs constitute pollution of the marine environment. One can expect climate litigants to closely scrutinise the processes and outcomes of EIAs for high GHG emitting projects.

Finally, whilst the Opinion was unanimous, there was discussion by some judges in their Declarations to the Opinion of the relevance of human rights in interpreting obligations under UNCLOS. In the Opinion, the Tribunal merely states, in brief, that “*climate change represents an existential threat and raises human rights concerns*”.

In Judge Pawlak’s view, the Opinion could have gone further, “*reflect[ing] the broader implications of recent developments in climate change justice*”, specifically referring to the ECtHR’s *KlimaSeniorinnen* judgment. He acknowledged that pursuant to *KlimaSeniorinnen*, States have the responsibility to combat climate change to protect human rights and the decision “*created preceden[t]*” for other judicial institutions. Indeed, in Judge Pawlak’s view, *KlimaSeniorinnen* (as well as the UN Human Rights Committee’s decision in the *Torres Strait Islanders* case)—“*which added human rights considerations to the global fight against climate change*”—are “*essential*” and “*not isolated*.”

Judge Infante Caffi meanwhile thought the reference to human rights in the Opinion could have been supplemented by further arguments, noting the reference to human rights in the preamble to the Paris Agreement and the UN General Assembly’s resolution 76/300 with [t]he human right to a clean, healthy and sustainable environment”.

[1] In that context, please note that UNCLOS has been ratified by 168 parties. Notably, whilst the European Union has ratified the Convention, the United States has not.

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Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any

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