

# On the high seas of change: ITLOS pioneers future climate protection

*The consequences of climatic change have already caused considerable damage to coastal and open ocean ecosystems.<sup>1</sup> Nevertheless, the precise measures to be taken to guarantee the protection of the most vulnerable coastal and island states in accordance with the relevant United Nations Convention on the Law of the Sea (UNCLOS) have, until recently, remained unclear. The International Tribunal for the Law of the Sea (ITLOS) advisory opinion establishes a new precedent for climate protection and clarifies that the obligations under the convention may extend existing climate agreements. This article provides an overview of the state parties' submissions on the interpretation of UNCLOS regarding the allocation of responsibility and the scope of the obligations in question, while reconciling the tribunal's decision with the latest scientific findings.*

## I. Introduction

The window of opportunity to „secure a livable and sustainable future for all” is „rapidly closing.”<sup>2</sup> With these words, the Intergovernmental Panel on Climate Change (IPCC) summarizes the ongoing global warming in its latest climate report from March 2023. Despite ambitious international agreements, global emissions are currently rising instead of falling.<sup>3</sup> The world's oceans, as the largest sink for CO<sub>2</sub> emitted from land-based sources, including industry and commerce, are particularly affected. The effects of global warming range from ocean acidification and warming to sea level rise, with negative impacts on marine life and ecosystems.<sup>4</sup> In view of

the imminent threats to marine systems and the neighbouring coastal and island states that depend on these systems as supply for food production<sup>5</sup>, the Commission of Small Island States (COSIS) requested an interpretation of the relevant articles under UNCLOS from ITLOS on 12 December 2022.<sup>6</sup> Established in 2021, COSIS aims to “promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of states relating to the protection and preservation of the marine environment.”<sup>7</sup> To bring its case to the tribunal, COSIS submitted a request for an advisory opinion, which is a legal clarification of a question of law, to the United Nations or a specialised agency by an international tribunal.<sup>8</sup> Regarding the Law of the Sea, Article 191 UNCLOS empowers the Seabed Disputes Chamber, the dispute resolution chamber of ITLOS, to “give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities.”<sup>9</sup> In order to ascertain the extent to which states are obliged to protect and preserve the marine environment under UNCLOS, COSIS has relied on this instrument.<sup>10</sup> While COSIS also sought an inter-

<sup>1</sup> IPCC Report, p. 5, A.2.3.

<sup>2</sup> Intergovernmental Panel on Climate Change – AR6 Synthesis Report: Climate Change 2023, p. 24, C.1.

<sup>3</sup> IPCC Report, p. 10, A.4.

<sup>4</sup> IPCC Report, p. 10, A.2.3.

<sup>5</sup> IPCC Report, p. 5, A.2.4.

<sup>6</sup> International Tribunal for the Law of the Sea, Order 2022/4, Request for an Advisory Opinion, p. 1.

<sup>7</sup> UN – Registration 56940, Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, Article 1(3).

<sup>8</sup> Aust, Advisory Opinions, Journal of International Dispute Settlement, Volume 1, Issue 1, February 2010, § 4.B.

<sup>9</sup> Aust, JIDS, Volume 1, Issue 1, February 2010, § 3.B.

<sup>10</sup> ITLOS Order 2022/4, Request for an Advisory Opinion (16.04.2024).

pretation of the broader Article 192 UNCLOS, it specifically requested an interpretation of Article 194 UNCLOS, which contains the obligation of States to take the necessary measures to preserve the marine environment and provides as follows:

*Article 194: Measures to prevent, reduce and control pollution of the marine environment:*

1. 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 this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.

In the context of global warming, the question is raised as to whether the failure of states to limit greenhouse gases (GHGs) and the resulting negative impact on the marine environment can be considered a violation of Article 194 I UNCLOS. Moreover, it gives rise to the question of what measures states are obliged to take to mitigate this damage. Welcoming a ruling in this regard, 31 member states and eight invited intergovernmental organizations submitted written statements on the COSIS proposal at the ITLOS in July 2023 and presented oral statements in September 2023. The applicant, COSIS, a commission of vulnerable island and coastal states, aimed to persuade ITLOS to interpret UNCLOS in a way that imposes more stringent obligations on states to protect the marine environment than those set out in existing climate change regimes.<sup>11</sup>

## II. Existing climate change regimes

In light of these circumstances, an examination of the pertinent climate agreements provides insight into the current approach to addressing climate change. At the center of the existing climate agreements is the United Nations Framework Convention on Climate Change (UNFCCC). It outlines a comprehensive regime, defining emissions mitigation as the ultimate goal and setting out principles and general commitments, but

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<sup>11</sup> ITLOS/PV.23/C31/3/Rev.1 (COSIS Submission), p. 31, para. 7.

also referring to further negotiations to establish specific commitments.<sup>12</sup> Result of such further negotiations is the Paris Agreement (PA), adopted in 2015, which builds on the institutions and processes established by the UNFCCC. The PA is committed to strengthen the global response to the threat of climate change, in particular to limit the in global temperature increase to well below 2 °C and to pursue efforts to limit the temperature increase to 1.5 °C.<sup>13</sup> In pursuit of its goal, the PA introduces the instrument of “Nationally Determined Contributions” (NDCs) to the global response to climate change which requires all Parties to undertake and communicate ambitious efforts to mitigate GHG emissions.<sup>14</sup> Taken together, these climate actions will determine whether the world achieves the long-term goals of the PA and reaches the global peak in GHG as soon as possible and then rapidly reduces them in line with the best available science. Ultimately, this means that a "balance between anthropogenic emissions by sources and removals by sinks" shall be achieved by the end of the 21st century.<sup>15</sup> Accordingly, NDCs are seen as „the heart” of the PA and crucial to achieve the PA’s envisaged objective to regulate global warming.<sup>16</sup> In terms of responsibility, the PA relies on the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR–RC principle). This principle expresses that states have different obligations while pursuing the same common goal, to stop climate change as a „common concern of mankind“, depending on their socio-economic situation and their historical contribution to the environmental problem.<sup>17</sup> It implies a fair distribution of the burden, which ensures the involvement of developing countries,

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<sup>12</sup> *Carlarne et. al.*, The Oxford Handbook of International Climate Change Law Oxford, 2016, p. 101.

<sup>13</sup> United Nations on Climate Change, Key aspects of the Paris Agreement (16.04.2024).

<sup>14</sup> UN on Climate Change, NDC Synthesis Report (16.04.2024).

<sup>15</sup> UN on Climate Change, Nationally Determined Contributions (NDCs), The Paris Agreement and NDCs (16.04.2024).

<sup>16</sup> UN on Climate Change, Nationally Determined Contributions (NDCs), The Paris Agreement and NDCs (16.04.2024).

<sup>17</sup> *Hey/Paulini*, MPEPIL 2021, para. 1.

which is essential for effective global climate protection.<sup>18</sup> First laid down in the Rio Declaration of 1992 as part of the UNFCCC, the principle strictly differentiated between developed and developing countries.<sup>19</sup> With the adoption of the PA in 2015, it was codified in Article 4 II PA and expanded to the effect that although the original distinction was maintained so that developed states shall take the lead in mitigating pollution, national circumstances must also be taken into account.<sup>20</sup> As of today, the principle forms a central part of state responsibility in connection to climate change. It has provided developing states with a basis for demanding that their position be taken into account in the formulation of treaty regimes, and that developed states provide for funds and technology so developing states can properly fulfil their international obligations to effectively combat climate change.<sup>21</sup>

### III. Time for change?

However, the Climate Change Report published by the IPCC in March 2023 made it clear that achieving the PA's temperature goal is in imminent danger. To keep global warming below 1.5 °C, global emissions would have to fall by 48 % by 2030 compared to 2019.<sup>22</sup> Against this background, the interpretation of Art. 194 I UNCLOS before ITLOS raised the question of the influence of existing measures under the relevant climate agreements on the content and extent of the obligations under the relevant provision. The following section will therefore first examine the requested applicability of the CBDR-RC principle to Art. 194 I UNCLOS and the tribunals opinion on this question. Thereafter, the positions of the parties and the tribunal on the controversial question of whether it is appropriate to transfer the standard of care, that is to say, what is to be un-

derstood as "necessary" to mitigate pollution under the PA to UNCLOS, will be considered and contextualised in light of the ongoing development of global warming.

#### 1. Applicability of the CBDR-RC principle

First, consideration must be given as to what responsibility the states have in order to mitigate climate change and if the current system imposed by UNFCCC and the PA suffices to apply it to UNCLOS. The reason why the allocation of responsibility must be discussed in the ongoing proceedings before the ITLOS is made clear by the Bangladesh Commission. The commission posits that Bangladesh is historically responsible for a mere 0.4 % of global emissions, thereby reinforcing their assertion that industrialised countries bear a greater responsibility than developing countries in mitigating climate change.<sup>23</sup> Since the developed countries, as the winners of industrialisation, are responsible for the current problem, they should support the developing countries in mitigating the effects of climate change and compensate for the financial and technical deficits.<sup>24</sup> Given the international acceptance of the CBDR-RC principle in environmental law the developing countries and coastal state parties to the Convention such as Timor-Leste, Guatemala and Mozambique call for the application of the principle to Article 194 I UNCLOS to ensure that the global problem is being dealt with globally and not just by those who can afford it.<sup>25</sup>

In order to respond to the question of responsibility allocation, ITLOS initially considers the wording of the relevant provision. Article 194 I UNCLOS expressly states that states shall use "the best practicable means at their disposal" and "in accordance with their capabili-

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<sup>18</sup> *Sands et. al.*, Principles of Int. Env. Law, 2018, p. 244; Mayer/Zahar, Defence of CBDR-RC Principle, 2021, p. 65.

<sup>19</sup> UN on Climate Change, Parties & Observers, Annex I, II (16.04.2024); Mayer/Zahar, Defence of CBDR-RC Principle, 2021, p. 65.

<sup>20</sup> Böhringer, Das neue Pariser Klimaübereinkommen, Zeitschrift für Ausländisches und Öffentliches Recht, 2016, p. 779.

<sup>21</sup> Hey/Paulini, MPEPIL 2021, para. 20.

<sup>22</sup> IPCC Report, p. 21, B.6.1.

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<sup>23</sup> ITLOS/PV.23/C31/6/Rev.1 (Bangladesh Submission), p. 29, line 37.

<sup>24</sup> ITLOS/PV.23/C31/6/Rev.1 (Bangladesh Submission), p. 30, line 1.

<sup>25</sup> Mozambique Written Statement (16.04.2024), p. 28, para. 3.48; ITLOS/PV.23/C31/8/Rev.1 (Guatemala Submission), p. 15, line 18; ITLOS/PV.23/C31/14/Rev.1 (Timor-Leste Submission), p. 5, line 10.

ties.”<sup>26</sup> The tribunal asserts that the extent of the necessary obligations of states may vary and depend on their scientific, technical, economic, and financial capabilities.<sup>27</sup> In response to the submissions of the states, the tribunal considers the CBDR-RC principle to be one of the key elements of the UNFCCC and the PA and draws parallels with the relevant provision under UNCLOS.<sup>28</sup> In this respect, the tribunal however notes that the principle cannot be found directly in the provision, but that it contains elements of the principle. Without deriving the principle directly from Article 194 I UNCLOS, the tribunal nevertheless respects the relevance and importance of the approach embedded in the PA and calls upon states in clear terms to collectively reduce emissions in accordance with the principle under UNCLOS. The tribunal underlines this perspective by clarifying that this interpretation should not be used as an excuse for inadequate action. Although developed countries should continue to take the lead, all states shall and must make efforts to mitigate the effects of climate change.<sup>29</sup>

In the absence of an explicit reference to the principle in question within the convention, the tribunal was entitled to adopt an alternative approach that would have been more conducive to the mitigation of maritime pollution. Nevertheless, it was the tribunal's decision to adhere to the principle that governs the PA.<sup>30</sup> It is evident that this decision is rational and logical, as the principle represents an effective method for combating climate change in a comprehensive manner and is especially well suited for the specific objective of mitigating maritime pollution. In light of the resources and capabilities of coastal and island states, which bear the least historical responsibility for climate change but are more significantly affected than other states, it seems reasonable to conclude that collective action in accordance with the principle to mitigate maritime pollution is the most appropriate course of action. Given that financial capabilities are often limited, requiring developed states to provide technical and

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<sup>26</sup> ITLOS Advisory Opinion, p. 81, para. 226.  
<sup>27</sup> ITLOS Advisory Opinion, p. 81, para. 225.  
<sup>28</sup> ITLOS Advisory Opinion, p. 82, para. 227.  
<sup>29</sup> ITLOS Advisory Opinion, p. 82, para. 229.  
<sup>30</sup> ITLOS Advisory Opinion, p. 82, para. 227.

financial support ensures that the states most familiar with the endangered maritime systems can act effectively on the front line.

## 2. Scope of UNCLOS' obligations

While the Parties and the tribunal therefore agree that the interpretation of states' responsibilities under UNCLOS is guided by the existing principle found in the UNFCCC and the PA, there is disagreement on the scope of the obligation to prevent, reduce and control the marine environment under UNCLOS in relation to the approach of the PA. In particular, it is disputed whether the PA should form a boundary for the scope of obligations under UNCLOS.

### a) First submission: “Don't go beyond Paris”

The first position, which is shared and submitted by the Australian Commission among other states, emphasizes that the content of the commitments under the Convention must be interpreted under the „highly relevant” UNFCCC and PA.<sup>31</sup> Australia's commission proposes to not just take a brief glance at these treaties for guidance but rather submits that „Part XII of UNCLOS should not be interpreted as imposing obligations [...] inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement.”<sup>32</sup> It understands UNCLOS as a Framework Agreement that deliberately leaves the development of specific rules on particular topics for the future, including by imposing obligations on State Parties to adopt and enforce laws.<sup>33</sup> The Commission further elaborates that one shall not undermine those agreements as they are the „product of close negotiation and careful compromise” having attracted the support of almost 200 parties. Due to this, Australia submits that the international community has already decided on what is necessary to prevent, reduce and control pollution under

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<sup>31</sup> ITLOS/PV.23/C31/5/Rev.1 (Australia Submission), p. 2, line 34.  
<sup>32</sup> ITLOS/PV.23/C31/5/Rev.1 (Australia Submission), p. 3, line 22.  
<sup>33</sup> ITLOS/PV.23/C31/5/Rev.1 (Australia Submission), p. 3, line 30.

Article 194 I UNCLOS.<sup>34</sup> The United Kingdom (UK) agrees in this regard and argues that, while COSIS requests to install an obligation under UNCLOS to reach the 1.5°C goal, the PA itself does not even impose a binding obligation to limit temperature rise to 1.5°C. In the following, the UK formulates that „the way that the Paris Agreement does treat the temperature rise goal should inform what legal meaning is to be given to what is „necessary“ under UNCLOS.<sup>35</sup> Specifically, since the climate change treaties exactly address the measures to be necessarily taken, ITLOS cannot credibly interpret UNCLOS as imposing more stringent or more specific obligations than the PA.<sup>36</sup> Australia’s Commission finishes the common argumentation with an explicit statement: „It follows that compliance with the UNFCCC and the PA satisfies the specific obligation under Article 194 I UNCLOS to take measures to prevent, reduce and control pollution of the marine environment arising from GHG emissions.”<sup>37</sup> In summary, the states agree that the scope of the necessary measures has already been determined extensively and sufficiently. While the UK sees the PA as the decisive standard to which ITLOS should be oriented, Australia agrees and goes even further by saying that mere compliance with the PA already leads to fulfilment of the obligation under UNCLOS.

**b) Second Submission: “Go further than Paris”**

Other states, such as Guatemala, Belize, and Comoros, which are situated on coastal areas and islands and thereby in need of change, do not perceive the existing obligations set forth in the UNFCCC and PA as a limitation to the provisions set forth in UNCLOS. Guatemala first argues that the agreements are supplementary to UNCLOS and do not supersede the obligations of UNCLOS as *lex specialis*. This is because all agreements

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<sup>34</sup> Australia Written Statement (16.04.2024), p. 12, para. 46; ITLOS/PV.23/C31/5/Rev.1 (Australia Submission), p. 5, line 18.  
<sup>35</sup> ITLOS/PV.23/C31/18/Rev.1 (United Kingdom Submission), p. 39, line 8.  
<sup>36</sup> ITLOS/PV.23/C31/18/Rev.1 (UK Submission), p. 39, line 12.  
<sup>37</sup> ITLOS/PV.23/C31/5/Rev.1 (Australia Submission), p. 9, line 10, 20.

deal with GHG emissions and simultaneous application does not lead to any recognisable normative conflict.<sup>38</sup> The commission justifies the application of the agreements to the present case with the argument that UNCLOS must be „interpreted in an evolutive manner, in light of the best available science, so that it may cover the problems posed by climate change”<sup>39</sup>, which can be achieved through the application of the UNFCCC and the PA as the most recent agreements. On the one hand, this can result in states preventing, controlling and reducing marine pollution in order to achieve the 2.0 °C/1.5 °C goal agreed under the PA.<sup>40</sup> On the other hand, this does not mean that the obligations under UNCLOS cannot be interpreted more further-reaching than the obligations under the UNFCCC and PA. Rather, in case the obligations under UNFCCC and PA do not suffice to meet the obligations the ITLOS may identify under UNCLOS, states may need to go beyond the existing efforts. According to Guatemala, „[t]his is a perfectly acceptable legal proposition insofar as states do not have conflicting obligations” under the three agreements.<sup>41</sup> Belize continues by specifically addressing the comments made by Australia and the UK. Unlike the submissions of these countries, Belize takes the view that what is „necessary“ cannot and must not be determined by fully relying on the provisions of the UNFCCC and PA. In particular, the provisions under UNCLOS do not consist of obligations to comply with the requirements of other treaties that do not even deal with marine pollution as specifically as UNCLOS.<sup>42</sup> Rather, what measures are „necessary“ is a separate and prior question before taking recourse to other agreements. And when doing so, UNCLOS must still be interpreted in conjunction with the best available science, which is not the PA, but rather the IPCC's climate

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<sup>38</sup> ITLOS/PV.23/C31/8/Rev.1 (Guatemala Submission), p. 11, line 16; ITLOS/PV.23/C31/16/Rev.1 (Comoros Submission), p. 6, line 31.  
<sup>39</sup> ITLOS/PV.23/C31/8/Rev.1 (Guatemala Submission), p. 10, line 38.  
<sup>40</sup> ITLOS/PV.23/C31/8/Rev.1 (Guatemala Submission), p. 11, line 28.  
<sup>41</sup> ITLOS/PV.23/C31/8/Rev.1 (Guatemala Submission), p. 11, line 38.  
<sup>42</sup> ITLOS/PV.23/C31/11/Rev.1 (Belize Submission), p. 32, line 11.

report of 2023.<sup>43</sup> Belize goes on to state that the published NDCs under the PA no longer represent the „best available science“ according to the IPCC's findings. The science could not be clearer that the individual efforts of the Parties under the PA fall far short of what is necessary to prevent, reduce and control pollution of the marine environment.<sup>44</sup> The commission of Comoros further agrees with Guatemala and Belize that merely meeting the obligations in order to pursue the 1.5 °C goal under the PA does not exhaust the obligation under Article 194 I UNCLOS.<sup>45</sup> In this context, Comoros relies on a literal interpretation of Article 194 I UNCLOS and states that even if the global community were to achieve the 1.5°C target under the PA, assuming that this target would also apply to Article 194 I UNCLOS, this would only lead to a certain degree of „control“ over marine pollution. However, states do not only have to „control“ marine pollution but must also strive to „prevent“ and „reduce“ it under Article 194 I UNCLOS.<sup>46</sup> Therefore, as the marine environment is already experiencing significant damage, more needs to be done than just meeting the 1.5 °C target envisaged by the PA when concretizing the obligations under UNCLOS.<sup>47</sup> Since, as stated by Guatemala, Belize, and Comoros, taking recourse to the UNFCCC and the PA is generally helpful in interpreting UNCLOS, the current commitments under the PA do not constitute sufficient obligations to achieve the stated objective.

**c) The Tribunal's Perspective**

Regarding the interpretation of which measures are “necessary” to prevent, reduce and control maritime pollution, the tribunal first asserts that the term “necessary measures” should be interpreted broadly.<sup>48</sup> In this respect, the measures

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<sup>43</sup> ITLOS/PV.23/C31/11/Rev.1 (Belize Submission), p. 32, line 29.  
<sup>44</sup> ITLOS/PV.23/C31/11/Rev.1 (Belize Submission), p. 34, line 12; IPCC Report, p. 10, A.4.  
<sup>45</sup> ITLOS/PV.23/C31/16/Rev.1 (Comoros Submission), p. 8, line 40.  
<sup>46</sup> ITLOS/PV.23/C31/16/Rev.1 (Comoros Submission), p. 9, line 11.  
<sup>47</sup> ITLOS/PV.23/C31/16/Rev.1 (Comoros Submission), p. 8, line 40.  
<sup>48</sup> ITLOS Advisory Opinion, p. 73, para. 203.

taken by states should not only be “indispensable” measures for the preservation of the marine environment, but should also, and above all, include all measures which serve to achieve this objective.<sup>49</sup> In defining the term, the tribunal emphasises that while states are, in principle, at liberty to determine the extent of their own reduction efforts, the term must nevertheless be interpreted in an objective manner.<sup>50</sup> The interpretation of Article 194 I UNCLOS should be based on the latest scientific findings of the IPCC reports as well as the UNFCCC and the PA, which are based on the best available scientific knowledge.<sup>51</sup> According to the tribunal, these primary legal instruments are therefore relevant for the interpretation of UNCLOS. In particular, the tribunal rules that the temperature target and the timeline for emission pathways of the PA “inform” the content of the necessary measures to be taken under Art. 194 I UNCLOS.<sup>52</sup> While this initially suggests a straightforward reference to the PA to determine what measures are actually necessary under UNCLOS as the Commission of Australia and the UK have suggested, the tribunal clarifies that the requirements of Article 194 I UNCLOS are not fulfilled if the provisions and commitments of the PA are complied with.<sup>53</sup> In contrast, the PA serves to supplement, rather than supersede, the Convention with respect to the obligation to regulate marine pollution from GHG emissions, thereby allowing for a more expansive scope of obligations. Ultimately, they are two different treaties with different obligations.<sup>54</sup> Consequently, the tribunal agrees with the second view, according to which a continuation of the promised commitments under the PA does not lead to the fulfilment of the obligations under Art. 194 I UNCLOS.

**d) Scientific Support**

In this regard, it can be asserted that the tribunal is committed to aligning its approach with the latest scientific findings in order to determine the

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<sup>49</sup> ITLOS Advisory Opinion, p. 73, para. 203.  
<sup>50</sup> ITLOS Advisory Opinion, p. 75, para. 206.  
<sup>51</sup> ITLOS Advisory Opinion, p. 78, para. 215.  
<sup>52</sup> ITLOS Advisory Opinion, p. 80, para. 222.  
<sup>53</sup> ITLOS Advisory Opinion, p. 80, para. 223.  
<sup>54</sup> ITLOS Advisory Opinion, p. 81, para. 223.

“necessary measures”. A review of the scientific evidence indicates that a more expansive interpretation of the obligations set forth in UNCLOS, when compared to the PA, suggests that the tribunal's decision is aligned with the appropriate course of action. While the tribunal is opposed to adopting the measures proposed by the PA, it is nevertheless to be welcomed that the tribunal understands the temperature target of the PA as the decisive standard for the interpretation of the obligations under UNCLOS. This is due to the fact that, according to the findings of the latest IPCC report, any action short of full compliance with the PA would be disproportionate to the magnitude of the damage to the oceans caused by climate change.<sup>55</sup> It is of the utmost importance that the tribunal establishes that UNCLOS is an autonomous treaty and that it is not necessary for it to be aligned with the PA in terms of the scope of its obligations. Furthermore, it is essential that the tribunal recognizes that the most up-to-date scientific evidence should be taken into account.<sup>56</sup> As a result, the necessary measures under UNCLOS can be understood as more far-reaching than those under the PA. An examination of the NDCs that have been submitted under the PA reveals that this represents the most significant achievement of the advisory opinion.

In fact, the current NDCs are insufficient to address the threat of climate change, and in some cases are not even fully complied with.<sup>57</sup> The IPCC report finds that by the end of 2020, the global average temperature was 1.1 °C higher than in the pre-industrial age.<sup>58</sup> Concurrently, the report elucidates that global warming to 1.5 °C would engender considerable risks to distinctive systems, which could ultimately constitute a profound threat to their continued existence.<sup>59</sup> For instance, an increase of global warming to 1.5 °C compared to pre-industrial levels (1850 – 1900) will lead to the destruction of 70-90 % of all coral

reefs by 2030 and would cause sea levels to rise by half a meter by the end of the century. This will lead to the salinisation of freshwater in the Caribbean, rendering it uninhabitable for humans and animals.<sup>60</sup> While many countries have stated their intention to achieve net-zero GHG by around mid-century, pledges vary from state to state in terms of scope and specificity.<sup>61</sup> If the development continues at the level of the NDCs submitted before 2021, the IPCC report from March 2023 predicts an average temperature of 1.5 °C above the pre-industrial age before the end of the 21st century with high confidence.<sup>62</sup> However, by the conclusion of 2023 – a mere nine months subsequent to the IPCC report – the global average temperature had already surpassed pre-industrial levels by 1.5 °C.<sup>63</sup> While it could be argued that the PA has already failed to achieve its goal, it must be stated without compromise that the current NDCs are by no means sufficient to pursue the intended long-term goal within the framework of the PA. The report reveals that the rapid change in GHG emissions progresses faster than the development of current NDCs under the PA.<sup>64</sup> As a reason for that the IPCC report identifies a significant „emission gap“ between global GHG emissions expected in 2030 associated with the implementation of NDCs under the PA announced before 2021 and those associated with modelled mitigation pathways that limit warming to 1.5 °C. Apparently, this is the result of many obligations under the PA not being fulfilled by the states responsible.<sup>65</sup> While climate financing flows from industrialised countries to developing countries were below the joint target under the UNFCCC and the PA an „implementation gap“ is also detected.<sup>66</sup> The IPCC states that „[p]olicies

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<sup>60</sup> *Headley/Valmond*, Agriculture in the Caribbean facing destructive climate impacts, Climate Tracker, 2023; IPCC Working Group II, Chapter 3: Ocean and Coastal Ecosystems and Their Services, 6th Report: Impacts, Adaption and Vulnerability, 2022, p. 412.

<sup>61</sup> IPCC Report, p. 11, A 4.3.

<sup>62</sup> IPCC Report, p. 11, A 4.3, A 4.4.

<sup>63</sup> Tagesschau, Global warming averages over 1.5 °C for the first time (08.02.2024).

<sup>64</sup> IPCC Report, p. 11, A 3.3.

<sup>65</sup> IPCC Report, p. 11, A. 4.3.

<sup>66</sup> IPCC Report, p 11, A 4.4.

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<sup>55</sup> IPCC Report, p. 10, A 4.1.

<sup>56</sup> ITLOS Advisory Opinion, p. 81, para. 223.

<sup>57</sup> *Davide et.al.*, Fairness in NDCs: comparing mitigation efforts from an equity perspective, 2017, p. 13; IPCC Report, p. 11, A 4.3.

<sup>58</sup> IPCC Report, p. 4, A 1.

<sup>59</sup> IPCC Report, p. 17.

implemented by the end of 2020 are projected to result in higher global GHG emissions in 2030 than emissions implied by NDCs [...]. Without a strengthening of policies, global warming of 3.2 °C is projected by 2100.”<sup>67</sup> This finding is corroborated by an independent study which reveals that, overall, the „mitigation contributions submitted by most of the developed countries are far from being consistent with the objectives of the PA in terms of either stringency or equity.”<sup>68</sup> A significant gap affects the NDCs of major emitters, particularly the USA, China and Russia, whose emission budgets are expected to expire well before 2030.<sup>69</sup> In light of these scientific findings it can be concluded that the efforts made thus far under the NDCs system under the PA are insufficient to adequately address climate change. The Tribunal's interpretation of the obligations outlined in the UNCLOS suggests that they are not constrained by the PA. This interpretation paves the way for the establishment of a novel, more rigorous approach tailored to the specific purpose of safeguarding the marine environment and mitigating the effects of sea-level rise, thereby aligning with the scientific findings of the IPCC.

#### IV. Implications

The tribunal's opinion marks a decisive turning point in the fight against progressive climate change. The CBDR-RC principle is identified as an appropriate means of addressing climate change, and existing climate regimes are not considered an impediment to obligations under UNCLOS. Furthermore, the importance of aligning with the latest scientific evidence is emphasised. The advisory opinion opens up an important area of law that is directly related to the climate crisis, but where the precise obligations have been unclear. While it does not lead to an immediate change due to the non-binding nature of the opinion, it translates abstract principles into concrete obligations to protect the marine environment, which may influence the interpretation of states' obligations. In this con-

text it is notable that a considerable number of states that are not even parties to UNCLOS have already acknowledged many provisions of the Convention as customary international law.<sup>70</sup> Furthermore, the tribunal's opinion may serve as a source of guidance for the adjudication of pending and future cases by national, regional, and international courts. The opinion serves to establish a tangible reference point for obligations in the context of climate change, thus providing a solid foundation upon which further analysis and debate can be based. Although the opinion addresses solely the scope of states' international obligations, it could be employed in claims initiated by private actors. It is common practice for private actors to rely on cases that establish a legal framework, which are typically brought against states. Such cases frequently incorporate pivotal evidentiary and legal findings into the strategies of claimants against companies.<sup>71</sup> Finally, the opinion will be of significant influence on the forthcoming and much-anticipated opinions of the International Court of Justice and the Inter-American Court of Human Rights. In addition to the issues raised in the ITLOS case, the ICJ has been asked to clarify the general obligations of states to mitigate climate change and whether obligations under existing climate change regimes should be interpreted more broadly.<sup>72</sup> While the courts may ultimately reach differing conclusions than those presented in the advisory opinion, it nevertheless serves as a definitive guideline, with ITLOS acting as a pioneering authority in this regard. In light of the findings presented in the IPCC report, it is, however, incontestable that a change in approach is imperative.

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<sup>70</sup> *Silverman-Roati/Bönnemann*, The ITLOS Advisory Opinion on Climate Change: An introduction into the joint blog symposium (22.05.2024).

<sup>71</sup> *Davies et al.*, International Tribunal on the Law of the Sea Issues Landmark Advisory Opinion on Climate Change (30.05.2024).

<sup>72</sup> *Tigre/Bañuelos*, The ICJ's Advisory Opinion on Climate Change: What Happens Now? (16.04.2024).

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<sup>67</sup> IPCC Report, p. 11, A 4.4, A 4.5.

<sup>68</sup> *Davide et.al.*, Fairness in NDCs, 2017, p. 12.

<sup>69</sup> *Davide et.al.*, Fairness in NDCs, 2017, p. 13.