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The UNCLOS as a legal living instrument to combat climate change and its deleterious effects: the specific obligations of State Parties according to the interpretation of ITLOS

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Abstract: this contribution analyses the advisory opinion rendered by the International Tribunal for the Law of the Sea on 21 May 2024. Accordingly, the contribution summarizes the background of the advisory proceedings considering the legal nature of the Commission of Small Island States on Climate Change and International Law. This required the advisory opinion to the Tribunal about the specific obligations of the States Parties to the United Nations Convention on the Law of the Sea to prevent, reduce and control pollution of the marine environment and to protect and preserve the marine environment in relation to climate change impacts. In this sense, the contribution highlights the acknowledgement by the Tribunal of its jurisdiction to answer the request following its previous jurisprudence. Moreover, this paper studies the specific obligations on climate change of UNCLOS States Parties declared by ITLOS. According to the Tribunal and in addition to other important specific obligations, States Parties have specific due diligence obligations to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions, taking into account the goal of limiting the temperature increase to 1.5°C above pre-industrial levels, and to ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States or their environments. In short, this paper concludes the interesting contribution made by the Tribunal making clear the specific obligations of UNCLOS States Parties on climate change, which is in line with the valuable jurisprudence of ITLOS along its nearly 30 years of existence.

Keywords: climate change litigation, specific obligations, States Parties, United Nations Convention on the Law of the Sea, International Tribunal for the Law of the Sea

(A) INTRODUCTION

Climate change is one of the primary concerns currently facing the international community. As acknowledged in the Preamble of the Paris Agreement, "climate change is a common concern of humankind," which entails crucial challenges and issues of international governance of a highly diverse nature that undoubtedly exceed the scope of the Law of the Sea and even that of International Environmental Law.[1] In this regard, various initiatives are being proposed to establish a legal strategy that, through

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1 See in this sense the following Resolutions of the United Nations General Assembly: *Resolution 76/205 of 17 December 2021 on the protection of the global climate for present and future generations*; or *Resolution 76/300 of 28 July 2022 on the human right to a clean, healthy, and sustainable environment.*

International Law, may contribute to addressing climate change and its deleterious effects.

Among these, the recent initiatives aimed at requesting advisory opinions on climate change deserve particular attention. These include, on the one hand, a request before the International Tribunal for the Law of the Sea (hereinafter ITLOS or the Tribunal) and, on the other hand, a request before the International Court of Justice (hereinafter ICJ or the Court).[2] Additionally, we may also highlight the Request for an Advisory Opinion on Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile on January 9, 2023.

Along this contribution I will focus on the firstly mentioned advisory opinion, the one requested by the Commission of Small Island States on climate change and International Law before the International Tribunal for the Law of the Sea, which is at the time being the only one given by the aforementioned international courts and tribunals. As it is known, the International Tribunal for the Law of the Sea rendered its advisory opinion on 21 May 2024 answering the request submitted by the Commission of Small Island States on climate change and International Law.[3] Nonetheless, the other advisory opinions requested before the International Court of Justice and before the Inter-American Court of Human Rights are highly interesting, too. This Agora contains significant contributions analysing the other two advisory opinions.[4]

In this regard, the relationship between the oceans and the climate is evident, close, and significantly more complex than its current reflection in international legal frameworks.[5] Oceans and seas are among the areas most affected by the adverse and negative effects of climate change such as rising sea levels and loss of biodiversity and simultaneously play a crucial role in mitigating the effects of this phenomenon due to their status as the world's largest carbon sink.[6]

Although the United Nations Convention on the Law of the Sea (UNCLOS) does not explicitly regulate climate change, it establishes a comprehensive legal regime for the seas and oceans, from which rights and obligations arise that are directly impacted by and relevant to the effects of climate change. Consequently, it is clear that climate change

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In particular, along the Preamble of the Paris Agreement it is acknowledged that 'that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.'

2 *Obligations of States in respect of Climate Change*.

3 Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS Reports 2024, to be published.

4 See in this sense the contributions by Eulalia Petit de Gabriel and by Gastón Alejandro Medici Colombo in this Agora.

5 R. J., Roland Holst, 'The Climate-Oceans Nexus: Oceans in the Climate Regime, Climate in the Oceans Regime', in P. G., Harris (ed.), *Routledge Handbook of Marine Governance and Global Environmental Change* (Routledge, New York, 2022) 28.

6 See A. Boyle, 'Protecting the Marine Environment from Climate Change', in E. Johansen *et al* (eds), *The Law of the Sea and Climate Change. Solutions and Constraints* (Cambridge University Press, Cambridge, 2022) 81-103.

poses direct challenges and raises fundamental issues for the sector of international legal frameworks governed by the Law of the Sea.

Accordingly, along the following pages of this contribution I will firstly address the background of this advisory proceedings. Secondly, I will analyse the jurisdiction of the Tribunal to render this advisory opinion. Thirdly I will reflect on the contribution of the Tribunal to the clarification of the specific obligations of the UNCLOS States Parties to combat climate change. Finally, I will make some final considerations in light of the study previously developed.

(B) THE ADVISORY OPINION'S PROCEDURAL BACKGROUND

On October 31, 2021, the first day of the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change held in Glasgow,[7] the governments of Antigua and Barbuda and Tuvalu signed an Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law.[8] This agreement is open to members of the Alliance of Small Island States, with seven States having acceded to it so far: Palau, Niue, Saint Lucia, Vanuatu, Saint Vincent and the Grenadines, Saint Kitts and Nevis, and The Bahamas.

The agreement, consisting of only four articles, provides for the creation of the aforementioned Commission and, significantly, authorizes it to request advisory opinions from the International Tribunal for the Law of the Sea on any legal question within the scope of the United Nations Convention on the Law of the Sea, in accordance with Article 21 of the Tribunal's Statute and Article 138 of its Rules.[9]

Thus, the Commission aimed to follow the path initiated by the advisory opinion issued by the Tribunal in 2015 in response to the request of the Subregional Fisheries Commission.[10] In that opinion, the international judicial body determined for the first time that its full bench could exercise advisory jurisdiction on a legal question if an international treaty related to the objectives of the United Nations Convention on the Law of the Sea specifically provided for such a request.[11] This conclusion received some criticism among legal scholars, highlighting differing interpretations of the Tribunal's advisory jurisdiction.[12] Nevertheless, in this case, as will be detailed below, the Tribunal accepted its jurisdiction without extensive deliberation.

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7 United Nations Framework Convention on Climate Change, adopted on 29 May 1992, *UNTS* vol. 1771, 107-321.

8 *Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law*. See D. Freestone, R. Barnes, and P. Akhavan, 'Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)', *International Journal of Marine and Coastal Law* (2022) 37, 166-178.

9 This provision is mentioned below.

10 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4.

11 *Ibid*, paras. 37-69, 219. See particularly paras. 58-60.

12 See among others M. Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission", *Leiden Journal of International Law* (2016) 441-461 ; or Y. Tanaka, 'Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015', *The Law and Practice of International Courts and Tribunals* (2015) 318 339.

Therefore, on December 12, 2022, the Commission of Small Island States submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea. In this request, the applicants invoked the following legal bases to establish the advisory jurisdiction of the Tribunal: Article 21 of its Statute, Article 138 of its Rules, and Article 2.2 of the Agreement for the establishment of the Commission. In particular, the article 2.2 establishes as follows: '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.'

In light of these jurisdictional provisions, the Commission presented the following questions to the Hamburg Tribunal:

> '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:
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> (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?'

Four days after the submission of the request, on December 16, 2022, the Tribunal issued an order to include this request for an advisory opinion on its docket (as Case No. 31) and to notify all States Parties to the United Nations Convention on the Law of the Sea (UNCLOS) of its receipt. Furthermore, through this order, the Tribunal decided, in accordance with Article 133, paragraph 1, of its Rules, to invite certain intergovernmental international organizations, listed in an annex to the order, to provide information on the issues submitted to the Tribunal in this advisory opinion.[13] Additionally, the order invited, pursuant to Article 133, paragraph 3, of the Tribunal's Rules, the Commission and the aforementioned organizations to submit written statements on these issues, initially setting May 16, 2023, as the deadline for such submissions, which was subsequently extended to June 16, 2023.[14]

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13 Order of 16 December 2022.

14 Article 133 of the Rules of the Tribunal establishes: '1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States Parties. 2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations. 3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber, or its President if the Chamber is not sitting, may fix a further time-limit within which such States Parties and organizations may present written statements on the statements made. 4. The Chamber, or its President if the Chamber is not sitting, shall decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings. States Parties and the organizations referred to in paragraph 2 shall be invited to make oral statements at the proceedings.'

This advisory procedure has received significant interest, not only among scholars but also among States themselves, as evidenced by the high level of participation it has elicited. A total of 31 States Parties to UNCLOS participated in the process, including the Democratic Republic of Congo, Poland, New Zealand, Japan, Norway, Germany, Italy, China, the European Union, Mozambique, Australia, Mauritius, Indonesia, Latvia, Singapore, South Korea, Egypt, Brazil, France, Chile, Bangladesh, Nauru, Belize, Portugal, Canada, Guatemala, the United Kingdom, the Netherlands, Sierra Leone, Micronesia, and Djibouti.

Additionally, 8 intergovernmental international organizations submitted written statements pursuant to articles 138, paragraph 3, and 133, paragraph 3, of the Rules of the Tribunal, including the United Nations, the International Union for Conservation of Nature, the International Maritime Organization, the Commission of Small Island States on Climate Change and International Law, the Pacific Community, the United Nations Environment Programme, the African Union, and the International Seabed Authority.[15] Furthermore, four written submissions were presented after the deadline (from Rwanda, the Food and Agriculture Organization of the United Nations, Vietnam, and India), and 10 *amicus curiae* participated.[16]

In my view, the wording of the questions submitted by the Commission is highly appropriate due to their precision, specificity, and clear legal connection to the Convention.[17] Nevertheless, in order to respect the main object of this contribution, I will now proceed to highlight the most relevant aspects of the advisory opinion issued by the International Tribunal for the Law of the Sea on May 21, 2024, addressing firstly the jurisdictional aspects and subsequently the substantive issues.

(C) THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

First of all, the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) is, in principle, expressly and explicitly recognized by the Convention only for a specific chamber of the Tribunal, the Seabed Disputes Chamber (SDC), and solely with regard to matters concerning the international seabed area (Articles 191 and 159, paragraph 10, of UNCLOS).[18]

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15 All the documents concerning this advisory proceedings, included the written statements of these international organizations can be accessed here.

16 These *amicus curiae* are: United Nations Special Rapporteurs on Human Rights, & Climate Change, Toxics & Human Rights and Human Rights & the Environment, High Seas Alliance, Client Earth, Opportunity Green, Center for International Environmental Law and Greenpeace International, Advisory Committee on Protection of the Sea, World Wide Fund for Nature, Our Children's Trust and Oxfam International, Observatory for Marine and Coastal Governance, One Ocean Hub.

17 I have considered this question in a previous paper: E. Jiménez Pineda, 'Hacia una opinión consultive sobre cambio climático: a propósito de la solicitud de dictamen de la Comisión de Pequeños Estados insulares al Tribunal Internacional del Derecho del Mar', *Revista Electrónica de Estudios Internacionales (2023) 45, at 16.*

18 See M. García García-Revillo, and E. Jiménez Pineda, 'Los aspectos jurisdiccionales de la opinión consultiva sometida al Tribunal Internacional del Derecho del Mar por la Comisión Subregional de Pesca',

As such, the Tribunal itself, in plenary session, is not explicitly mentioned as having authority to address such matters or others through an advisory procedure. However, it should be noted that the Tribunal in plenary took a decisive turn on this issue through what has been described as a bold play: the introduction, *motu proprio*, of Article 138 (the final article) into its Rules. This provision expressly establishes a general advisory jurisdiction for the Tribunal in plenary, albeit subject to certain conditions or prerequisites.[19] Significantly, the legal grounds on which the Tribunal based this addition or, at the very least, this extensive modification of its advisory jurisdiction, are not explicitly stated.

The question of the jurisdiction of the ITLOS plenary was one of the fundamental points of discussion in the case concerning the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, with arguments presented both in favour and against.[20] As is well known, the Tribunal resolved the dispute concerning its jurisdiction by deeming itself competent to render its advisory opinion on the questions submitted.

This decision was essentially based on the interpretation of Article 21 of its Statute, which considers the reference to "all matters" as authorizing it to address any request for an advisory opinion.[21] Regarding Article 138 of its Rules, the Tribunal stated that this provision does not establish advisory jurisdiction but merely sets forth the preliminary requirements that must be satisfied, namely: the existence of an international treaty related to the purposes of UNCLOS and the presentation of a question of a legal nature.[22]

In any case, it can be noted that, even in that earlier request, the potential risk was highlighted that certain States, through bilateral or multilateral agreements, might establish an international organization similar to the Subregional Fisheries Commission or this *new* Commission of Small Island States with the aim of submitting a request for an advisory opinion and thereby gaining a certain advantage over third

in J. M. Sobrino Heredia (ed), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar (Bomarzo, Albacete, 2016) 155-166, at 157.*

19 See M. García García-Revillo, *The contentious and advisory jurisdiction of the International Tribunal for the Law of the Sea* (Brill Nijhoff, Leiden Boston, 2016) 297.

20 In a nutshell, the principal argument advanced in favour of the advisory jurisdiction was based on the phrase "all matters" employed in the final clause of Article 21 of the Tribunal's Statute. This argument emphasized that, when contrasting the terms "disputes" and "claims," the word "matters" carries a noticeably broader meaning. On the contrary, the arguments briefly presented against the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) in its plenary composition were as follows: (1) the absence of a provision expressly conferring advisory jurisdiction upon the Tribunal (see China's declaration); (2) the lack of precedent in the practice of States concerning other international tribunals, whose advisory jurisdiction has always been explicitly and expressly conferred (see Spain's declaration); (3) the parallelism between Article 21 of the ITLOS Statute and Article 36(1) of the Statute of the International Court of Justice (ICJ), bearing in mind that the advisory jurisdiction of the principal judicial organ of the United Nations is grounded in Article 96 of the United Nations Charter and Article 65(1) of the ICJ Statute; and, finally, (4) the real possibility that affirming the advisory jurisdiction of the Tribunal in plenary session would enable third States, including those not party to UNCLOS, to bring matters before the Tribunal (see Australia's declaration).

21 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 21, para. 56.

22 *Ibid*, p. 22, para. 60.

States.[23] In other words, the creation of an *ad hoc* international organization with the sole and genuine purpose of enabling its member States to seek an advisory opinion from this international tribunal may be deemed problematic.

Concerning the issue of jurisdiction, the Tribunal unanimously determined that it has jurisdiction to issue the advisory opinion requested by the Commission and further decided to respond to said request.[24] To this end, the International Tribunal for the Law of the Sea invoked both Article 21 of its Statute and the Agreement establishing the requesting Commission, as well as, most notably, its prior jurisprudence in the advisory opinion issued in 2015 at the request of the Subregional Fisheries Commission, previously mentioned.

In this regard, the Tribunal noted that the majority of participants in this proceeding expressed the view that it has jurisdiction to issue the requested advisory opinion.[25] Likewise, recalling its prior jurisprudence, the Tribunal affirmed the three requirements necessary for its advisory jurisdiction to be established, namely: (a) the existence of an international agreement related to the objectives of the Convention that specifically provides for the possibility of requesting an advisory opinion from the Tribunal; (b) that the request be submitted to the Tribunal by an entity authorized by or in accordance with the agreement; and (c) that the request concerns a legal question.[26]

In this case, the Tribunal considered that the questions submitted by the Commission bear a sufficient connection to the object and purpose of the treaty establishing the Commission, thereby affirming its jurisdiction to address the requested opinion.[27]

Furthermore, the Tribunal declared that it is 'aware of the importance of the questions in the Request for the members of the Commission and that by answering the questions, the Tribunal would be assisting the Commission in the performance of its activities and contributing to the fulfilment of its mandate, including the implementation of the Convention.'[28]

Accordingly, the Tribunal highlighted that it is 'is mindful of the fact that climate change is recognized internationally as a common concern of humankind' and it is 'also conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts.'[29] As such, the Tribunal concluded that it 'deems it appropriate to render the advisory opinion requested by the Commission', upholding its jurisdiction in this case.[30]

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23 See in this sense the *Declaration of Judge Cot*, particularly p. 74, para. 9.
24 *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS Reports 2024,* para. 441.
25 *Ibid, para. 91.*
26 *Ibid, para. 95.*
27 *Ibid, paras. 108-109.*
28 *Ibid, para. 118.*
29 *Ibid, para. 122.*
30 *Ibid, para. 121.*

(D) THE SPECIFIC OBLIGATIONS OF UNCLOS STATES PARTIES ON CLIMATE CHANGE ACCORDING TO ITLOS

Along its advisory opinion, the International Tribunal for the Law of the Sea devoted greater attention to the substantive issues than to the resolution of jurisdictional questions, which have been recently commented upon. First and foremost, the ITLOS addressed the interpretation of the Convention and the link between this treaty and other norms of International Law, declaring that the rules contained in Part XII (concerning the protection and preservation of the marine environment) and Article 237 demonstrate the openness of Part XII to legal regimes established by other treaties.[31]

Accordingly, the Tribunal held that, 'subject to article 293 of the Convention, the provisions of the Convention and external rules should, to the extent possible, be interpreted consistently.'[32] In this sense, the Tribunal affirmed that 'there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment' and that, 'in the present case, relevant external rules may be found, in particular, in those agreements., with respect to climate change, include the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Montreal Protocol.'[33]

Moreover, when addressing the substantive issues raised by the Commission, the Tribunal, with regard to the first issue presented, declared that anthropogenic emissions of greenhouse gases into the atmosphere constitute marine pollution within the meaning of the Convention. Furthermore, it held that the States Parties have specific obligations, pursuant to Article 194, paragraph 1, of the Convention, to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions.[34]

In a very interesting approach, the Hamburg Tribunal affirmed that such measures must be determined objectively, taking into account, among other aspects, the best available science and the relevant international standards and rules contained in treaties on climate change, such as the United Nations Framework Convention on Climate Change and the Paris Agreement, particularly the goal of limiting the temperature increase to 1.5°C above pre-industrial levels.[35]

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31 *Ibid, para. 134.*

32 *Ibid, para. 136.*

33 *Ibid, paras. 137.*

34 *Ibid, para. 441, a, a).*

35 *Ibid*, para. 441, a, b). In particular, the Tribunal declared: 'Under article 194, paragraph 1, of the Convention, 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 endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, inter alia, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions.'

In addition, the Tribunal expressed its view that the scope and ambition of the necessary measures may vary in accordance with the resources available to the States Parties and their capacities, and include, in particular, the reduction of greenhouse gas emissions. Furthermore, the obligation 'under article 194, paragraph 1, of the Convention to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence.'[36] Such 'standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions,' although 'the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.'[37]

In this regard, the ITLOS stated that, pursuant to Article 194, paragraph 2, of the Convention, States Parties have a specific obligation to take all necessary measures to ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States and their environment, and that pollution resulting from such emissions under their jurisdiction or control does not extend beyond areas where they exercise sovereign rights.[38] Even though the Tribunal also concluded that this is a due diligence obligation, it considered that the standard of due diligence could be even more stringent than that established in Article 194, paragraph 1.[39]

In a nutshell, among the specific obligations declared by the Tribunal in response to the first question submitted by the Commission namely, what are the specific obligations of State Parties to UNCLOS 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 which are caused by anthropogenic greenhouse gas emissions into the atmosphere , the following can be highlighted:

- Pursuant to Articles 207 and 212 of UNCLOS, the specific obligation to adopt laws and regulations to prevent, reduce, and control marine pollution caused by greenhouse gas emissions from land-based sources and atmospheric discharges.[40]
- In accordance with Article 217, the specific obligation to ensure that ships flying their flag or registered under their jurisdiction comply with the applicable international rules and standards established by the competent international organization or through a general diplomatic conference, as well as with their own laws and regulations for the prevention, reduction, and control of marine pollution from greenhouse gas emissions originating from ships.[41]
- Pursuant to Articles 197, 200, and 201, interpreted jointly with Articles 194 and 192, the specific obligation to cooperate, directly or indirectly through competent international organizations, in a continuous, meaningful, and good-faith manner to prevent, reduce, and control marine pollution caused by anthropogenic greenhouse gas emissions.[42]

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36 *Ibid, para. 441, a, c).*
37 *Ibid.*
38 *Ibid, para. 441, a, d).*
39 *Ibid.*
40 *Ibid, para. 441, a, f).*
41 *Ibid, para. 441, a, i).*
42 *Ibid, para. 441, a, j).*

- Under Article 202, the specific obligation to assist developing States, particularly vulnerable developing States, in their efforts to address marine pollution resulting from greenhouse gas emissions.[43]

On the other hand, in response to the second question, the International Tribunal for the Law of the Sea stated that the obligation under Article 192 of the Convention includes the duty to protect and preserve the marine environment from the impacts of climate change and ocean acidification, being a due diligence obligation whose standard is stringent, 'given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification'.[44] Pursuant to Article 194, paragraph five, UNCLOS States Parties have the specific obligation to 'to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification'.[45]

According to ITLOS, pursuant to Articles 61 and 119 of the Convention, States Parties have a specific obligation to adopt the necessary measures to conserve living marine resources threatened by the impacts of climate change and ocean acidification, taking into account, among other factors, the best available science as well as relevant environmental and economic considerations.[46] Similarly, the obligation to seek to reach an agreement under Article 63(1) and the obligation to cooperate under Article 64(1) of the Convention require States Parties, among other things, to consult with each other in good faith with the aim of adopting the effective measures necessary to coordinate and ensure the conservation and development of shared stocks.[47]

Finally, the International Tribunal for the Law of the Sea declared that pursuant to Article 196 of the Convention-States Parties have a specific obligation to 'take appropriate measures to prevent, reduce and control pollution from the introduction of non-indigenous species due to the effects of climate change and ocean acidification which may cause significant and harmful changes to the marine environment,' which requires the application of the precautionary approach.[48]

(E) CONCLUSION

This contribution has tried to highlight both from a jurisdictional perspective and from a substantive viewpoint the most noteworthy aspects of the advisory opinion rendered by the International Tribunal for the Law of the Sea on May 21, 2024, following

43 *Ibid*, *para.* 441, a, k).
44 *Ibid*, para. 441, b, b) and c).
45 *Ibid*, *para. 441, b, d).*
46 *Ibid*, *para. 441, b, e).*
47 *Ibid*, *para. 441, b, f).* In this paragraph, the Tribunal further declared: 'The necessary measures on which consultations are required must take into account the impacts of climate change and ocean acidification on living marine resources. Under article 118 of the Convention, States Parties have the specific obligation to cooperate in taking measures necessary for the conservation of living marine resources in the high seas that are threatened by climate change impacts and ocean acidification.'
48 *Ibid*, para. 441, b, g).

the request submitted by the Commission of Small Island States on Climate Change and International Law.

Climate change is, in the words of the Paris Agreement's Preamble, a common concern of humankind. From a legal perspective, climate change has become a central issue in international and domestic law, prompting the development of treaties, regulations, and litigation aimed at mitigating its effects, adapting to its impacts, and ensuring accountability for environmental harm.

Although the advisory nature of the Tribunal's decision should not be overlooked considering that it is an advisory opinion, and as such, by definition, it is not legally binding. Nonetheless, it is a decision grounded in law, rendered by the full bench of an international judicial body specializing in the Law of the Sea. In this regard, this advisory opinion should not be undervalued, specially taking into consideration that the decision has been reached unanimously by the 21 members of the Tribunal.[49]

In my view, this advisory opinion undoubtedly means a significant contribution in clarifying the meaning and determining the scope of the specific obligations of States Parties in the matter of climate change under the United Nations Convention on the Law of the Sea (UNCLOS). These obligations include, on the one hand, the prevention, reduction, and control of marine environmental pollution in connection with the harmful effects that result from or are likely to result from climate change and, on the other hand, the protection and preservation of the marine environment from the impacts of climate change.

With respect to the jurisdictional issue, the Tribunal followed the approach it first started in 2015 when addressing the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission. In this *climate change case*, the Tribunal considered that it has jurisdiction in its plenary formation under Articles 21 of its Statute and 138 of its Rules, given the fulfilment of the conditions that, in the Tribunal's interpretation, must be satisfied and which, in its judgment, are present in this case, namely: 1) the existence of an international agreement related to the objectives of the Convention that expressly provides for the possibility of requesting an advisory opinion from the Tribunal; 2) that the request be submitted to the Tribunal by an entity authorized by or pursuant to the agreement; and 3) that the request pertain to a legal question.

In my opinion, even more interesting is the substantive approach taken by the Hamburg Tribunal to the issues raised by the Commission of Small Island States on Climate Change and International Law concerning the specific obligations of States Parties under the Convention in the context of climate change.

On top of declaring that anthropogenic greenhouse gas emissions into the atmosphere constitute marine pollution within the meaning of the Convention, the Tribunal determined a relevant set of specific obligations. Notably, it highlighted that States Parties have specific due diligence obligations to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions and to

[49] In this sense, it can be noted that the advisory opinion received individual declarations from the Judges Jesus, Pawlak, Kulyk, Kittichaisaree, and Infante Caffi.

ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States or their environments.

Moreover, States Parties to the Convention are under a specific obligation to protect and preserve the marine environment from the impacts of climate change and ocean acidification, as well as to safeguard rare or fragile ecosystems, habitats of depleted, threatened, or endangered species, and other forms of marine life from the impacts of climate change and ocean acidification. In this regard, the Tribunal also determined that States Parties have a specific obligation to adopt appropriate measures to prevent, reduce, and control pollution arising from the introduction of non-native species due to the adverse effects of climate change and ocean acidification.

In my view, this advisory opinion constitutes a historic decision by the International Tribunal for the Law of the Sea, addressing the highly technical issues raised by the requesting Commission. It continues with the case-law line established in other highly significant decisions by this Tribunal, such as among others its judgment in the dispute concerning the delimitation of maritime boundaries between Mauritius and the Maldives in the Indian Ocean.[50] In that case, the Tribunal applied in a contentious case the ruling given by the International Court of Justice in its advisory opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965.[51]

In addition, this opinion shows the forward-looking approach the Tribunal has consistently pursued since its beginning, an approach that sometimes contrasts with that of other international judicial bodies. It is shown, for instance, in the legal nature of the entity that requested this advisory opinion the very recent created Commission of Small Island States on Climate Change and International Law or in the ambition and in the extent of the specific obligations affirmed along this advisory opinion.

In conclusion, I consider this advisory opinion, even in its non-binding and consultative capacity, to be another major contribution by the Hamburg Tribunal to the appropriate interpretation of the United Nations Convention on the Law of the Sea and, in brief, to the development of this crucial sector of International Law represented by the Law of the Sea.

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[50] *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment, ITLOS Reports 2022-2023*, to be published.

[51] *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif, C.I.J. Recueil 2019*, p. 95