ITLOS's Advisory Opinion on the notion of 'common but differentiated responsibilities' to protect the marine environment from impacts of climate change: A closer look from the Standpoint of developing States

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Matter commented on: The Advisory Opinion of ITLOS on climate change.

1. **Context**:

On 21 May 2024, the International Tribunal on the Law of the Sea (ITLOS, the Tribunal) delivered its historic advisory opinion (AO) on the obligations of States under the UN Convention on the Law of the Sea (LOSC) to protect the marine environment from impacts of climate change. The AO was requested in 2022 by the Commission of Small Island States on Climate Change and International Law (COSIS), which asked ITLOS to clarify States' obligations to address climate change under the LOSC. The process was highly participatory, with more than 40 States, intergovernmental organizations, and NGOs submitting written comments and participating in oral hearings hosted by ITLOS (see Maria A. Tigre and K. Silverman-Roati, 2023). Informed by science and international standards, in particular those in the climate law regime, the Tribunal unanimously held that States have due diligence obligations under the LOSC to protect the marine environment against the impacts of climate change. However, ITLOS underscores that the implementation of this due diligence obligation may vary according to States' capabilities and available resources in line with the principle of common but differentiated responsibility (CBDR) and that developed States must provide technical assistance for climate-vulnerable States. In this blog post, we examine the Tribunal's elaboration on these two substantive aspects from the standpoint of developing States. The post first provides an overview of the key conclusions of ITLOS, followed by our commentary on specific issues.

2. **ITLOS's key findings on obligations of States to protect the marine environment from impacts of climate change in a nutshell**

One of the key conclusions of the ITLOS' advisory opinion is that anthropogenic greenhouse gas (GHG) emissions into the atmosphere constitute pollution of the marine environment within the meaning of Article 1(1(4)) of LOSC (para. 179). This conclusion served as a basis for the Tribunal's assessment of the specific obligations of States under the LOSC (particularly Part XII, Articles 192, 193, and 194).

The Tribunal articulated three main obligations of States under Article 194: i) the obligation under paragraph 1 to take all necessary measures to prevent, reduce, and control pollution of the marine environment from any sources; ii) the obligation under paragraph 2 to take necessary measures to ensure that activities under their jurisdiction or control do not cause transboundary harm, or that pollution arising from incidents or activities under their jurisdiction or control do not spread beyond areas where they exercise sovereign rights; and iii) the obligation under paragraph 5 to take necessary measures 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 (see para. 195). With respect to the first obligation, ITLOS declared that Article 194(1) of LOSC "imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions" into the atmosphere (para 223); and such measures shall be taken individually or jointly as appropriate (para. 201-202). The Tribunal characterized this obligation as a 'due diligence' obligation requiring States to exercise adequate vigilance in taking all necessary measures including, *inter alia*, to put in place a national system to control GHG emissions and effectively enforce that system (para 235). The standard of due diligence is also stringent due to "the high risks of serious and irreversible harm to the marine environment from such emissions" (para. 243). ITLOS observed that Article 194 does not provide States with complete discretion to determine what measures are necessary, rather such determination must be made "objectively" informed by "the best available science" on climate change as is found in the works of the

Intergovernmental Panel on Climate Change (IPCC) "which reflect the scientific consensus" (para. 206-208). However, the Tribunal noted that scientific certainty is not required in determining necessary measures. In the absence of such certainty, States must apply the precautionary approach in regulating marine pollution from anthropogenic GHGs even though such approach has not been explicitly recognized in the LOSC (para. 213). The Tribunal underscored that States would not meet their obligation under Article 194 (1) of LOSC "if they disregarded or did not adequately account for the risks involved in the activities under their jurisdiction or control. This is so, even if scientific evidence as to the probability and severity of harm to the marine environment of such activities were insufficient" (para. 242). Moreover, the Tribunal cautioned that science alone would not determine the content of necessary measures; rather other relevant factors should be considered and weighed together with the best available science, including international rules and standards adopted to address climate change, and the available means and capacities of the States concerned (paras. 207, 212, 214, 225-230, 243).

With respect to the second obligation, under Article 194 (2) LOSC, the Tribunal held that the provision imposes a specific due diligence obligation on States Parties to take all necessary measures to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment and that pollution arising from emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights (paras. 250, 254, 258). The Tribunal further concluded that the standard of due diligence can be more stringent than that under Article 194 (1) because of the nature of transboundary pollution (para. 254, 256, 258). The Tribunal analyzed the third obligation, i.e. obligation under Article 194(5) to take measures necessary to protect and preserve rare or fragile ecosystems and habitats, as part of the obligations of States to protect and preserve the marine environment under Article 192 (discussed below).

ITLOS described the obligations of States to protect and preserve the marine environment under Article 192 LOSC as "broad [in] scope, encompassing any type of harm or threat to the marine environment," including those arising from climate change impacts (paras 385 and 388). Following its reasoning for Article 194, the Tribunal imposed a stringent due diligence threshold for the fulfilment of obligations under Article 192. It states that Article 192 requires "measures as far-reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment. The standard of due diligence under article 192 is … stringent given the high risks of serious and irreversible harm to the marine environment" (para. 399). ITLOS further identified two broad categories of actions that could be taken to protect and preserve the marine environment in the context of climate change: namely (1) climate change mitigation actions, and (2) climate adaptation and resilience actions. To realize these actions, States have obligations "to reduce GHG emissions" and "to implement . . . resilience and adaptation actions as described in the climate change treaties" (para. 391). While actions to protect the marine ecosystems that sequester carbon dioxide were indicated by some States as additional actions, ITLOS did not explicitly address States' obligations with respect to taking actions that sequester carbon dioxide. The Tribunal simply noted that "carbon sequestration" could be enhanced "through measures to restore the marine environment" but did not provide any further guidance on the precise measures States can, should, or must adopt (para. 389). Finally, regarding States' obligation to protect and preserve rare or fragile ecosystems, the Tribunal stressed that climate resilience and adaptation actions "as described in climate change treaties" are part of the corpus of necessary measures under LOSC Article 192, to protect and preserve the marine environment in relation to climate change impacts and ocean acidification (para. 402).

3. Applying the principle of 'common but differentiated responsibilities'

With respect to States' obligations to take all necessary measures to address marine pollution, ITLOS sought to delineate differentiated State obligations applying the principle of common but differentiated responsibilities (CBDR). The CBDR is a cornerstone of the UN Framework Convention on Climate Change (UNFCCC, Art 3) and the Paris Agreement (PA, Art 4(3)). The principle is also one of the most divisive topics among scholars and in international negotiations. This divisiveness results from

disagreement among States regarding whether their 'differentiated' responsibility stems from past, current, or future GHG emissions, or other sets of criteria (see the discussion further below). Although the LOSC does not expressly mention the principle of CBDR, ITLOS applied the principle through a capacity-based lens by interpreting the phrase "the *best practicable means at their disposal and in accordance with their capabilities*" under Article 194 (1) of LOSC in the light of the climate law regime (emphasis added). While all States have due diligence obligations to take all necessary measures to address climate change, the Tribunal held that "the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic, and financial capabilities" (para. 225). Thus, the reference to "available means and capabilities" under Article 194 (1) aims "to accommodate the needs and interests of States with limited means and capabilities and to lessen the excessive burden that the implementation of this obligation may entail for those States" (para. 226). It is worth noting that, although Article 194 (2) does not include any reference to "available means and capabilities", ITLOS concluded that the principle of CBDR equally applies to inform "the scope and content of necessary measures under article [194 (2)]" (para. 249).

Therefore, the principle of CBDR requires States with greater capabilities and sufficient resources to do more to reduce their GHG emissions than developing States (paras. 227, 229, 241). This basically entails that developing States have flexibility in preparing and communicating their strategies, plans, and actions for low GHG emissions reflecting their special circumstances. However, ITLOS cautioned that the CBDR should not be used as an excuse to unduly postpone or exempt developing States from their due diligence obligation to take all necessary measures (paras. 226, 441). This means that developing States are required to do whatever they can in accordance with their capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions (para. 241). This caveat is particularly essential from the viewpoint of human rights, as it deters developing States from using their lack of capacity as a pretext (justification) for their failure to take adequate and timely adaptation and mitigation measures to protect against violation of human rights of individuals and communities from impacts of climate change.

The emphasis on capacity is important because it reflects the transition that the principle of CBDR has undergone since the 1992 Rio Declaration. The principle of CBDR in the Rio Declaration expressly refers to the historical contributions of developed States to environmental degradation (principle 7). Whereas the UNFCCC adopted later refers to historical contribution only in the preamble (para 3) and adds the term "respective capabilities" to the principle of CBDR. The principle of CBDR in the Rio Declaration transitioned into the principle of CBDR-RC in the UNFCCC. The principle of CBDR-RC may be understood as the new consensus which has been reached between developed and developing States with regard to their differentiated responsibilities. One of the main reasons for this change was the developed States' insistence that responsibility must be linked to capabilities, and not historical contributions (Thomas Deleuil, 2012). During UNFCCC negotiations, the developing States argued that the differentiated responsibility must be based on historic contributions, and accordingly the developed States had to 'lead' the fight against climate change. However, the developed States resisted the idea of historic responsibility emphasizing that climate change was the 'common' responsibility of all States. Accordingly, developing States, especially with emerging economies also needed to commit. Thus, suggesting that the developed States opposed a rigid distinction between developed and developing States. Despite this change or transition, both developing and developed States continue to interpret the term 'differentiated' differently (Jutta Brunnee & Charlotte Streck, 2013). In doing so, developing States still perceive historical considerations as vital, whereas developed States steer clear of the same putting more emphasis on capabilities. The Paris Agreement interestingly omits any reference to historical emissions, while reiterating the principle of CBDR-RC. Nonetheless, considering the UNFCCC is the overarching convention applicable to climate change, the history of GHG emissions remains important at least for developing States.

In the AO, ITLOS cited the 2023 Synthesis report of IPCC which underscores historical consideration, but the Tribunal did not specifically touch upon the link between historic contributions in GHG emissions and the pollution of the marine environment. Rather, the Tribunal simply drew upon the principle of CBDR-RC from the climate change regime and applied it to the marine environment under LOSC. However, this also means that the issues associated with the principle of CBDR-RC in the climate change regime accompanied the principle to this regime as well. In the context of the marine environment, this would mean that States, especially developing States, could argue that the differentiation must be made between States according to historical responsibilities. Whereas developed States would argue that considering the changed environmental and economic realities the differentiation should not be based on the developed/developing binary. Accordingly, one needs to ask how this loggerhead in the interpretation of the principle possibly affects the objective of preserving and protecting the marine environment from climate change-induced harm. The above two arguments may have a significant effect on the obligation of developed States to provide technical assistance to vulnerable developing States. Also, historical consideration may have a serious effect on the obligation to restore the marine environment as we shall see below.

4. Implication of the duty of Restoration of the marine environment

As stated above, ITLOS ruled that States have an obligation to protect the marine environment from climate-related impacts pursuant to Article 192 LOSC. The Tribunal further recognized that "even if anthropogenic GHG emissions were to cease, the deleterious effects on the marine environment would nevertheless continue owing to the extent of GHGs already accumulated in the atmosphere" (para 199). Thus, to the extent that climate change has already damaged the marine environment, States may need to take steps to remedy that damage. In this regard, the Tribunal opined that: "Where the marine environment has been degraded, the Tribunal is of the view that the term 'preservation' may include *restoring marine habitats and ecosystems*" (paras 386 & 400, emphasis added). However, since the Tribunal used the word "may", the exact scope of States' obligation remains uncertain. Thus, ITLOS fails to provide useful guidance on whether, when, how, and by whom restoration activities might be pursued; the Tribunal seems content to leave those determinations to the Meetings of States Parties of the Law of the Sea Convention or other relevant bodies.

Nonetheless, the Tribunal's observations on restoration are quite important from the perspective of the historical considerations as noted above. This is because, history is central to the process of restoration as it may either be used as information or as reference (Eric Higgs, 2014). While history as information helps to understand how ecosystem functioned before and how it might operate now, history as a reference entail using history as a baseline for change. Any restoration of the marine habitats and/or ecosystem would necessarily require information about its past, including the cause of degradation to assess the necessary measures to be adopted. Also, the historical data acting as the reference point shall inform the standard to which improvement might be required to achieve restoration. Such determination would entail first, the time in history which needs to be taken as the reference point. Second, it would also bring forth the cause of degradation which needs to be mitigated or curtailed. The determination of cause would again necessitate a timeline which inevitably would relate to the historical emissions. It seems that the obligation to restore is incumbent upon all States, including developing States, even though historically they contributed the least to GHG emissions. Keeping this in mind, the question is whether developing States can bring action against historical emitters before an international tribunal or court based on this general obligation to restore. In doing so, developing States would possibly interpret the principle of CBDR-CR in accordance with historical considerations as the duty to restore would be tied to historical responsibility.

5. Technical assistance to vulnerable States

Assistance for developing States is essential to enhance their capacity for combating pollution of the marine environment from anthropogenic GHG emissions. ITLOS thus developed an interesting

interpretation on the relationship between the principle of CBDR and the obligation to provide assistance to developing States under Articles 202 and 203 of LOSC. The Tribunal observed that, although these provisions do not refer to the principle of CBDR, the obligation of assistance to developing States under these provisions has some elements underlying the CBDR principle in that "States with lesser capabilities need assistance from States that are better placed to meet their environmental responsibilities" (para. 326). Although developing States contribute less to anthropogenic GHG emissions, such States suffer more severely from the effects of such emissions on the marine environment. Thus, the Tribunal took the view that "scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change is a means of addressing an inequitable situation" (para. 327). It recalled that the fifth paragraph of the preamble to the LOSC refers to the achievement of the goals of the Convention will contribute "to the realization of a just and equitable international economic order which takes into account…the special interests and needs of developing countries" (para. 328). The Tribunal underlined that the assistance is to be used exclusively for the protection and preservation of the marine environment and the prevention, reduction, and control of marine pollution (para. 330).

After providing the justifications for technical assistance for developing States, ITLOS clarified the application of the three categories of assistance measures stipulated under Article 202 of LOSC in the context of addressing climate change impacts. The first category of assistance measures provided under Article 202(a) relates to the "promotion of programmes of scientific, educational, technical, and *other assistance* to developing States" (emphasis added). This provision provides a non-exhaustive list of assistance for developing States, which includes: i) training their scientific and technical personnel; (ii) facilitating their participation in relevant international programmes; (iii) supplying them with necessary equipment and facilities; (iv) enhancing their capacity to manufacture such equipment; and (v) advice on and developing facilities for research, monitoring, educational and other programmes. The overall objective of these assistance measures is, in the short and medium term, to provide adequate scientific and technological knowledge to developing States by facilitating and supporting their participation in relevant international research and capacity-building programmes; and, in the long term, to develop capacities for research, production and management of scientific knowledge and technologies in these States to enable them to set up their own programmes to counter marine pollution from anthropogenic GHG emissions (para. 332). Importantly, the Tribunal observed that the reference to "other assistance" under Article 202 (a) may include "financial assistance" to enable developing States to promote the programmes and undertake the activities indicated above (para. 336). However, ITLOS failed to extend such reference to include a duty of developed States to transfer relevant technology, such as those used for carbon removal, to developing States.

The second and third categories of assistance measures relate respectively to the "provision of appropriate assistance" under Article 202(b) "to minimize the effects of major incidents which may cause serious pollution of the marine environment" and under Article 202(c) "on the preparation of environmental assessments". The Tribunal considered the second category of assistance "to be of lesser relevance in the context of addressing marine pollution from anthropogenic GHG emissions" without providing any explanation why this is so (para. 334). Nor does it provide any guidance as to what constitutes "appropriate assistance" in the context of the preparation of environmental assessment; it simply states that the determination of the appropriate modalities of assistance is left to the discretion of States (para 335). Finally, the Tribunal held that the right of preferential treatment of developing States within international organizations with respect to the allocation of appropriate funds and technical assistance and the use of their specialized services to prevent, reduce, control and minimize the effects of marine pollution under Article 203 LOSC implies an obligation of States to take, through the international organizations of which they are members, the measures necessary to put into effect preferential treatment for developing States (para. 338).

It is worth noting here that the Tribunal narrowly defined developing States that are eligible to receive technical assistance or preferential treatment as those States with lesser capabilities and "that are most directly and severely affected by the effects of climate change" (para. 330, 338), without providing further guidance as to what those States are. However, such a category of States may be equivalent to "States particularly vulnerable to the adverse effects of climate change" listed under the UNFCCC. The preamble of UNFCCC (recital 19) provides that "low-lying and other small island [States], [States] with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing [States] with fragile mountainous ecosystems are identified as those particularly vulnerable to the adverse effects of climate change". Similarly, Art 4(8) of UNFCCC provides that in the implementation of commitments, "full consideration" is to be given to the specific needs and concerns of developing State parties arising from the adverse effects of climate change or the impact of the implementation of response measures, and provides a long list of such categories of States. These provisions should have informed the Tribunal's interpretation. Moreover, the Tribunal failed to indicate any modality and procedures through which the assistance measures are to be implemented. Perhaps, these details should be determined by the Meetings of the State Parties to the Law of the Sea Convention or any other competent body.

Generally, the Tribunal's interpretation of the provisions of the LOSC dealing with technical assistance was conservative in the sense that it was a straightforward reading of the texts. It should have provided a more proactive interpretation that promotes the interests of developing States, for example by drawing from other parts of the LOSC or other external rules dealing with capacity-building and assistance towards developing States, and technology transfer, such as the recently adopted BBNJ Agreement or the climate law regime.

6. Conclusion

The advisory opinion by ITLOS could have strong implications for States to mitigate their marine climate impacts by reducing GHG emissions and could be a useful tool for domestic actors, including courts and civil society organizations. In this sense, the AO is historic as it not only links the LOSC with the climate change regime but also elaborates in detail the relevant obligations applicable to States. Even though the AO is quite comprehensive, given its relevance to developing States, this blog post limits the discussion to the principle of CBDR-RC and the aspect of technical assistance. While all States Parties are under an obligation to take all necessary measures to address marine pollution and preserve the marine environment, the scope and content of their obligations are differentiated based on their respective capabilities. This is a significant development as the Tribunal introduced the principle of CBDR-RC to LOSC. This import, however, is not without the possible difficulties involving the different interpretations which the principle has been associated over the years in the climate change regime. In this respect, the historical consideration seems to be a crucial aspect related to the interpretation of the principle of CBDR-RC from the perspective of the developing States. Further, the Tribunal linked the obligation to protect the marine environment with the restoration of damaged marine habitats and ecosystems. However, against the backdrop of historical responsibility tied with developing States' interpretation of the principle of CBDR-RC, the restoration aspect of the obligation to protect might open doors for possible claims and even legal proceedings. On technical assistance, the AO justifies and enumerates three categories of technical assistance. Even though the Tribunal dealt with the technical assistance in some detail, it simply adopts a conservative reading of the relevant provisions of the LOSC.

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