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**FURTHER CONSIDERATION OF THE DEVELOPMENT OF
CANDIDATE MID-TERM MEASURE(S)**

The ITLOS Advisory Opinion: legal obligations on States

Submitted by Pacific Environment and CSC

SUMMARY

Executive summary: This document sets out key legal obligations relevant to the international shipping sector as explained by the International Tribunal for the Law of the Sea (ITLOS) in its advisory opinion of 21 May 2024 in case number 31 and puts forward policy recommendations that will assist States in complying with such obligations.

*Strategic direction,
if applicable:* 3

Output: 3.2

Action to be taken: Paragraph 29

Related documents: None

Introduction

1 On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) issued its advisory opinion in case number 31 (Advisory Opinion), clarifying Member States' obligations under the United Nations Convention on the Law of the Sea (UNCLOS) to tackle the climate crisis and protect the marine environment from climate harm caused by anthropogenic GHG emissions.¹

¹ Available here:
https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf, accessed 9 August 2024.

2 The Advisory Opinion addressed two legal questions:

- .1 the obligations of States that are party to UNCLOS (States) to prevent, reduce and control marine pollution caused by anthropogenic GHG emissions in relation to climate change impacts; and
- .2 the obligations of States to protect and preserve the marine environment in relation to climate change impacts.

3 In this document², the co-sponsors set out the key legal obligations relevant to the international shipping sector as explained by the Tribunal (paragraphs 5 to 27 of this document) and put forward policy recommendations that will assist States in complying with such obligations (paragraph 28 of this document).

4 Unless stated otherwise, in this document, a reference to "article" is a reference to an article of UNCLOS, and a reference to "paragraph" is a reference to a paragraph of the Advisory Opinion.

Legal analysis

5 ITLOS referred to the authoritative assessments of scientific knowledge on climate change produced by the Intergovernmental Panel on Climate Change (IPCC) (paragraphs 46 to 66), noting that human activities have unequivocally caused global warming, resulting in numerous adverse effects on the ocean including increased ocean temperatures and acidification, deoxygenation, and rising sea levels. ITLOS noted that climate change has a disproportionate impact on vulnerable communities and represents an "existential threat and raises human rights concerns" (paragraph 66).

6 ITLOS confirmed, inter alia, that anthropogenic GHG emissions from all sources, including from land, ships and aircraft, constitute "marine pollution" under article 1(1)(4) of UNCLOS, and that States are thus subject to the attendant obligations under UNCLOS in respect of such emissions.

7 The key legal obligations of States under UNCLOS in relation to GHG emissions from the shipping sector include, inter alia:

- .1 the general obligation to take "all necessary measures" to prevent, reduce and control GHG emissions (article 194(1));
- .2 the general obligation to take all measures necessary to ensure GHG emissions from activities under the State's jurisdiction or control do not cause damage to other States and their environment (article 194(2));
- .3 the specific obligation on flag States to adopt laws and regulations to prevent, reduce and control GHG emissions from ships (article 211(2));
- .4 the specific obligation on States to adopt domestic measures and to endeavor to establish international rules to address GHG emissions from or through the atmosphere (article 212); and

² This document was prepared by Opportunity Green and draws on a legal briefing for policymakers available here: <https://www.opportunitygreen.org/publication-itlos-advisory-opinion>, accessed 9 August 2024.

- .5 the general obligation on developed States to provide assistance, including financial assistance, to developing States, and, in particular, climate vulnerable States (article 202).

States need to take "all necessary measures" to prevent, reduce and control GHG emissions from ships

8 Under article 194(1), States need to take "all necessary measures" to prevent, reduce and control GHG emissions from all sources, including ships. Such measures are to be determined objectively, taking into account, in particular, the best available science, the global temperature goal of 1.5°C and the emissions pathway to such goal, as well as relevant international rules and standards including climate change treaties (paragraph 243).

9 This general obligation is one of due diligence and has a stringent standard (paragraph 243). Such an obligation cannot be satisfied simply by submitting nationally determined contributions (NDCs) under the Paris Agreement as the UNCLOS obligations are separate but complementary to the Paris Agreement obligations (paragraph 223). Whilst joint actions are important "it does not follow that the obligation [...] is discharged exclusively through participation in the global efforts to address the problems of climate change. States are required to take all necessary measures, including individual actions "as appropriate" (paragraph 202). Failure to comply with this obligation engages international responsibility for the non-compliant State (paragraph 223).

10 Developed States must do more than others to address GHG emissions from ships, but the Tribunal noted this should not be used as an excuse to postpone or even claim exemption from the need of all States to take all necessary measures (paragraph 226).

11 States therefore need to ensure that they take all necessary measures, individually and jointly as appropriate, to prevent, reduce and control GHG emissions from ships and that such measures are determined objectively, taking into account the 1.5°C temperature goal and timeline to meet such goal.

States need to take all measures necessary to prevent damage to other States and their environment from GHG emissions from shipping activities which are within their jurisdiction and control

12 Under article 194(2), States are subject to an additional obligation to take all measures necessary to prevent damage to other States and their environment from GHG emissions from all activities under their jurisdiction or control. The Tribunal explained that this obligation is one of due diligence, the standard of which can be even more stringent than under article 194(1), given the nature of such pollution which affects the environment of other States (paragraph 258).

13 The Tribunal considered that "jurisdiction and control" includes all areas where a State can exercise its competence or authority in accordance with international law (paragraph 247). This includes, for example, a State's exclusive economic zone and continental shelf, and activities carried out on board of ships registered in that State. It includes activities carried out by both public and private actors.

14 States therefore have a separate obligation to take all measures necessary to prevent damage to other States and their environment from ships which are under their jurisdiction or control, including under their flag, port and coastal jurisdiction.

States need to adopt laws and regulations to prevent, reduce and control GHG emissions from ships flying their flag which must, at a minimum, have the same effect as international rules and standards established through the International Maritime Organization

15 Under article 211(2), States must adopt laws and regulations to prevent, reduce and control GHG emissions from ships flying their flag which must, at a minimum, have the same effect as that of generally accepted international rules and standards established through the competent international organization, understood to be the International Maritime Organization (IMO) (paragraph 280).

16 The Tribunal stressed that this is a minimum threshold and States may adopt more stringent laws and regulations (paragraph 279). The specific obligation under article 211(2) "complement[s] and elaborate[s]" the general obligations under article 194 (paragraph 265). The general obligations under article 194 apply to all sources of pollution; therefore, the specific obligation under article 211(2) is an *additional* obligation that relates to flag States only. States are also required to enforce such laws and regulations under article 217.

17 Flag States must therefore ensure that their domestic laws and regulations meet the minimum threshold of having the same effect as IMO rules and standards and also ensure that they meet the general obligations to take all necessary measures to prevent, reduce and control GHG emissions in line with the 1.5°C temperature goal, as per article 194 outlined above. If the Organization's rules and standards do not meet the standard required under the article 194 obligation, then clearly States need to adopt laws and regulations that go further than the Organization's rules and standards. Article 211(2) does not apply to port or coastal States, but such States are subject to the general obligations under article 194.

States need to adopt national legislation, to take other necessary measures, and to endeavor to establish international rules and standards to prevent, reduce and control GHG emissions from or through the atmosphere

18 Under article 212, States have three specific obligations relating to GHG emissions from or through the atmosphere:

- .1 to adopt national legislation to prevent, reduce and control GHG emissions from or through the atmosphere;
- .2 to take other necessary measures; and
- .3 to endeavor to establish international rules, standards and practices and procedures.

19 Such obligations apply to GHG emissions from ships, which may be considered to transmit "from or through the atmosphere". In adopting domestic legislation, States are required to duly consider internationally agreed rules and standards in good faith (paragraphs 271 and 277). In relation to the obligation to endeavor to establish international rules, the Tribunal considered that States are required to "make every effort in good faith" to establish these rules by acting through the competent international organizations or diplomatic conferences, on a continuing basis (paragraphs 271 and 277).

20 States are therefore required, on a continuing basis, to make every effort to establish international rules and standards to prevent, reduce and control GHG emissions from or through the atmosphere and to adopt domestic legislation and take other necessary measures in respect of the same. This obligation is additional to the obligations under articles 194 and 211 outlined above.

Developed States need to provide assistance, including financial assistance, to developing States (in particular, climate vulnerable States)

21 Developed States are required to provide scientific and technical assistance to developing States (under article 202) and developing States shall be granted preferential treatment by international organizations in the allocation of appropriate funds and technical assistance (under article 203).

22 ITLOS noted that such assistance is a means of addressing an inequitable situation where such States suffer more severely from the impacts of GHG emissions on the marine environment, despite having contributed less to such emissions (paragraph 327) and that climate vulnerable States in particular should be the main recipients (paragraph 330). The Tribunal stated that such assistance includes financial assistance (paragraph 336).

23 As such, States have specific obligations to provide assistance (including financial assistance) to developing States, in particular climate vulnerable developing States, to address marine pollution from GHG emissions, and the provision of assistance directly or through competent international organizations.

Conclusion

24 The Tribunal's confirmation that the term "marine pollution" includes anthropogenic GHG emissions from all sources for the purposes of article 1(1)(4) engages a wide range of legal obligations for States to address such emissions, including from international shipping. Certain key obligations have been outlined above as they relate to the international shipping sector.

25 From the foregoing legal analysis, it is clear that States have both specific obligations to adopt rules and regulations on GHG emissions from ships as well as general obligations to take all necessary measures in respect of such emissions. Those general obligations go further than the specific obligations, with a wider application (e.g. to port and coastal States) and a potentially higher standard (i.e. the standard is to be determined objectively using the best available science rather than using international rules and standards as a baseline).

26 In respect of the regulation of GHG emissions from ships, to the extent that the Organization's reduction measures for GHG emissions do not meet the objective standard required by the best available science and a 1.5°C pathway and timeline, States will need to adopt further measures individually in order to be comfortable that they have discharged their general obligations under article 194.

27 In order to assist States in meeting these obligations, the co-sponsors present the following practical recommendations for consideration.

Recommendations

28 On the basis of the information presented in this document, the co-sponsors put forward the following recommendations:

- .1 the measures to be adopted under the IMO's "basket of mid-term measures" should be 1.5°C aligned. The technical element and economic element of the mid-term measures should align with a 1.5°C pathway and timeline;
- .2 the short-term measures (the Energy Efficiency Existing Ship Index and Carbon Intensity Indicator) should be revised to ensure they are in line with a 1.5°C pathway at the next revision. These measures are set to be revised by no later than 1 January 2026 and should align with a 1.5°C pathway and timeline;

- .3 the 2023 IMO Strategy on Reduction of GHG Emissions from Ships should be revised to ensure it is 1.5°C aligned. The strategic framework for measures to reduce GHG emissions from ships should be updated to be consistent with a 1.5°C pathway and timeline at the next revision scheduled for 2028;
- .4 States should adopt domestic legislation and regulations to regulate GHG emissions from ships which is 1.5°C aligned. The Tribunal was clear that States' obligations under UNCLOS in respect of GHG emissions cannot be met exclusively by participating in global efforts, and States need to take individual action as appropriate in addition to global cooperation. States should all assess their domestic legislation and ensure that the regulation of GHG emissions from ships is consistent with a 1.5°C pathway and timeline, including under their flag, port and coastal State jurisdictions;
- .5 States should include international shipping in their nationally determined contributions (NDCs) under the Paris Agreement. To assist aligning States' regulation of GHG emissions from ships with 1.5°C and ensuring that domestic action is taken by States, all States should include international shipping in their NDCs submitted in 2025. The Paris Agreement applies to such emissions and inclusion within NDCs would help drive the legislation and regulation required to meet States' obligations in relation to GHG emissions from ships under UNCLOS; and
- .6 States should provide financial assistance to developing States, in particular climate vulnerable States. The Tribunal placed a significant emphasis on developed States supporting developing States, in particular climate vulnerable States, during the transition, including through financial assistance and granting them preferential treatment in funding from international organizations. The current proposals for an "economic measure" under the mid-term measures discussions provide an opportunity for States to implement this by dedicating funds for the just and equitable transition that leaves no country behind.

Action requested of the Working Group

29 The Working Group is invited to consider this document, in particular the legal analysis and conclusions in paragraphs 5 to 27 and the recommendations in paragraph 28, and take action as appropriate.