

The ITLOS advisory opinion on climate change and COP decisions

IMPORTANT: Legal Response International (LRI) acts as an intermediary in obtaining legal advice from third parties on the query you have raised. That advice is provided to LRI but we are able to share it with you. The third-party advisers have accepted certain duties to LRI but have not and do not accept any duty to you. LRI itself does not and cannot provide legal advice. As a consequence, LRI takes no responsibility for the content of any advice that it forwards, nor does it accept any responsibility for any delay either in obtaining or sending copies to you of the advice it receives.

In forwarding the advice to you, LRI does not intend to create a lawyer-client relationship with you and to the extent permitted by law, any liability of LRI to you (including in negligence or for any damages of any kind) is excluded. Any dispute between you and LRI shall be governed by English Law, and the English Courts will have exclusive jurisdiction. You agree that the English courts are the most appropriate and convenient courts to settle any dispute or claim that arises out of or in connection with this retainer and, accordingly, that you will not argue to the contrary. In consideration of LRI sharing the advice with you, you agree to the terms set out above.

*This advice is provided by third parties in response to **Query 37/24***

Query:

The ITLOS Advisory Opinion paragraph 77 reads:

“The Tribunal also notes that the COP has adopted numerous decisions in relation to the UNFCCC, the Kyoto Protocol and the Paris Agreement. Thus, on 20 November 2022, the twenty-seventh COP adopted the Sharm el-Sheikh Implementation Plan, in which it “[r]ecognizes that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030”, “[a]lso recognizes that this requires accelerated action” and “requests Parties that have not yet done so to revisit and strengthen the 2030 targets in their nationally determined contributions as necessary to align with the Paris Agreement temperature goal by the end of 2023, taking into account different national circumstances” (Decision 1/CMA.4 of 20 November 2022, paras. 15, 16 and 23). In its decision 1/CP.27 of 20 November 2022, the COP “[r]eiterates that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2 °C and resolves to pursue further efforts to limit the temperature increase to 1.5 °C”. On 13 December 2023, the twenty-eighth COP adopted the First Global Stocktake, where it, *inter alia*, in paragraph 28, recognized “the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5°C pathways” and called on Parties to contribute to certain global efforts enumerated therein (Decision FCCC/PA/CMA/2023/L.17 of 13 December 2023). Several COP decisions address matters relating to climate change and the ocean (Decision 1/CP.25 of 15 December 2019, para. 31; Decision 1/CP.26 of 12 November 2021, paras. 60-61; Decision 1/CP.27 of 20 November 2022, paras. 49-50; Decision 1/CMA.4 of 20 November 2022, para. 79).”¹

¹ International Tribunal for the Law of the Sea, “Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law – Advisory Opinion” (21 May 2024), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_corr.pdf.

- 1) On the basis of the opinion, what consideration is the tribunal giving to COP decisions, and are these being regarded as source of law, an element for customary law, a declaration or something else?
- 2) Are there other international courts or cases where COP decisions have also been considered and if so, how?
- 3) How have COP decisions been considered in the ICJ advisory opinion in relation to climate change?

Advice:

1. Background

1.1. On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion (AO) for Case No. 31, *Request submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law*.²

1.2. The AO concerned the following questions:

“What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (‘UNCLOS’), including under Part XII:

(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?”³

1.3. In the clauses providing background to the opinion, on international instruments on climate change, the ITLOS “also notes” that the COP has adopted decisions in relation to the UNFCCC, the Kyoto Protocol and the Paris Agreement.⁴

2. The UNCLOS and the UNFCCC

2.1. The United Nations Convention on the Law of the Sea (UNCLOS) is an international treaty ratified by 169 states and the European Union. Notably, the United States has not ratified the

² International Tribunal for the Law of the Sea, “Press Release: Tribunal delivers unanimous Advisory Opinion in Case No. 31” (21 May 2024), https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_350_EN.pdf

³ ITLOS advisory opinion, para 3

⁴ *ibid* para 77.

UNCLOS. The ITLOS is a judicial body established by the UNCLOS. It adjudicates disputes arising out of the interpretation and application of the UNCLOS. The ITLOS found that it has jurisdiction under its Statute and its Rules to give an advisory opinion on the matter of climate change.⁵

2.2. The United Nations Framework Convention on Climate Change (**UNFCCC**) is an international treaty ratified by 196 states and the European Union.⁶ Per Article 2 of the UNFCCC, the ultimate objective of the UNFCCC, and any related legal instruments that the Conference of the Parties (**COP**) may adopt, is to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The governing body of the UNFCCC is the COP. Subsequent to the UNFCCC, and to further the legal framework to achieve the objective of the UNFCCC, the COP adopted the Kyoto Protocol in 1997 and the Paris Agreement in 2015. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (**CMP**) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (**CMA**) are the governing bodies of the Kyoto Protocol and the Paris Agreement, respectively. The COP, CMP and CMA adopt decisions by agreement (for simplicity, referred to below as **COP decisions**).

2.3. For an overview of the legal effect of COP decisions, please refer to this [LRI advice](#).

3. Query 1: References to COP decisions by the ITLOS

3.1. Paragraph 216 of the AO is as follows:

“Article 2, paragraph 1, of the Paris Agreement [...] provides that the [Paris] Agreement aims to strengthen the global response to the threat of climate change, including by

[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

The dual temperature goal stipulated in the Paris Agreement has been further strengthened by the successive decisions of the Parties to the Paris Agreement. In 2022, for example, the COP adopted the Sharm el-Sheikh Implementation Plan, in which it “[r]eiterates that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and *resolves* to pursue further efforts to limit the temperature

⁵ *ibid* para 109.

⁶ The US withdrew from the UNFCCC in 2025.

increase to 1.5°C” (Decision 1/CP.27 of 20 November 2022, para. 7; see also Decision FCCC/PA/CMA/2023/L.17 of 13 December 2023, para. 4).”

- 3.2. The first question of the query concerns the implications of the ITLOS’ references to COP decisions, and whether these grant COP decisions any legal weight or status.
- 3.3. In its AO, the ITLOS is asked to interpret the UNCLOS, and to clarify the specific obligations that States Parties have under the UNCLOS. Hence, references to obligations under other treaties are read in light of the interpretation of the UNCLOS. As such, the ITLOS considers that treaties addressing climate change, including but not limited to the UNFCCC, the Kyoto Protocol and the Paris Agreement, contain “relevant external rules”.⁷
- 3.4. By rejecting the application of the *lex specialis* regime to the Paris Agreement in relation to the UNCLOS, the ITLOS confirms that the UNFCCC and Paris Agreement are relevant to the interpretation and application of the UNCLOS.⁸ The ITLOS further stresses that cooperation through relevant international organisations and processes is of continuing nature.⁹ It expressly mentions that the adoption of the UNFCCC and Paris Agreement does not discharge a state from fulfilling its obligation to cooperate, as it requires ongoing effort “in the development of new or revised regulatory instruments, in particular in light of the evolution of scientific knowledge”.¹⁰
- 3.5. In addition, the conclusion of the AO includes the following:

“To conclude, under article 194, paragraph 1, of the [UNCLOS], States Parties to the [UNCLOS] 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** (emphasis added). 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. The obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence under article 194, paragraph 1, of the [UNCLOS] is stringent, given the high risks of serious and irreversible harm to the marine environment

⁷ Ibid para 137.

⁸ ITLOS AO para 224: ‘Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention’.

⁹ Ibid para 273.

¹⁰ Ibid para 311.

from such emissions. However, the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.”¹¹

3.6. In the sentence that mentions the UNFCCC and the Paris Agreement, the AO uses two qualifiers – “*inter alia*” and “such as”. The use of “*inter alia*” suggests that sources that should be taken into account for determining States’ obligations to prevent, reduce and control marine pollution are not limited to “the best available science” and “relevant international rules and standards contained in climate change treaties”. The use of “such as” when referring to “relevant international rules and standards contained in climate change treaties” suggests that the UNFCCC and the Paris Agreement are examples of such rules and standards. While neither COP nor CMA decisions are not mentioned in the sentence, they are understood to be part of the corpus of international rules stemming from climate change treaties, as suggested by the verb “contained”.

3.7. Based on paragraph 243, the ITLOS does not view the Paris Agreement as the only or definitive source of obligations relating to climate change and pollution that inform compliance with the UNCLOS. In other words, the ITLOS’s view is that compliance with the Paris Agreement is not sufficient to ensure compliance with the obligation to prevent marine pollution. Indeed, the Tribunal understands the Paris Agreement itself to establish “rules and standards” such as the global temperature goal and timelines to achieve it, which are themselves subject to development under the Paris Agreement.

In general, COP and CMA decisions are not considered as legally binding. However, there are limited cases where the Paris Agreement explicitly authorises the COP and CMA to adopt decisions that would contain legally binding obligations or have legal effect.¹² For example, decision 1/CP.21, adopting the Paris Agreement is understood to be legally binding. Moreover, the treaty may also provide for it through an enabling clause such as in Article 4.8 of the Paris Agreement, which requires Parties, when communicating their nationally determined contributions, to provide information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the CMA. This provides a legal weight to these decisions.

3.8. The references to COP and CMA decisions by the ITLOS illustrate that the content of obligations must be read in light of the latest developments under the governing treaty body, including its understanding of best available science as explained below.

4. “Best available science”

4.1. The concept of “best scientific evidence available” or “best available scientific evidence” appears in the UNCLOS in relation to:

¹¹ *ibid* para 243.

¹² Legal Response International, “Possible outcomes from a COP” (30 May 2024), <https://legalresponse.org/legaladvice/possible-outcomes-from-a-cop/>

- Article 61(2) – Conservation of the living resources in the exclusive economic zone: taking into account the best scientific evidence available, to ensure through proper conservation and management measures that the maintenance of living resources in an exclusive economic zone is not endangered by over-exploitation;
- Article 119(1)(a) – Conservation of the living resources of the high seas: taking measures which are designed, on the best scientific evidence available, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield; and
- Article 234 – Ice-covered areas: having due regard to the protection and preservation of the marine environment based on the best available scientific evidence when formulating laws and regulations applicable to ice-covered areas.

4.2. In relation to Part XII of UNCLOS on the protection and preservation of the marine environment, which addresses pollution, though it does not directly mention “best available science”, Articles 200 and 201 contain references to scientific research to inform “rules, standards and recommended practices and procedures”.

4.3. Under Article 4 of the Paris Agreement, Parties agreed to aim to “undertake rapid reductions” of greenhouse gas emissions “in accordance with best available science”.

5. Analysis

5.1. The AO’s references to the UNFCCC, the Paris Agreement and COP decisions acknowledge the existence of international rules and standards contained in climate change treaties. These are relevant because a large proportion of states that have ratified the UNCLOS have also ratified climate change treaties and because the prevention of (transboundary) pollution is inscribed in customary international law. Hence, states are under obligations of the treaty they ratified and customary international law.

5.2. A potential question arising from paragraph 216 relates to whether the ITLOS considers COP decisions to be modifications and/or subsequent interpretations of the relevant instrument. The jurisdiction of the Tribunal, while limited to matters arising from the interpretation of UNCLOS, does include relevant rules of international law, namely, the application of the Convention and other rules of international law not incompatible with it.¹³ The Tribunal thus has jurisdiction to identify relevant rules of international law, which may include climate change treaties and determining the relationship between climate change treaties and COP decisions. The ITLOS can therefore use the COP decisions to interpret the obligations states have to protect the marine environment.¹⁴ Thus, without questioning their legal status, the ITLOS demonstrates that a goal contained in the Paris Agreement can be “further

¹³ see Statute of the International Tribunal for the Law of the Sea (Annex VI to the United Nations Convention on the Law of the Sea), art 1(1) and 21; UNCLOS, art 293; Rules of the ITLOS, art 138.

¹⁴ ITLOS advisory opinion para 222.

strengthened” by COP decisions.¹⁵ The Tribunal makes this point to highlight that the temperature goal has strengthened over time, through the best available science and the consensus of Parties.

- 5.3. Paragraph 216 also underscores the role of “best available science” and how this may change over time in line with changes as to what constitutes current best available science. This is given the Paris Agreement’s specification for greenhouse gas emission reductions to be “in accordance with best available science” (Article 4 of the Paris Agreement). COP decisions that are more recent may reflect clarifications and updates based on the best available science at a given point in time. Indeed, the Tribunal notes that the global temperature goal and the timeline for emission pathways set out in the Paris Agreement are “based upon the best available science stated above”.¹⁶ This aligns with the conclusion (paragraph 243) that obligations under the UNCLOS should take into account “best available science” and not merely compliance with the Paris Agreement (or other international treaties).

6. Query 2: Other courts which have considered COP decisions

- 6.1. In the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* before the European Court of Human Rights (ECHR), the majority judgment referred to the UNFCCC, the Kyoto Protocol and the Paris Agreement (for example, at paragraph 104) and to the Glasgow Climate Pact and COP decisions (for example, at paragraph 105).¹⁷ The ECHR notes these as “factual elements” (paragraph 103). Following these paragraphs, the ECHR discusses the scientific findings of the IPCC.
- 6.2. In the conclusion to the majority judgment, the ECHR refers to international commitments undertaken by the member states under the UNFCCC and the Paris Agreement as well as “the cogent scientific evidence provided, in particular, by the IPCC” (paragraph 546). Similar to the ITLOS AO, such references are not to establish existing rules in customary international law or treaty law, but to show that states have formed consensus on the scientific evidence through decisions taken by the COP and CMA, by acknowledging the IPCC reports which present best available science.
- 6.3. The International Court of Justice (ICJ) referred to COP and CMA decisions in more detail. Below we describe how the ICJ considered COP decisions in its advisory opinion.

¹⁵ *ibid* para 216.

¹⁶ *ibid* para 215.

¹⁷ European Court of Human Rights, “Case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Application no. 53600/20) – Judgment” (9 April 2024).

7. Query 3: ICJ Advisory Opinion and implications of ITLOS Advisory Opinion

- 7.1. The advisory opinion request submitted to the ICJ on the *Obligations of States in respect of Climate Change (ICJ AO)* is not restricted to the interpretation of one particular treaty.¹⁸ Rather, the questions encompass the totality of obligations under international law.¹⁹
- 7.2. With respect to treaty obligations, the ICJ uses CMA decisions to show the progression of the temperature goal of limiting warming to 1.5°C from secondary goal to primary objective of the Paris Agreement.²⁰ The ICJ thus considers the consensus of 1.5°C being the temperature limit to be accepted by reading CMA 3 and CMA 5 as evidence of states' agreement on it.²¹
- 7.3. Indeed, the ICJ considers decisions taken by governing bodies of the UNFCCC and Paris Agreement may constitute "subsequent agreements under Article 31, paragraph 3 (a) of the Vienna Convention on the Law of Treaties, in so far as such decisions express agreement in substance between the Parties regarding the interpretation of the relevant treaty".²²
- 7.4. Article 31 of the VCLT concerns the general rule of interpretation. Article 31(3)(a) states that 'any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions' shall be taken into account, together with the context of a treaty. This does not amount to understanding the decisions to be binding but it entails that the decisions contribute to the interpretation of a treaty.²³
- 7.5. Thereby, the ICJ finds decisions from a governing body to constitute agreement between States Parties when these express agreement on the substance. As such, the legal character of the decisions is not relevant for the purpose of determining the presence of agreement on the substance of the decisions between State Parties.
- 7.6. Concerning customary international law obligations, the ICJ refers to COP decisions in two instances: in relation to the duty to cooperate and with respect to the duty to prevent significant harm to the environment.
- 7.7. The ICJ finds that compliance with the duty to cooperate compels states to consider the 'guidance provided by the COP decisions pertaining to financial transfers, technology transfers and capacity-building'.²⁴ The Court further provides that 'the guidelines, frameworks and

¹⁸ The advisory jurisdiction of the ICJ relates to "any legal question" put in front of it by any of the five principal organs of the UN (UN Charter, art 96(1)).

¹⁹ International Court of Justice, "Obligations of States in respect of Climate Change – Order" (30 May 2024).

²⁰ [CMA 3](#) and [CMA 5](#).

²¹ ICJ AO para 224.

²² *ibid* para 184.

²³ The International Law Commission in its commentaries to conclusion 11 on subsequent agreements and practice found that "The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a) and (b), but not necessarily treat it as legally binding.", see ILC Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Yearbook of the International Law Commission, vol. II p 93. The ICJ refers to conclusion 11 in para 184 of the ICJ AO.

²⁴ *ibid* para 218.

mechanisms adopted by COP decisions aid the effective implementation of the UNFCCC's provisions'. As such, the adequacy of current financial and technology transfer commitments must be determined case-by-case through the application of good faith by states in fulfilling their duty to cooperate.²⁵

7.8. The customary obligation to prevent significant harm to the environment extends to the climate system.²⁶ Customary international law applies to all states, regardless of whether they are Party to a treaty.

7.9. Concerning the duty to prevent significant environmental harm, the ICJ notes that the standards of due diligence can be reflected in certain COP decisions.²⁷ The Court finds COP decisions 'relevant for the identification of customary international law, in so far as they reflect state practice and [...] express an opinio juris of states'.²⁸ Hence, although COP decisions are adopted by states Parties to the UNFCCC, they may aid in identifying customary international law, which would be binding upon states not party to the UNFCCC or Paris Agreement.

7.10. The Court also notes that a state that does not comply with customary obligations that stem from climate change treaties, as well as from COP decisions, will bear the full burden of proving that it satisfied with its obligations.²⁹

Related advice and briefing papers

- [States' duties and obligations vis-à-vis other states and their own population in the climate change context](#) (06/07/2014)
- [Possible outcomes of a COP](#) (30/05/2024, updated 2026)

²⁵ *ibid*

²⁶ *ibid* para 273.

²⁷ *ibid* para 287.

²⁸ *ibid* para 288.

²⁹ *ibid* para 315.