

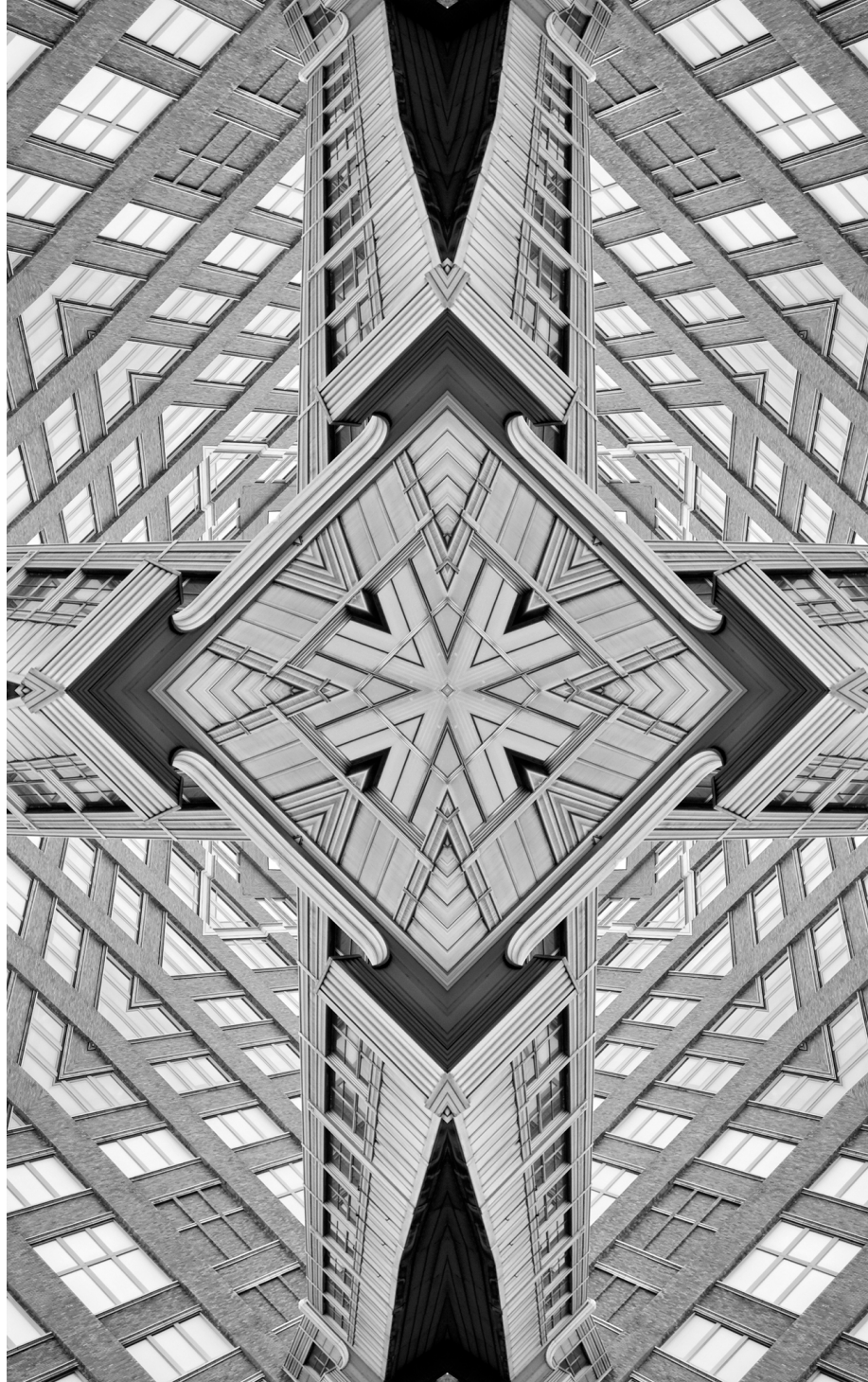
# Issue

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# Brief

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# Redefining Horizons: ITLOS Advisory Opinion on Climate Obligations

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## **Abstract**

The 2024 advisory opinion issued by the International Tribunal for the Law of the Sea (ITLOS), recognising GHG emissions as marine pollution, marks a pivotal intersection in maritime and climate governance. The opinion, while non-binding, establishes legal obligations for states to mitigate climate-induced marine impacts, including acidification, warming, and sea-level rise. It emphasises due diligence, transboundary impact assessments, and adherence to the principle of 'common but differentiated responsibilities'. The opinion holds important implications for developing states, presenting both challenges and opportunities to align sustainability goals with climate commitments. By bridging the UN Convention on the Law of the Sea and broader climate frameworks like the Paris Agreement, ITLOS advances international legal norms and sets a precedent for future climate litigation. This brief analyses these implications, focusing on India and other Global South nations.

**O**n 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) issued a landmark advisory opinion on states' obligations to mitigate climate change—particularly by reducing greenhouse gas (GHG) emissions, under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).<sup>1</sup> The unanimous opinion interprets UNCLOS as establishing distinct legal obligations for member states to preserve the marine environment, prevent ocean acidification, and address marine pollution caused by climate change, independent of other international laws.

Advisory opinions, though not legally binding, hold legal and political weight as authoritative statements of the law from international tribunals.<sup>2</sup> ITLOS's findings are likely to influence upcoming climate change cases before the International Court of Justice (ICJ) and the Inter-American Court of Human Rights (IACtHR) and could impact the trajectory of domestic climate litigation globally.

The surge in climate litigation across domestic and international forums reflects the growing inadequacy of current climate action. Meanwhile, multilateral frameworks like the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement have failed to meet their objectives, with global temperature projections indicating a rise to 3.1°C—far exceeding the threshold of 1.5°C necessary to avert catastrophic climate impacts. In this context, the ITLOS advisory opinion is poised to serve as a critical bargaining tool for developing countries, particularly small island states, to demand stronger action and more ambitious emissions reduction commitments from developed states in climate negotiations.

India's position on the ITLOS opinion may have been a missed strategic opportunity to advance its more nuanced stance on international climate change law. It is a view that explicitly balances the urgency of reducing GHG emissions with the need for development, and outlines the specific responsibilities of developed states in facilitating technology transfer and establishing effective loss and damage mechanisms to assist developing states in transitioning to sustainable energy sources.

This brief examines the advisory opinion. It addresses the contentions raised by states and international organisations, and analyses ITLOS's key findings on jurisdiction and merits. The brief explores the broader impacts of the opinion, with a focus on its implications for India and other developing states.

Signed in 1982 and effective from 1994, the UNCLOS is the foremost codification of international maritime law. Ratified by 170 parties, most of its provisions are considered customary international law.<sup>3</sup> The treaty established ITLOS as a judicial body with jurisdiction over matters related to the interpretation and application of UNCLOS. Since its inception, ITLOS has served as an effective dispute resolution mechanism; it has heard 33 cases since 1997, including three advisory opinions.<sup>4</sup>

The last decade has witnessed a rise in climate litigation globally, reflecting the growing use of law as a tool to combat climate change.<sup>5</sup> This rise aligns with the failure of multilateral climate action. Insufficient mitigation efforts by developed countries, coupled with climate-induced stresses on water, land, ecosystems, and biodiversity in the developing world, have intensified these legal challenges. Cases before ITLOS, the ICJ, and the IACtHR exemplify this trend.

Small island states have been at the forefront of this strategy internationally.<sup>6</sup> In October 2021, Antigua and Barbuda, along with Tuvalu, formed the Commission of Small Island States on Climate Change and International Law (COSIS) through an international agreement signed in Edinburgh.<sup>7</sup> As per Article 2(2) of its founding Agreement, COSIS is authorised to seek advisory opinions from ITLOS on legal questions arising under UNCLOS.

In December 2022, COSIS formally requested an advisory opinion from ITLOS on states' obligations regarding climate change under UNCLOS.<sup>8</sup> The request presented the following legal questions for ITLOS:

“What are the specific obligations of State Parties to the UN Convention on the Law of the Sea, 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?”

The request was subsequently entered into ITLOS's List of Cases, marking the beginning of the formal process for hearing and deciding the case.<sup>9</sup>

# Arguments by States and International Organisations

Under the ITLOS Statute and its associated rules, states and international organisations may submit written and oral contributions during advisory proceedings to present their views on the questions before the Tribunal.<sup>10</sup> Scholars have noted that participants strategically used these proceedings for “legal statecraft”, using the legal argument to gain political leverage.<sup>11</sup> For example, the founding members of COSIS emphasised the universal urgency for climate action while emphasising that international law was being violated by states failing to mitigate climate change.<sup>12</sup>

India, along with China,<sup>13</sup> asserted that ITLOS lacked jurisdiction over the matter and should decline to offer an opinion.<sup>14</sup> However, most other states agreed that ITLOS had jurisdiction to issue an advisory opinion and merely disagreed on the scope thereof.<sup>15</sup> Further, most states discussed the scientific aspects of climate change and marine pollution, referencing extensive scientific material and considering the Intergovernmental Panel on Climate Change (IPCC) findings as the most reliable scientific information. The main scientific rationale behind COSIS’s request was that human-caused GHG emissions alter oceans’ chemistry,<sup>16</sup> leading to harmful effects such as ocean acidification and warming.<sup>17</sup> Ocean warming reduces oxygen levels, bleaches coral reefs, disrupts marine ecosystems,<sup>18</sup> and causes sea levels to rise, threatening the survival of many communities, especially in low-lying small island states.<sup>19</sup>

Most states, except China and India, argued that GHG emissions constitute marine pollution, obligating UNCLOS member states to prevent, reduce, and control them. However, there was disagreement on the exact consequences of these obligations. The United Kingdom and Australia argued for lower standards of due diligence (that is, the continuous monitoring and prevention of climate harm by states). In contrast, COSIS, Mauritius, and Belize called for stringent standards.<sup>20</sup> This divide also emerged in discussion on applying other international legal frameworks to the issues before the Tribunal. While most developing states argued that UNCLOS obligations should be interpreted harmoniously with other international law sources, including human rights law, the United Kingdom, Australia, and the European Union preferred a narrower focus on climate treaties.<sup>21</sup>

India’s submissions on these issues could have been more substantial and better supported by relevant law. India primarily argued that ITLOS should

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“refrain from rendering an opinion,”<sup>22</sup> basing this argument on the ITLOS Statute and rules. It further argued that the issue fell under the UNFCCC regime, thereby placing it outside ITLOS’s purview. India also argued that the Conference of the Parties, rather than ITLOS, was the appropriate forum for addressing states’ obligations. Finally, India questioned the scientific basis of the opinion, arguing that the science was still evolving and was not yet settled enough to warrant legal consequences.

# The Judgement: Findings on Jurisdiction and Merits

## **Jurisdiction**

Before addressing the merits, ITLOS had to address the most contentious issue: whether it had jurisdiction over the case. Some participants and scholars argued that ITLOS should decline to give an opinion, as its Statute does not explicitly grant advisory jurisdiction.<sup>23</sup> However, this issue had been addressed in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* case, wherein ITLOS affirmed its advisory jurisdiction by referencing Article 21 of its Statute and Article 138(1) of its rules.<sup>24</sup> ITLOS upheld these findings and based its advisory jurisdiction in the present case on Article 2(2) of the COSIS Agreement.<sup>25</sup> However, COSIS's authority to request an advisory opinion stems from ITLOS's Rules, which allow international agreements like UNCLOS to authorise "whatever body" to seek an opinion on legal questions. This raises concerns, especially since the request addresses the obligations of states not party to the agreement authorising COSIS to make the request.

## **The Impact of GHG Emissions on Marine Pollution**

On the merits, ITLOS first addressed the pollution from human-induced GHG emissions affecting the marine environment. The key question was whether these atmospheric emissions qualify as "pollution of the marine environment", prohibited under Part XII of UNCLOS. This hinged on whether these emissions fit the definition of "pollution" under Article 1(1)(4) of UNCLOS. ITLOS determined that GHG emissions meet this definition as they are: (a) a substance or energy, (b) introduced by humans, directly or indirectly, into the marine environment, and (c) cause harmful effects such as ocean warming, acidification, and damage to marine ecosystems and resources. These effects are well-documented and acknowledged by the scientific community and states.<sup>26</sup> Consequently, ITLOS concluded, these emissions do constitute "pollution" under UNCLOS.<sup>27</sup>

## **Responsibility to Ensure Comprehensive Actions**

Once GHG emissions are identified as "marine pollution", states are obligated under Article 194 of UNCLOS to "take all necessary measures" to reduce and control such pollution and eventually prevent it altogether.<sup>28</sup> ITLOS clarified that Article 194(1) imposes a due diligence obligation on states, requiring sustained and reasonable efforts focused on their conduct rather than on

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guaranteeing specific outcomes, such as the immediate cessation of marine pollution from anthropogenic GHG emissions.

Furthermore, ITLOS recognises the “stringent obligation” under Article 194(2),<sup>29</sup> which specifically addresses preventing transboundary pollution and the resulting harm caused by GHG emissions. This “stringent obligation” entails a higher standard of responsibility, requiring states to adopt comprehensive and proactive measures. This heightened responsibility involves actions such as:

**Conducting Transboundary Environmental Impact Assessments (TEIAs):** States must conduct detailed assessments to identify potential transboundary harm caused by GHG emissions to marine ecosystems and neighbouring states. The 1991 Convention on Environmental Impact Assessment in a Transboundary Context<sup>30</sup> provides a framework for implementing TEIAs. Additionally, in the *Pulp Mills Case*,<sup>31</sup> the ICJ recognised environmental impact assessments as a general requirement under international law and is also recognised as customary international law. The integration of Climate Change Impact Assessments (CCIAs) into environmental evaluations is also gaining momentum as an emerging norm in customary international law, highlighting the growing need to address climate-related impacts in project assessments.

**Public Participation and Transparency:** States must involve affected stakeholders, including neighbouring states and civil society, in the assessment process, ensuring transparency and accountability.

**Monitoring and Reporting:** States should establish mechanisms for continuous monitoring of activities affecting the marine environment and regularly report their findings to relevant international bodies.

**Implementing Mitigation Measures:** Based on TEIA findings, states must implement robust mitigation strategies to minimise harm, such as integrating Carbon Capture and Storage (CCS) technologies, regulating high-risk activities like offshore oil drilling, and adhering to rigorous environmental safeguards.

By integrating these measures, states could fulfil their heightened responsibilities under the “stringent obligation” framework, aligning with UNCLOS and customary international law. ITLOS’s emphasis on these obligations reflects the growing recognition of the interconnectedness of global environmental protection and the need for proactive, science-based policymaking to address climate change and its impacts.



# The Judgement: Findings on Jurisdiction and Merits

## External Standards and Differentiated Responsibilities

ITLOS emphasised that while states have some discretion in determining what measures to take, the following factors exist objectively:

**Best Available Science:** ITLOS settled the debate regarding the inadequacy of current science by recognising the scientific findings of the IPCC as authoritative. Further, ITLOS held that when a scientific consensus is lacking, states must adopt a “precautionary approach” to preserve the marine ecosystem.<sup>32</sup> The Tribunal supported this position by referencing its ruling in the advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*,<sup>33</sup> where it called for the crystallisation of the precautionary approach as customary international law.<sup>34</sup> ITLOS stressed the urgency of implementing this approach when addressing marine pollution, particularly when the scientific understanding remains uncertain or unsettled.<sup>35</sup>

**External International Rules and Standards:** The Tribunal found that external legal frameworks, including the UNFCCC,<sup>36</sup> the Kyoto Protocol (adopted in 1997), and the Paris Agreement, are relevant when interpreting UNCLOS in the context of climate change mitigation.<sup>37</sup> Specifically, the Paris Agreement’s target of limiting global temperature rise to 1.5°C above pre-industrial levels,<sup>38</sup> along with the emission pathways necessary to achieve this target, are important considerations in outlining UNCLOS-related obligations. Nevertheless, ITLOS clarified that meeting the obligations and commitments under the Paris Agreement alone does not fulfil the requirements of UNCLOS.<sup>39</sup> While UNCLOS and the Paris Agreement are distinct agreements with separate obligations, the Tribunal showed its willingness to interpret them harmoniously to avoid the fragmentation of international climate change law.<sup>40</sup>

**Available Means and Capabilities:** ITLOS emphasised that while Articles 202 and 203 of UNCLOS do not explicitly reference the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC), they reflect its core elements. States with greater capabilities are obligated to assist those with lesser capacities through capacity-building and financial aid, enabling developing states to fulfil their environmental obligations.

The Tribunal further highlighted that states should make proportionate efforts to curb marine pollution, aligning with the Paris Agreement, which

# The Judgement: Findings on Jurisdiction and Merits

incorporates self-differentiation through nationally determined contributions and the principle of CBDR-RC. Thus, the ITLOS opinion complements the Paris Agreement framework by reinforcing the capability-based model of international climate obligations.<sup>41</sup>

Additionally, ITLOS stressed the responsibility of developed states to assist developing and climate-vulnerable states, including small island states, by providing support such as scientific expertise and technology transfer.<sup>42</sup>

## **Due Diligence and Harm Prevention**

ITLOS held that Article 194 creates a due diligence obligation for states, requiring them to establish a national system to regulate polluting activities by all actors within their jurisdiction, including non-state actors, and to ensure the effectiveness of that system.<sup>43</sup> The Tribunal further noted that, in the context of GHG emissions, the due diligence standard “is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions.”<sup>44</sup> While the standard is objectively stringent, it would be interpreted in a way that accommodates the different capabilities and resources of states.

Finally, ITLOS offers insights into the principle of harm prevention,<sup>45</sup> traditionally framed in a bilateral context, particularly for addressing transboundary pollution. The Tribunal extended the principle’s application to climate change, viewing it as a collective interest rather than a bilateral concern. This nuanced interpretation acknowledges that climate change transcends borders and affects the global community. While challenges related to attribution and standing make it difficult to establish breaches of climate change obligations, the opinion creatively integrates the prevention principle to address climate change as a shared, collective responsibility.

# Impacts of the Advisory Opinion

The ITLOS advisory opinion is highly relevant to global efforts to combat marine pollution, ocean acidification, and rising sea levels. It outlines key measures that state parties to UNCLOS must undertake, including stringent environmental due diligence, enhanced GHG emission reduction measures, and strengthened environmental impact assessment regulations that account for cumulative ocean impacts, with provisions for public reporting.

The ITLOS advisory opinion is particularly important because it bridges a gap between UNCLOS and modern climate governance frameworks. When UNCLOS was negotiated, climate change was not yet an international priority, and the treaty did not address this issue. This opinion marks the first major interface between UNCLOS and the UNFCCC. By interpreting UNCLOS to include obligations addressing GHG emissions as marine pollution, the Tribunal has provided a foundational framework for aligning ocean governance with climate mitigation and adaptation efforts.

The ITLOS ruling is anticipated to be influential on upcoming climate litigation, including advisory proceedings before the ICJ and the IACtHR. These proceedings will focus on the legal ramifications, especially for states highly vulnerable to climate change, within the broader context of international law, including human rights law, such as the American Convention on Human Rights for IACtHR. It is expected that the legal responses from various international courts and tribunals will be coherent and mutually reinforcing.<sup>46</sup>

The most important implication of the advisory opinion is the recognition of GHG emissions as a form of marine pollution under UNCLOS. This unprecedented acknowledgement establishes that states have an obligation to reduce and prevent such pollution, which the tribunal has categorised as obligations of a “continuing nature”.<sup>47</sup> This aligns UNCLOS with broader climate frameworks, such as the IPCC report, the Paris Agreement, and UNFCCC. It equates these frameworks under the obligation of state parties to reduce and prevent marine pollution under UNCLOS, holding them to be “obligations of a continuing nature”.<sup>48</sup>

However, the recognition of the applicability of external legal rules to UNCLOS is seen as non-comprehensive.<sup>49</sup> The Tribunal falls short of fully integrating the substantial commitments elaborated in the Paris Agreement with UNCLOS obligations. The advisory opinion excludes any requirement for member states to adhere to the standards of “maximum possible ambition” and “progression” in their efforts to reduce GHG emissions.<sup>50</sup>

# Relevance for Developing States

The ITLOS advisory opinion presents a mixed outcome for developing states. While it affirms obligations to prevent, control, and exercise due diligence by treating GHG emissions as marine pollution, these measures are cost-intensive and may hinder economic growth.<sup>51</sup> Furthermore, ITLOS refrains from holding Global North states accountable for historical climate injustices, including their historical GHG emissions, or imposing liability on the largest historical polluters.<sup>52</sup>

While the opinion supports the principle of CBDR and calls for greater efforts by developed states in addressing climate issues, it stops short of linking climate obligations to states' historical carbon footprints—a principle long advocated by developing countries, including India.<sup>53</sup> This failure to acknowledge the postcolonial reality leaves its opinion vulnerable to criticism from the perspective of the Third World Approaches to International Law (TWAIL) as perpetuating epistemic injustice.<sup>54</sup>

The opinion also underscores the importance of support mechanisms for developing states. While Articles 202 and 203 of UNCLOS do not explicitly codify the CBDR-RC principle, they reflect its underlying elements by obligating developed states to assist developing nations through capacity-building and technology transfer. This ensures that developing states are better equipped to address marine pollution and climate-related challenges effectively, ensuring they can meet their environmental obligations without undermining their developmental priorities.

However, international enforcement of a reduced anthropogenic GHG emission mandate based on this advisory opinion, though unlikely, could contribute to achieving the global target of limiting warming to 1.5°C above pre-industrial levels. This would be particularly beneficial for developing states, especially ones with marine geographies.<sup>55</sup> Limiting global warming would reduce its worst effects, such as heat waves and extreme climate swings. This would reduce costs on healthcare, housing, and crisis management, letting developing states preserve funds for developmental needs.

Further, the opinion could stimulate the growth of green industries in developing states,<sup>56</sup> fostering economic and environmental benefits. By attracting international investments and funding focused on sustainable development and green infrastructure, states could lay the groundwork for low-carbon


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pathways. This shift will likely generate numerous job opportunities<sup>57</sup> in emerging sectors such as solar, wind, and bioenergy. These industries not only provide employment but also drive innovation and technological advancements, positioning developing states as key players in the global green economy.

Moreover, renewed international cooperation—often accompanied by technology transfer and capacity-building initiatives—can empower developing nations to achieve sustainable development goals.<sup>58</sup> Thus, an ITLOS advisory opinion promoting the reduction of GHG emissions should be viewed as a positive and strategic move, accelerating the transition towards a sustainable and resilient future for developing countries.<sup>59</sup>

The ITLOS advisory opinion is a powerful precedent for global environmental governance. While non-binding, it represents a transformative development at the intersection of international maritime law and climate governance. By recognising GHG emissions as marine pollution, the opinion broadens the scope of UNCLOS and incorporates the principle of harm prevention into a collective framework for addressing climate change. This establishes a robust legal foundation for global action on shared environmental responsibilities. By aligning UNCLOS with treaties like the Paris Agreement and UNFCCC, it strengthens global environmental governance and underscores the interconnectedness of climate and ocean-related challenges.

While the precise impact of this on upcoming decisions by the ICJ and IACtHR remains uncertain, it is likely to encourage these courts to adopt more progressive interpretations of the law. The advisory opinion offers a precedent for advancing international law to tackle climate change, bridging gaps in existing treaties to address its multifaceted impacts. It highlights the importance of states' active engagement in shaping legal interpretations. India's passive stance missed a chance to advance the CBDR-RC principle and highlight the unique challenges faced by developing states. In contrast, small island states demonstrated how tribunals can be leveraged for climate advocacy.

For developing states, the advisory opinion is both a challenge and an opportunity to align national priorities with evolving norms, emphasising technology transfers, financial support, and loss-and-damage mechanisms. The opinion emphasises the need for collective ambition and cooperation, inspiring future legal and policy developments to address transboundary and global environmental challenges. By reinforcing the role of international law in climate governance, the advisory opinion paves the groundwork for a more equitable and resilient global future. 

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