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PSIDS REQUEST FOR AN ITLOS ADVISORY OPINION ON THE CONTENT OF UNCLOS CLIMATE CHANGE OBLIGATIONS

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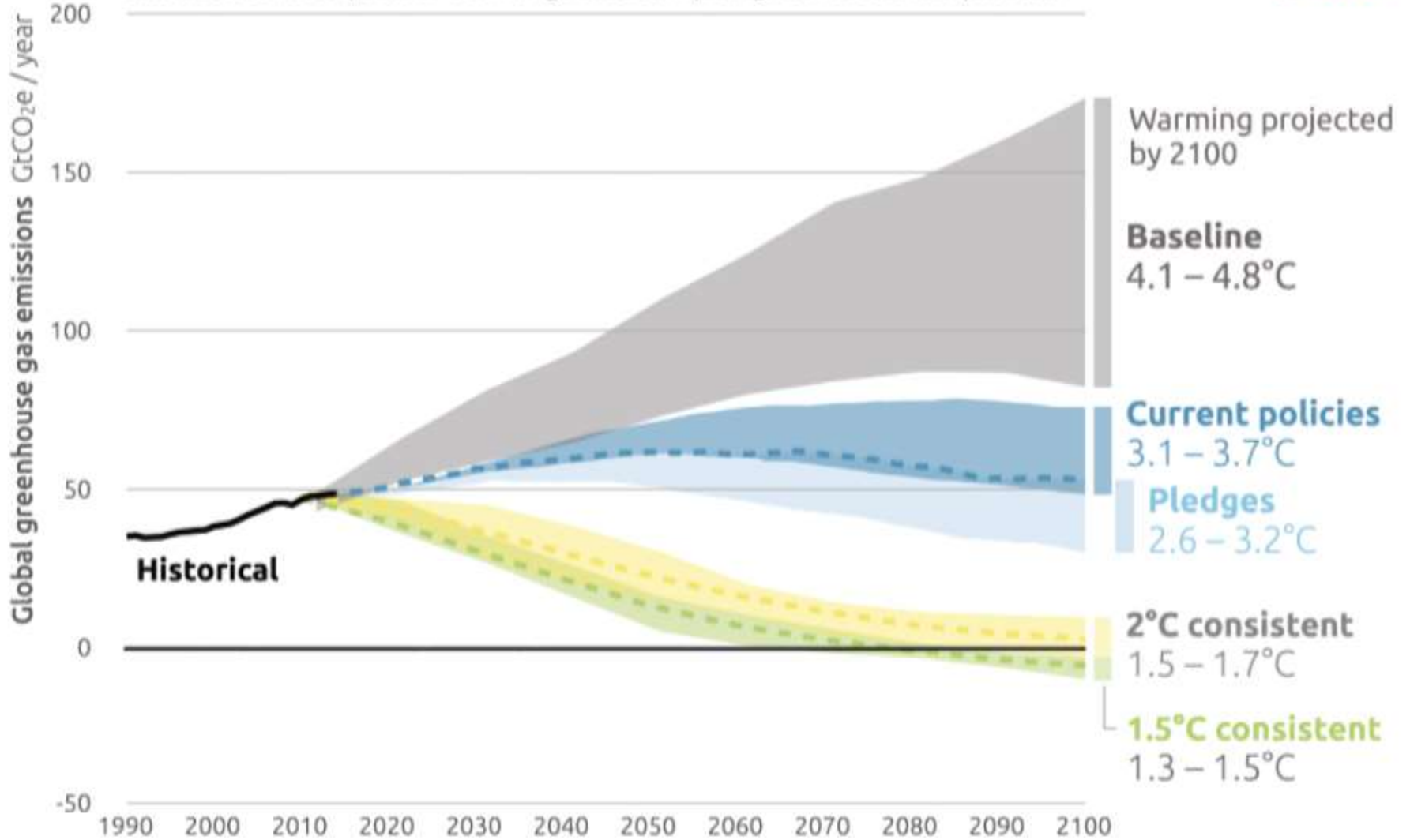
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PART 1 CONTEXT

Tuvalu. Photo: DFAT

2100 WARMING PROJECTIONS

Emissions and expected warming based on pledges and current policies

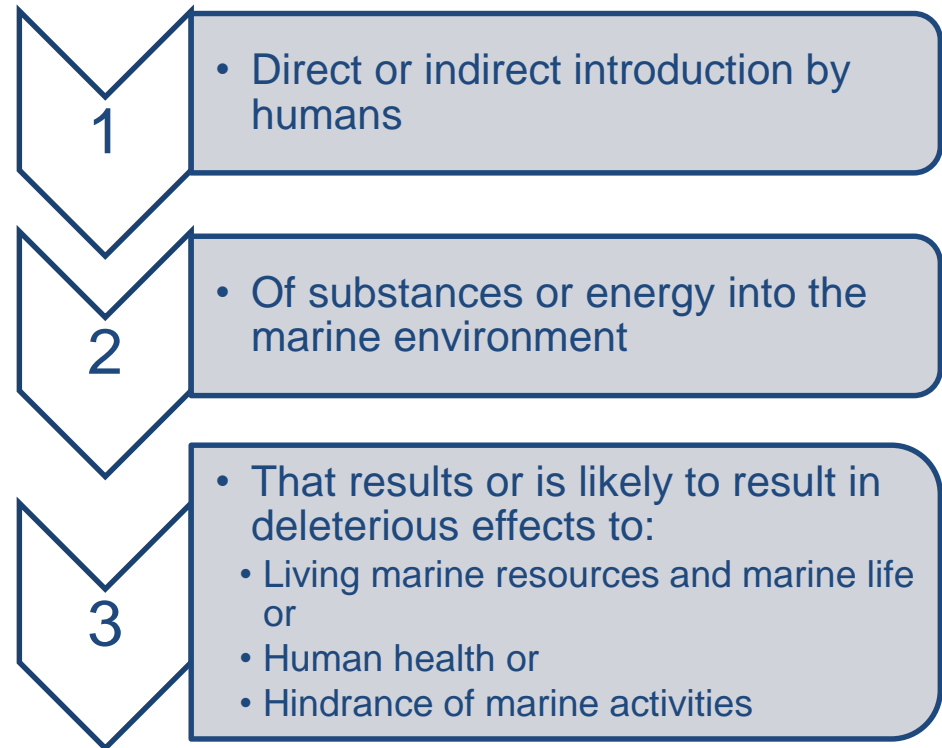


<https://climateactiontracker.org/global/temperatures/>

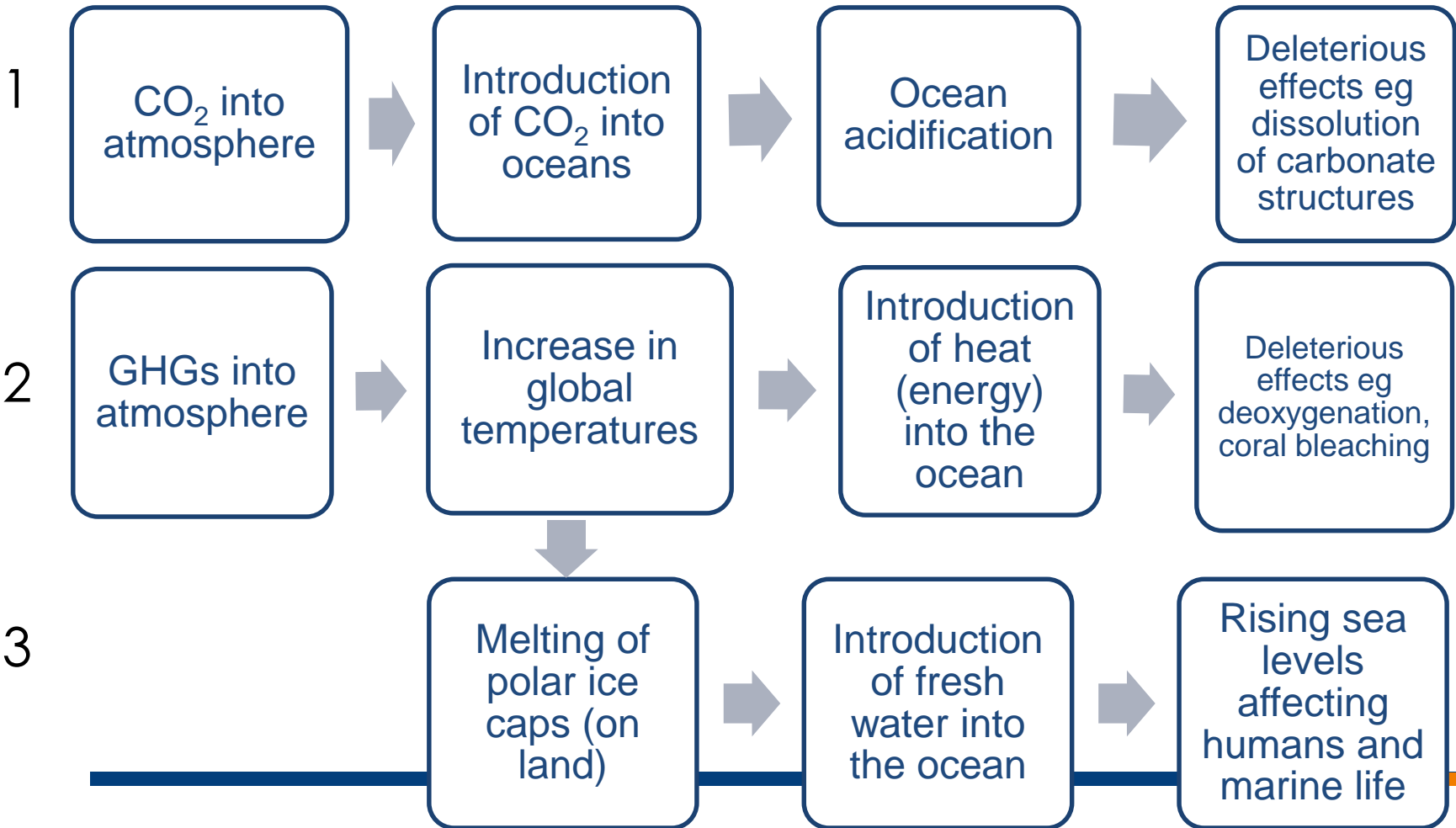
CLIMATE CHANGE IS A LAW OF THE SEA ISSUE

1. For the purposes of this Convention:

(4) "pollution of the marine environment" means the **introduction by man, directly or indirectly, of substances or energy into the marine environment**, including estuaries, which **results or is likely to result in such deleterious effects** as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;



CLIMATE CHANGE IS A LAW OF THE SEA ISSUE



POSSIBLE OUTCOMES OF AN ADVISORY OPINION

- Clarify the content of UNCLOS climate change obligations
- Encourage states to take effective action to satisfy obligations
- Open door for contentious UNCLOS case?
- BUT: may describe obligations as weaker than hoped

PART 2

WHAT LEGAL QUESTION WOULD BE HELPFUL TO HAVE ANSWERED?

UNCLOS CLIMATE CHANGE OBLIGATIONS - GENERAL

- 192 –obligation to protect and preserve the marine environment
- 194(1) –obligation to take all measures necessary to prevent, reduce and control marine pollution from any source
- 194(2) – obligation to take all measures necessary to ensure that activities under jurisdiction or control do not cause damage by pollution to other states or areas beyond national jurisdiction
- 194(3) – measures shall include those designed to minimise to fullest possible extent:
 - (a) the release of toxic, harmful or noxious substances from or through the atmosphere
- 194(5) – measures shall include those necessary to protect and preserve rare or fragile ecosystems and habitats of threatened species

UNCLOS CLIMATE CHANGE OBLIGATIONS – SOURCE-BASED

- Articles 207 “Pollution from land-based sources” and 212 “Pollution from or through the atmosphere”
 - Adopt laws and regulations and take other necessary measures to prevent, reduce and control such pollution
 - States shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution
- Read these obligations in light of their due diligence nature and article 193:
 - Sovereign right to exploit natural resources pursuant to environmental policies and in accordance with duty to protect and preserve marine environment

UNCLOS CLIMATE CHANGE OBLIGATIONS & RELATIONSHIP WITH PARIS

- Paris Agreement (2015)
 - Temperature rise limit of well below 2°C, pursuing “efforts to limit the temperature increase to 1.5°C”
 - Parties prepare, communicate and maintain successive “nationally determined contributions” (NDCs) towards the global temperature goal
- Is compliance with Paris enough to meet the UNCLOS standard? – i.e. have an NDC?
- OR: does UNCLOS require more? >> ‘fair share’ of 2°C?
- What about ocean acidification?

A POTENTIAL QUESTION

Philippe Sands, *Journal of Environmental Law*, 2016:

*it may be possible, useful and desirable, to invite the Court to express a view as to the content of any existing obligation under international law on the actions of States on, for example, **the nature and extent of the duty or obligation to prevent climate change**, and the nature and extent of the duty or obligation under international law **to address the consequences of climate change**.*

- Something like:
 - What are the obligations of states to prevent, reduce and control pollution of the marine environment from greenhouse gas emissions?

PART 3

IS IT LEGALLY POSSIBLE FOR THE PSIDS TO OBTAIN SUCH AN OPINION?

THE 2015 SRFC ADVISORY OPINION

- ITLOS unanimously found it had jurisdiction to give the opinion
- Found 19-1 that it should exercise the jurisdiction (Judge Cot against)



Photo: ITLOS

THREE PRIMARY PROCEDURAL REQUIREMENTS IN ART 138 RULES

1

- An international agreement related to the purposes of the Convention specifically provides for the submission of a request to ITLOS for an advisory opinion;

2

- The request must be submitted by a body authorised by the agreement to do so; and

3

- The opinion may be given on a legal question.

APPLIED TO THE PSIDS CONTEXT

1

- An agreement between PSIDS relating to climate change and the ocean which specifically authorises a “body” to submit a request for an opinion to ITLOS

2

- The request is submitted by the relevant body authorised under the PSIDS agreement

3

- A legal question eg “What are the obligations of states to prevent, reduce and control pollution of the marine environment from greenhouse gas emissions?”

POTENTIAL ISSUES (1)

Legal question relating to UNCLOS or the “other agreement”?

- A legal question on climate change mitigation and the ocean is most likely really about UNCLOS rather than the other agreement
- Article 288(2) and art 21 would suggest that the opinion should be limited to the interpretation of the “other agreement”
- BUT ITLOS does not agree – “sufficient connection with the purposes and principles” of the “other agreement” is ok
- So provided this is satisfied, does not matter if the question is based on the interpretation of UNCLOS

POTENTIAL ISSUES (2)

Deciding on the obligations assumed by third states?

- The purpose of advisory opinions is “offer legal advice to the organs and institutions requesting the opinion” (*Legality of the Threat or Use of Nuclear Weapons* [15])
- ITLOS in Case 21 confined opinion to the EEZs of SRFC members
 - “The object of the request by the SRFC is to seek guidance in respect of its own actions.” [76]
 - Answering the questions “will assist the SRFC in the performance of its activities and contribute to the implementation of the Convention.” [77]
- The PSIDS are not significant GHG emitters: the opinion would be more relevant to the obligations assumed by third states
- Exercise discretion not to render opinion?

CONCLUSION

- An ITLOS advisory opinion could helpfully explain what action the UNCLOS Part XII obligations require states to take re climate change
- But unlikely that the PSIDS could obtain this opinion as it is more relevant to the obligations of third states
- Framing the opinion in terms of the mitigation obligations of the PSIDS would be artificial
- ITLOS would likely exercise discretion not to render opinion

THANK YOU

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