APPLICATION OF THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND RESPECTIVE CAPABILITIES IN THE CONTROL OF GREENHOUSE GAS EMISSIONS IN INTERNATIONAL MARITIME TRANSPORT

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I. INTRODUCTION

The interrelationship between International Maritime Law and International Climate Change Law holds significant prominence in the international legal framework, both due to environmental, economic, and social conditions, as well as the legal challenges and/or gaps in regulations involving the oceans and greenhouse gas (GHG) emissions from international maritime transport, by both developed and developing States.

This study aims to analyze how, in a world shaped by international maritime transport, which has substantial socioeconomic impacts and a significant contrast in GHG emissions between developed and developing States, the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) can be applied by International Maritime Law in the equitable control—while acknowledging the vulnerability of States—of marine pollution from GHG emissions, particularly in developing countries.

The central challenge lies in the fact that, when addressing climate issues outside the climate regime—such as maritime transport and the regulation of GHG emissions in this sector—it is not always possible to fully apply the fundamental principles of this regime, such as the CBDR-RC principle. This principle, in essence, conflicts with the principles of the International Maritime Organization (IMO), such as the Principle of Non-Discrimination and the More Favourable Treatment (NMFT).

Applying the CBDR-RC principle emerges as a plausible path to balance responsibilities between developed and developing States, and promote a fair equilibrium between States, ensuring that the most vulnerable countries can contribute to environmental protection without compromising their socioeconomic development.

Thus, the research aims to fill an important gap in the existing literature and provide a solid foundation for the formulation of policies and legal practices that, in the future, could effectively mitigate GHG emissions in international maritime transport and promote global sustainability, while respecting the respective national capacities of developing States.

II. INTERACTION BETWEEN INTERNATIONAL MARITIME LAW AND THE CBDR-RC PRINCIPLE IN INTERNATIONAL MARITIME TRANSPORT

The 2023-2024 UNDP report highlights that development among countries is profoundly unequal. While wealthy nations achieve record levels of development, the poorest experience a setback in the pace of progress. It is important to emphasize that the data shows an economic concentration solely among the major global powers, as nearly 40% (forty percent) of global merchandise trade is concentrated in three or fewer countries, and the market capitalization of each of the three largest technology companies in the world exceeded the GDP of more than 90% (ninety percent) of countries in 2021[1].

The 2024 Review of Maritime Transport by the United Nations Conference on Trade and Development reveals that the volume of maritime trade reached 12.292 million tons in 2023, marking a 2.4% increase following the contraction in 2022. Specifically, global maritime trade exceeded expectations in 2023 due to reduced pressures on the global economy and better-than-expected economic performance in major economies.[2].

When analyzing the interrelationship of principles, an important point of analysis is that the application of the CBDR-RC principle to international maritime transport does not fully align in a straightforward, as one of the objectives of the IMO, summarized in Article 1(b), é "*to promote the availability of shipping services to the commerce of the world without discrimination*"[3]. To this end, legally, the IMO, through its treaties, enshrines the principles of non-discrimination and equality of treatment, known as the principle of flag neutrality[4]; these principles run counter to the CBDR-RC.

In practical terms, the CBDR-RC principle has two main consequences. First, it allows States to provide distinct responses when addressing environmental issues. Second, it leads to varying environmental standards, with differentiated obligations among States[5], which, per se,

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[1]PNUD. **Human Development Report (RDH) 2023-2024**. Available at: https://www.undp.org/pt/angola/publications/relatorio-do-desenvolvimento-humano-rdh-2023-2024. Accessed on: 27 mar. 2024.

[2]UNITED TRADE & DEVELOPMENT. **International maritime trade** in 2024 Review of maritime transport. Available at: https://unctad.org/system/files/official-document/rmt2024ch1_en.pdf. Accessed on: 14 jan. 2025. p. 04.

[3]UNITED NATIONS. Treaty Collection. **Convention on the International Maritime Organization**. Geneva, 6 mar. 1948. Available at: https://treaties.un.org/doc/Treaties/1958/03/19580317%2005-05%20PM/Ch_XII_1p.pdf. Accessed on: 21 mai. 2024.

[4]CHEN, Yuli. Reconciling common but differentiated responsibilities principle and no more favourable treatment principle in regulating greenhouse gas emissions from international shipping. **Marine Policy,** v. 123, p. 01-09. 2021. Available at: https://www.sciencedirect.com/science/article/pii/S0308597X20309647. Accessed on: 21 mai. 2024. p. 04.

[5]SANDS, Philippe; PEEL, Jacqueline. **Principles of international environmental law**. 3. ed. Cambridge: University Press, 2012. p. 235.

creates an implicit conflict when analyzing the principle of flag neutrality, due to the differentiation between States.

In the regulatory framework of international maritime transport, the responsibility for implementing the regulations and obligations developed by the IMO lies with the States that have become parties to the instruments, and they are required to ensure that ships flying their flags comply with the international rules imposed.

When analyzing the CBDR-RC principle and its applicability under International Maritime Law, as well as its interrelationship with the climate regime, it is essential to understand that climate change is internationally recognized as a common concern of humanity. Furthermore, its detrimental effects on the marine environment and the disproportionate consequences and impacts that already affect, and will continue to affect, vulnerable States, such as Small Island Developing States, are widely acknowledged by the international legal system.

In this context, it is important to consider that the application of the CBDR-RC principle to the ocean regime has significant impacts, including on the obligations that States must assume. When analyzing the obligation set out in Article 194(1) of UNCLOS, the necessary measures to prevent, reduce, and control marine pollution are to be taken through the adoption of the best environmental practices. Therefore, it can be interpreted that these measures require an assessment of the scientific, technical, economic, and financial capacities of States—i.e., the available means.

As examined by ITLOS in Advisory Opinion No. 31, the reference to "*best practicable means available*" and "*in accordance with their capacities*" introduces a degree of flexibility in the implementation of obligations. These provisions aim to accommodate the needs and interests, as well as the specificities, of States that face limitations. However, the reference to available means and capacities should not be used as an excuse to unduly delay or even exempt the implementation of the obligation to take all necessary measures, as set forth in Article 194(1) of UNCLOS.

Clearly, through the interpretation of ITLOS, as well as based on the text of the Convention, it is evident that there is an interaction between the consideration of the respective capacities of States in fulfilling the international obligations imposed by UNCLOS. While there is no explicit provision for the CBDR-RC principle, it is important to note that it was codified in a subsequent legal instrument, the UNFCCC. Therefore, there is, in essence, an interaction between the climate and ocean regimes.

Specifically regarding GHG emissions, the Court has ruled as follows: "*In the context of marine pollution from anthropogenic GHG emissions, States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities*"[6]. From this perspective, it is possible to identify that UNCLOS itself addresses differentiation within its context, with normative demands for the analysis of capacities among States.

In this regard, in Advisory Opinion N°. 31, it was explicitly stated that, although the obligation set out in Article 194(1) of UNCLOS does not refer to the CBDR-RC principle, it contains some elements common to that principle. The measures under this provision, particularly those aimed at reducing anthropogenic GHG emissions causing marine pollution, may differ between developed and developing States. However, as stated by the Court, it is not solely the responsibility of developed States to adopt such measures, although they must continue to take the lead.[7].

In this way, it is interpreted that all States must make efforts to mitigate the effects of climate change. That is, while recognizing the connection and application of the aforementioned principle to the ocean regime, which includes the IMO with regard to maritime transport, this does not exempt, nor should it be used as an argument to exempt, developing States from their responsibilities.

Another important obligation closely linked to GHG emissions from ships and the interpretations arising from the CBDR-RC principle is outlined in Article 194(2) of UNCLOS. This provision establishes the obligation for States in situations of transboundary pollution to prevent, reduce, and control marine pollution, resulting in a dual obligation: (I) activities under the jurisdiction or control of a State must not cause pollution damage to other States or their environment; (II) pollution resulting from incidents of activities under its jurisdiction or control must not spread beyond areas where the State exercises its sovereign rights[8].

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[6]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p. 82.

[7]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p.82

[8]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 (Request for**

In this regard, ITLOS, through Advisory Opinion N°. 31, stated that the concept of jurisdiction and control of a State has an extended context, encompassing not only its territories but also areas where the State may exercise its competence or authority under International Law. This includes activities carried out aboard ships or aircraft registered in that State[9].

It is interesting to note that the damages referred to in Article 194(2) of UNCLOS include both actual and potential damages. As a result, there is a stringent obligation for States to prevent the spread of pollution beyond their national jurisdictions. Regarding the connection with the CBDR-RC principle, Article 194(2) of UNCLOS, unlike paragraph one of the same provision, does not make any reference to the means to be employed by States in adopting the necessary measures and their capacities. This absence could lead to an interpretation that these obligations would not allow for any differentiation based on the availability of means and capacities by States.

However, contrary to this interpretation, ITLOS, through Advisory Opinion N°. 31, adopted the following stance: "*the scope and content of necessary measures under article 194, paragraph 2, may differ among States by the availability of means and capabilities*"[10]. Considering that "*this obligation is an obligation of due diligence, and its implementation may vary in relation to several factors, including the capabilities of each State*"[11]. Once again, it is possible to identify that the interpretation made by ITLOS was aimed at differentiating obligations among States, based on their respective capacities, whether technical or financial, for example.

Advisory Opinion submitted to the Tribunal). Case 31. Available at:https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p.89-91.

[9]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p.89-91

[10]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p. 90

[11]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p. 90

Another important point, which even modified the position previously adopted by the Court when issuing Advisory Opinion N°. 17, is that the obligations contained in paragraphs one and two of Article 194 of UNCLOS go beyond the mere duty of due diligence, also encompassing an obligation of result. The Court considered that, even with this stricter interpretation, the due diligence standard remains variable, depending on relevant factors, including the risks of the activities. However, to transboundary pollution, the standard should be even more stringent[12].

In the context of marine pollution caused by anthropogenic GHG emissions, Articles 213 and 222 of UNCLOS are interpreted as an obligation to adopt laws and regulations, as well as to take the necessary measures for the implementation of rules and standards established in climate change treaties and other relevant instruments. Therefore, if a State Party to the Convention, which is bound by these international rules and standards, fails to adopt the measures imposed by them, it would incur international liability[13].

At this point, it is noteworthy that when it comes to GHG emissions from ships, the responsible organization is the IMO. Consequently, the international rules and standards to be observed by States Parties, under the penalty of incurring liability, are defined by the IMO, such as Annex VI of MARPOL.

It is relevant to observe that the stance adopted by the Court was one of interaction between the oceanic and climate regimes. Therefore, it recognized that effective GHG reduction resulting from anthropogenic activities requires global cooperation. In other words, beyond the need for cooperation, there would be a general obligatory duty for all States. This position is grounded in Part XII of UNCLOS, which expressly addresses the protection and preservation of the marine environment, as well as in Article 197, which establishes a fundamental obligation

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[12]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p. 92

[13]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 (Request for Advisory Opinion submitted to the Tribunal)**. Case 31. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Accessed on: 02 jun. 2024. p.102.

for global and regional cooperation, further detailed in Articles 198, 199, 200, and 201 of UNCLOS[14].

Structurally, the differentiated treatment is reflected in the recognition of the limits of the legal system based on the fiction of legal equality between States, which, in reality, are not equal: "*this fiction lies at the root of the traditional structure of international law based on the reciprocity of the commitments of State parties to a given treaty*"[15]. Thus, the differentiation is justified for the introduction of "*non-reciprocal norms and to promote a reduction in inequality, preventing its increase and, more generally, ensuring a fairer outcome than that of a system without differentiation*"[16].

In contrast, the general duty of cooperation is also contemplated in treaties of the climate regime, such as the UNFCCC and the Paris Agreement. The preamble of the UNFCCC itself clarifies that, due to the existence of a globalized world and considering the global nature of climate change, the broadest possible cooperation from all countries is required, with effective and appropriate international responses.

In light of this context, it is reiterated that there is the possibility of interaction between both regimes, climate and oceanic, which demands global cooperation. This translates into an interpretation that, in the globalized world, there are States in diverse conditions, with different capacities, which consolidates the need for the international legal system to be understood jointly, under penalty of undermining the effectiveness of the obligations imposed.

Finally, regarding the conclusions of this point of the study, it was understood that International Maritime Law incorporates the essence of the CBDR-RC principle and differentiates the essential obligations for the protection and preservation of the marine environment, which includes GHG emissions.

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[14]Article 198. *Notification of imminent or actual damage; Article 199. Contingency plans against pollution; Article 200 Studies, research programmes and exchange of information and data; Article 201. Scientific criteria for regulations*.

[15]CULLET, Philippe. Differentiation. *In:* RAJAMANI, Lavanya. PEEL, Jacqueline. **International Environmental Law.** United Kingdom: Oxford University Press. 2021. p. 321.

[16]CULLET, Philippe. Differentiation. *In:* RAJAMANI, Lavanya. PEEL, Jacqueline. **International Environmental Law**. United Kingdom: Oxford University Press. 2021. p.321.

III. LIMITS OF THE DISCUSSION AT THE IMO ON THE REGULATION OF GHG EMISSIONS IN INTERNATIONAL MARITIME TRANSPORT AND THE CBDR-RC PRINCIPLE: THE LEGAL SPLIT BETWEEN DEVELOPED AND DEVELOPING STATES

In this context, it is identified that the international legal system has, in essence, consolidated the need to analyze and consider the existing differences between States, and this is also the position adopted by ITLOS. However, this is not the perception observed when analyzing the application of the CBDR-RC principle to international maritime transport within the institutional framework of the IMO. In this regard, one of the major international dilemmas currently faced by both developed and developing States is related to the international measures for GHG emissions from ships, as presented in the IMO's 2023 Strategy.

The Strategy seeks the approval of binding measures for the reduction of GHG emissions from ships, with short, medium, and long-term goals aimed at reducing carbon intensity through improved energy efficiency. Additionally, it is established that the carbon intensity of international maritime transport should be reduced by an average of at least 40% by 2030, compared to 2008 levels. Another important goal is the adoption of technologies, fuels, and energy sources with zero or near-zero GHG emissions, accounting for at least 5% of the energy used by international maritime transport, to reach 10% by 2030. Finally, the sector must work to achieve net-zero emissions by 2050, or around that date.[17].

In line with the idea established by the CBDR-RC principle, expressly mentioned in the 2023 Strategy as a guiding principle alongside the NMFT principle, the IMO, as the specialized agency of the United Nations responsible for developing global standards for maritime transport, has to support countries in implementing the adopted measures. To achieve the net-zero emissions target by 2050, or around that date, it is essential to consider national circumstances while striving for the gradual elimination of emissions[18].

Developing States have raised important and contextual points that clearly demonstrate the capacity differences they are facing. Among the uncertainties cited by developing States is

[17]INTERNATIONAL MARITIME ORGANIZATION. **Revised GHG reduction strategy for global shipping adopted**. Available at: https://www.imo.org/en/MediaCentre/PressBriefings/pages/Revised-GHG-reduction-strategy-for-global-shipping-adopted-.aspx. Accessed on: 21 jan. 2025.

[18]INTERNATIONAL MARITIME ORGANIZATION. **Revised GHG reduction strategy for global shipping adopted**. Available at: https://www.imo.org/en/MediaCentre/PressBriefings/pages/Revised-GHG-reduction-strategy-for-global-shipping-adopted-.aspx. Accessed on: 21 jan. 25.

the cost-efficiency relationship, which involves aspects related to the technologies necessary for decarbonization in maritime transport[19].

Moreover, they emphasize the cost-effectiveness of the ship decarbonization process, which encompasses carbon and fuel reduction, as well as its economic impacts, including irrecoverable costs—investment—operational costs, and compatibility costs. For developing States, these factors are crucial as they influence the commercial availability of decarbonization technologies[20]. In this regard, the position adopted by these States aligns with the uncertainties associated with the components involved and the lack of profitability, as the high costs of these technologies create barriers and obstacles to the commercialization of decarbonization technologies.

It is identified that the issues related to the cost-effectiveness relationship are the main sources of technical uncertainties, as there are different decarbonization effects and application scenarios, and these emerging technologies are still not fully matured. Another point raised by States is the fluctuations in economic factors—such as fuel prices, shipping freight rates, unclear political expectations regarding carbon taxes, and government subsidies—which must be considered, as the application of emerging energies or new technologies incurs considerable costs that, at times, States in situations of extreme vulnerability will not have the capacity to bear without subsidies[21].

In this context, it is examined that one of the IMO's objectives is for the 2023 Strategy to be presented as a fair and equitable transition plan, which includes adherence to the CBDR-RC principle. However, concerns were raised by some developing States, who do not see current actions moving towards a fair and equitable approach.

During the discussions on GHG emissions in maritime transport, particularly at MEPC 80 and 82, the IMO has explicitly maintained that medium-term measures to meet the 2023 Strategy's targets should be developed based on an analysis of the impacts on States, with special attention to developing States, SIDS, and LDCs.

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[19]INTERNATIONAL MARITIME ORGANIZATION. Proposal for improving the commercial readiness of low-carbon and zero-carbon ship technologies and marine fuels. **MEPC 82/7/6**. 26 July 2024. Accessed on: IMO DOCS em 20 jan. 2025. p. 2.

[20]INTERNATIONAL MARITIME ORGANIZATION. Proposal for improving the commercial readiness of low-carbon and zero-carbon ship technologies and marine fuels. **MEPC 82/7/6**. 26 July 2024. Accessed on: IMO DOCS em 20 jan. 2025. p. 2.

[21]INTERNATIONAL MARITIME ORGANIZATION. Proposal for improving the commercial readiness of low-carbon and zero-carbon ship technologies and marine fuels. **MEPC 82/7/6**. 26 July 2024. Accessed on: IMO DOCS em 20 jan. 2025. p. 2.

However, it is interesting to note that, during MEPC 82, held from September 30 to October 4, 2024, Brazil, joined by other developing States such as China, Bangladesh, Togo, India, and South Africa, argued that these measures would significantly impact their economies, resulting in disproportionate consequences. It also argued that there was a lack of validating data for the proposed strategies and that actions should be taken with caution to avoid irreversible harm to international maritime trade.

Thus, any measures to reduce GHG emissions that could lead to higher entry and transport costs would result in higher food prices, especially for basic and essential products. In short, the concerns expressed by developing States are grounded in solid facts, involving food security, livelihoods, and economic development in countries already facing precarious economic and social situations.

It is important to highlight that food security emerged as one of the key issues raised by States, particularly when viewed from the perspective of African countries, which claim that the IMO's medium- and long-term decarbonization measures are not adopting a fair and equitable transition between developed and developing States.

In this regard, during MEPC 82, South Africa, in its statement, argued that new energy transition measures should take into account the impacts on food security, which remains a central concern for developing countries.[22].

In contrast, and interestingly, the United States, although adopting a more neutral stance during MEPC 82, argued that States should act as a unified body, although they considered that it was not the right time to discuss reparations or compensation for past GHG emissions.[23]. The position adopted, consequently, seeks a stance of equality between developed and developing States.

The United Kingdom, on the other hand, agreed with the approval of the medium-term measures, meaning it would be in favor of the terms set in resolutions MEPC 80 and 82/74, stating that it would have the time and resources available to implement the measures. Similarly, it expressed a willingness to work together to reach a universal price that would not harm developing States, including in matters of food security, but emphasized that the measures must be feasible due to time limitations.[24].

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[22]INTERNATIONAL MARITIME ORGANIZATION. **MEPC Session 82**. Marine Environment Protection Committee. Available at: https://docs.imo.org/Category.aspx?cid=47&session=82. Accessed on: 15 jan. 2025.
[23]INTERNATIONAL MARITIME ORGANIZATION. **MEPC Session 82**. Marine Environment Protection Committee. Available at: https://docs.imo.org/Category.aspx?cid=47&session=82. Accessed on: 15 jan. 2025.
[24]INTERNATIONAL MARITIME ORGANIZATION. **MEPC Session 82**. Marine Environment Protection Committee. Available at: https://docs.imo.org/Category.aspx?cid=47&session=82. Accessed on: 15 jan. 2025.

Italy, in turn, stated that there is no longer time to wait, and that decarbonization actions must be immediate. Italy shared the position of Spain, the United States, Canada, and others—primarily EU Member States—who support the MEPC 82/74 document[25]. Additionally, Italy argued that the document presented by Bangladesh and Togo, No. 7/14/15, deserves to be analyzed concerning food security issues. This position was also followed by France, which emphasized the importance of considering the impacts that decarbonization measures could have on states, highlighting food security.

In this context, it is possible to analyze that the discussions held at the IMO regarding decarbonization, which primarily stem from the IMO's 2023 Strategy—projecting amendments to Annex VI of MARPOL—explicitly reflect the division between the positions adopted by developed and developing countries. A similar situation was also apparent during the statements outlined by ITLOS in Advisory Opinion N°. 31. In other words, it is evident that the stage for debates in the international legal system is becoming increasingly polarized between major economic powers, such as the European Union and the US, and developing countries like Brazil, India, China, and South Africa.

The fundamental issue is that, for developing countries, the actions being adopted by the IMO, involving capacity-building and technical cooperation, are insufficient to recognize the application of the CBDR-RC principle, since the measures and strategies being planned could disproportionately impact both developed and developing states.

In this line, it is interesting to note that the financial and technical support provided through support programs does not embody the essence of the application of the CBDR-RC principle. Certainly, they may present themselves as an important element, but the core of the principle lies in the differentiation in the application of international obligations, which, while common, should be differentiated and respect the respective capacities of each state.

Conceptually, differentiated responsibility translates into diverse environmental standards to be defined based on a series of factors, including the special needs and circumstances of states. However, this point is not reflected in the actions taken by the IMO, which leads to the conclusion that, although it recognizes in its resolutions and in its strategy[26]

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[25]INTERNATIONAL MARITIME ORGANIZATION. **MEPC Session 82**. Marine Environment Protection Committee. Available at: https://docs.imo.org/Category.aspx?cid=47&session=82. Accessed on: 15 jan. 2025.

[26]INTERNATIONAL MARITIME ORGANIZATION. **2023 IMO Strategy on reduction of ghg emissions from ships**. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/annex/MEPC%2080/Annex%2015.pdf. Accessed on: 03 fev. 2025.

The existence of the CBDR-RC principle suggests that the proposed targets and rules do not reflect the core of the principle, that is, the common but differentiated responsibilities.

It can be concluded that the IMO does not exclude the possibility of applying the CBDR-RC principle, since it recognizes it as a guiding principle. However, it is possible to understand that there is a dual interpretation of the principle: the first presents a more flexible application, through which the IMO applies it based on the respective capacities of states, offering technical and financial capacity-building support, and treating it as a guiding principle; the second is related to an application focused on common but differentiated obligations, meaning that, even based on historical recovery, it delineates that developed states should continue to take the lead in controlling GHG emissions.

The second interpretation is tied to the idea of climate justice.[27], This implies the notion that, although developing countries have contributed to a lesser extent—historically speaking—to climate change, they are facing its adverse effects. In relation to the rules for GHG emissions in international maritime transport, we are again moving toward the implementation of measures that will disproportionately affect the most vulnerable states.

It is important to note that, currently, the IMO is handling proposals aimed at ambitious medium-term actions—such as taxing GHG emissions in maritime transport—which present obligations that have been communicated equally to both developed and developing countries. These proposals were contested by several developing countries in 2024, which argued that they would cause significant social and economic impacts, including a threat to food security, especially for African countries.

In this sense, it is observed that there is an institutional limitation within the IMO for the approval of GHG regulatory measures that impose common but differentiated responsibilities, as the rule-approval process within the IMO occurs via votes from its Member States. Currently, the ongoing scenario is the approval of measures without the observance of differentiated obligations, as analyzed in the aforementioned statements.

[27]IPCC (2022), **Climate Change 2022: impacts, adaptation, and vulnerability**. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge: Cambridge University Press. p. 07.

IV. THE DUTY OF STATES IN APPLYING THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND RESPECTIVE CAPACITIES IN GHG EMISSIONS FROM INTERNATIONAL MARITIME TRANSPORT

Climate change is an ethical, moral, and cultural issue, and international obligations must take into account the varying levels of knowledge and environmental practices of States. In this context, Advisory Opinion N°. 31 serves as a tool that enhances ocean governance by incorporating the possibility of a duty for state parties. Although, at first glance, it may not have binding force, it presents itself as an element constituting moral authority.[28].

Although the central idea, largely accepted, is that advisory opinions are not legally binding, there are underlying elements in the position adopted in this study, such as in Advisory Opinion N°. 5, Eastern Carelia Case, by the ICJ. On that occasion, the Court emphasized that, although it had not been asked to resolve the dispute but to issue an advisory opinion, this would not substantially alter its considerations. This is because the issues presented were not abstract legal questions but were directly related to the core of the dispute between Finland and Russia, and the only way to address them was through an investigation into the underlying facts of the case. Thus, "*answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court*"[29].

To reinforce this understanding, it is possible to observe that, in Advisory Opinion OC-15/97, the Inter-American Court of Human Rights stated that "*moreover, even though the Court's advisory opinion does not have the binding nature of a judgment in a contentious case, it nevertheless has undeniable legal effects*."[30]. More recently, in 2014, in Advisory Opinion OC-21/14, the Inter-American Court of Human Rights reflected on the scope of the advisory opinion within the legal system, considering the broad reach of the Court's advisory function, which, as previously outlined, involves not only the States Parties to the American Convention.

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[28]VISSCHER, Charles De. **Aspects récents du droit procédural de la Cour internationale de Justice**. Paris: Pedone, 1966. Available at: https://peacepalace.on.worldcat.org/search/detail/781570427?queryString=Charles%20de%20Visscher%2C%20Aspects%20r%C3%A9cents%20du%20droit%20proc%C3%A9dural%20de%20la%20Cour%20internationale%20de%20justice&bookReviews=off&clusterResults=true&groupVariantRecords=false. Accessed on: 15 fev. 2025. p. 195.

[29]PERMANENT COURT OF INTERNATIONAL JUSTICE. Advisory Opinion n°. 5, **Status of the Eastern Carelia**, 23 July 1923. Available at: https://www.worldcourts.com/pcij/eng/decisions/1923.07.23_eastern_carelia.htm. Accessed on: 15 fev. 2025. Paragraph 35.

[30]CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Parecer Consultivo OC-15/97**, Informes de la Comisión Interamericana de Derechos Humanos. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_15_esp.pdf. Accessed on: 16 fev. 2025. Paragraph 26, p. 09.

Everything pointed out in the Advisory Opinion also holds legal relevance for all OAS Member States that have agreed to the American Declaration, regardless of whether they have ratified the American Convention, as well as for OAS bodies whose scope of competence relates to the subject matter of the consultation.[31].

Based on the conclusions of the Advisory Opinions of the Court, it can be interpreted analogously that there is substantial authority, reflected in the fact that, although there is no express legal binding, these opinions generate significant legal effects and impact international practice. This extension of substantive authority implies that, even though States are not directly obligated to follow the advisory opinion, the legal effect of this decision is such that the States of the Organization of American States are influenced by the interpretation provided by the Court.

In this sense, this effect can be interpreted as a form of indirect binding, as the advisory opinions guide future actions and help define the applicable legal norms, creating a common understanding that directs States in their practice.

Regarding the concrete effects of the Advisory Opinions, "*a consultative opinion constitutes an international constitutional and/or conventional interpretation that becomes integrated into the corpus juris of the system*."[32]. In light of this position, the advisory opinions "*produce legal effects – not merely moral ones – that must be followed by the members of the system due to the genesis of the consultative competence in the IACHR*."[3334].

In this scenario, it is possible to interpret that there are authoritative elements in the Advisory Opinions, given that they are issued unanimously by the members of the Chamber, which grants them unique authority. Advisory Opinion No. 31 involved the participation of several States Parties and International Organizations, which issued declarations, most of which recognized the Tribunal's competence and the importance of the issue to be analyzed, an issue that, until then, existed in the abstract realm of International Law due to the legal gap in UNCLOS regarding GHG emissions and marine pollution.

Thus, consent operates as a legal condition of jurisdiction imposed by the mandate providers and the parties in a specific dispute, emerging as a central element in the legitimation

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[31]CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Parecer Consultivo OC-21/14**. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_21_por.pdf. Accessed on: 16 fev. 2025. Paragraph 32, p. 13.

[32]PALACIOS, Augusto Guevara. **Los dictámenes consultivos de la Corte Interamericana de Derechos Humanos**, Barcelona: Bosch, 2012, p. 286.

[33]Inter-American System of Human Rights.

[34]**Los dictámenes consultivos de la Corte Interamericana de Derechos Humanos**, Barcelona: Bosch, 2012, p. 286. ROA, Jorge Ernesto. **La función consultiva de la Corte Interamericana de Derechos Humanos**. Bogotá: Impreso en Colombia, 2015.

of ITLOS's consultative jurisdiction. In issuing the Opinion, the Tribunal, as a judicial body, remained bound to its judicial function, with its actions guided by the provisions of its Statute, which apply equally in contentious cases.

Advisory Opinion No. 31 was the first to expressly foresee obligations regarding the protection and preservation of the marine environment, as outlined in Part XII of UNCLOS, specifically regarding GHG emissions. This action allowed for a clear interaction between legal regimes, advocating for the existence of international cooperation for environmental protection.

In other words, the opinion of ITLOS, the main Tribunal with jurisdiction over oceanic matters, holds authoritative force before other bodies and States Parties, or at least a duty to be taken into account in factual and normative considerations. After all, the frequent non-compliance with advisory opinions would even affect the position granted to ITLOS by UNCLOS, weakening the legal system established by International Maritime Law.

Another important point of reflection is that Advisory Opinion No. 31 was accepted by the majority. This proves that, in substance, ITLOS's opinions do indeed have effects within the legal system; otherwise, they would not be likely to persist. It is worth highlighting that the opinions rendered by ITLOS have been an important tool for the oceanic regime in enhancing the state of International Maritime Law. The convention may have moved from a state of inertia to an active interpretation, placing it at the center of new social and legal demands, such as climate change.

In this context, the Tribunal went further, reflecting on the possibility of emphatically providing the security and balance that developing States have sought for years to developed States. It clearly expressed its position that norms addressing or that may address the connection between the oceans and climate change should be in synergy with the CBDR-RC principle. This point is an evolution for the oceanic legal system, as it evokes the fundamental idea of justice in full application to a legal instrument created in 1982. Since then, there have been few changes in the weakening of developing States about the major powers of the North.

The inequalities between developed and developing countries are increasingly noticeable and palpable—the gap between them continues to widen. Currently, the scenario unfolding is the approval of GHG mitigation measures for ships in international maritime transport, which will result in significant damage to the economies and livelihoods of these nations.

In light of this, the Advisory Opinion initiated a process of integration within the legal regime[35], enabling the interaction of norms originating from different legal regimes. Legal norms exert a distinct influence on the conduct of various actors, including States and Organizations, which non-binding instruments do not have[36]. With the identification of legal norms, there is an understanding that "*certain types of human conduct are no longer optional, but in some sense, obligatory*."[37]. The strenuous efforts that States make to justify their conduct in light of International Law say something about the importance that their governments place on complying with International Law – or at least, they seem to do so.

At the same time, courts face greater challenges when applying International Law or mitigation obligations that are implicit in human rights treaties or multilateral environmental agreements. For example, in applying the norm, a court may have to balance opposing interpretations of sovereign rights, either by allowing economic development and the exploitation of natural resources at the expense of GHG emissions or by prohibiting interference with the rights of other States through those emissions.

Similarly, such situations are analyzed about regulating GHG emissions from international maritime transport, especially when seeking the application of general norms that will have significant consequences for developing States. From this perspective, it becomes evident that the application of the CBDR-RC principle does not occur easily, especially considering the political and economic interests that drive international negotiations. This often results in limitations for both developing States and the IMO, as an international organization, in fully implementing the CBDR-RC principle.

Although there is no explicit statement directly equating the weight of advisory opinions with binding decisions, it is argued that Advisory Opinion No. 31, issued by the ITLOS, carries substantial authority. This is because, although advisory opinions are not legally binding – meaning they do not create direct legal obligations for the parties requesting them – they hold significant authority and weight in International Law.

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[35]NDIAYE, Tafsir Malick. **Les avis consultatifs du Tribunal International du Droit de la Mer** *in* Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea. Leiden Boston: Brill Nijhoff, 2015. p. 622-656.

[36]MAYER, Benoit. **International Law Obligations on Climate Change Mitigation**. United Kingdom: Oxford University, 2022. Benoit Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy 127. Jana von Stein, 'The Engines of Compliance' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013).

[37]HLA Hart; RAZ, Joseph; BULLOCH A., Penelope. **The Concept of Law**. 3rd. London: Oxford University Press, 2012. Available at: https://peacepalace.on.worldcat.org/search/detail/37826957?queryString=The%20Concept%20of%20Law&bookReviews=off&clusterResults=true&groupVariantRecords=false. Accessed on: 11 fev. 2025.

The UNCLOS, as well as other treaties and conventions, along with the ITLOS, recognize the need for international cooperation and differentiated obligations for developing countries, allowing the CBDR-RC principle to be a relevant and applicable foundation in the context of marine environmental protection and preservation in light of GHG emissions. Thus, the CBDR-RC principle is an integral part of the oceanic regime, especially concerning environmental protection and the sustainable use of marine resources.

Therefore, although advisory opinions do not impose direct legal obligations on States, they guide their decisions and actions, offering a legal interpretation that must be considered, reflecting the substantial authority of the decision and its substantive binding within the international legal context.

Thus, given the institutional limitation of the IMO in imposing and creating rules that respect the CBDR-RC principle in GHG regulation for international maritime transport, it is understood that the interpretation of the substantial authority of Advisory Opinion No. 31 regarding the application of the principle gives rise to a legal duty for the States Parties. This is due to its elements as a guiding decision for the actions of the UNCLOS States Parties in fulfilling the obligations of marine environmental protection and preservation, as outlined in Part XII.

V. CONCLUSIONS

The BASIC countries – Brazil, South Africa, India, and China – exemplify the complexity of this dynamic. Although all are considered emerging powers with significant GDPs, their development status still places them far behind the standards of developed countries, both in terms of Gross Domestic Products (GDP) per capita and social indicators. India, for example, is characterized by a large population and high levels of poverty, while China, despite being the second-largest economy in the world, still faces a relatively low GDP per capita. Brazil and South Africa exhibit similar characteristics, with significant social and environmental challenges.

It is concluded that the CBDR-RC principle can be applied by International Maritime Law to equitably control GHG emissions in international maritime transport. This would allow developing countries, despite their limitations, to adopt appropriate measures to reduce greenhouse gas emissions from international shipping in accordance with common but differentiated obligations based on national capacities.

Thus, a potential lack of flexibility in applying these rules could undermine international consensus, especially if the needs of developing countries are not properly addressed, including technology transfer and financial support. Including the CBDR-RC principle in IMO discussions could, therefore, foster a more inclusive and cooperative environment, facilitating the implementation of more balanced measures and enabling the evolution of technical capacities in developing countries. On the other hand, the rigid application of the NMFT principle by the IMO, without adjustments to the realities of developing countries, could lead to resistance and undermine the effectiveness of global climate policies in the maritime sector.

According to the philosopher John Rawls, "*justice is the first virtue of social institutions, just as truth is of a theory's system*"[38]. Advisory Opinion N°. 31, by acting as a normative guide and promoting equity among States, reflects this pursuit of global justice, where environmental protection and intergenerational equity are central to strengthening the international legal system. This essay, therefore, concludes that ITLOS, in fulfilling its role as guardian of the International Law of the Sea, reaffirms its commitment to global governance that not only recognizes but also protects the interests of the most vulnerable States. It provides legal space for the interaction of legal regimes and brings forth a duty on the part of the State Parties to observe key principles, such as the application of the CBDR-RC principle and international cooperation.

[38]RAWLS, John. **A Theory of Justice**. Harvard University Press, Belknap Press. Disponível em: https://www.jstor.org/stable/j.ctvjf9z6v. Acesso em: 22 fev. 2025.