

A Bird's-Eye View of the ITLOS Advisory Opinion on Climate Change and International Law

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A Small But Important Step

'Historic' and 'unprecedented' are two adjectives that could easily apply to the [advisory opinion](#) rendered by the International Tribunal for the Law of the Sea (ITLOS) on May 21, 2024. Of course, these adjectives have also [been used](#) to describe many other recent judgments delivered on the topic of climate change. Still, there is something in this advisory opinion that—although not changing the world—could be impactful. It might, for example, pave the way for a strong advisory opinion from the International Court of Justice (ICJ) and change the course of future global negotiations on climate change.

As others in this blog symposium will provide detailed and thematic analyses, this post offers a bird's-eye view of the advisory opinion, focusing especially on the answer given by ITLOS to Question A (i.e. States' obligation to prevent, reduce, and control the pollution of the marine environment related to greenhouse gas (GHG) emissions), where ITLOS developed with greater detail States' obligations to reduce GHG emissions under UNCLOS, and examined the relationship between UNCLOS and the Paris Agreement.

Jurisdiction

As I explained in a previous [blog post](#), some have argued that ITLOS lacks advisory jurisdiction to render this opinion. However, ITLOS decided otherwise and specifically acknowledged its own competence to render the opinion. The reasons provided by the Tribunal are unconvincing and unsupported. For example, it did not explain what activities are developed by COSIS that necessitate this opinion, nor did it identify the primary rules of the law of the sea contained in the COSIS Agreement that justify its qualification as a treaty “related to the purposes of the UNCLOS”. ITLOS also overlooked the fact that the requesting body posed questions related to the obligations of third parties to the COSIS Agreement. Despite all of these shortcomings in the Tribunal’s analysis, it seems that States are not openly opposed to recognizing a “creeping” advisory jurisdiction of the ITLOS.

The interplay between [UNCLOS](#) and other rules of international law

Adopted in 1982, UNCLOS does not refer to global warming, climate change, GHG emissions, ocean acidification, or sea level rise. However, the broad and open-ended nature of its provisions concerning the protection and preservation of the marine environment can easily include all these issues—starting with the definition of marine pollution in Article 1(1)(4), which ITLOS determined includes the introduction of GHG as a substance and heat as a form of energy (para 159 ff.).

Articles 237 and 293 of UNCLOS expressly allow the use of other rules of international law that are not incompatible with UNCLOS to inform its interpretation. Unsurprisingly, ITLOS referenced the United Nations Framework Convention on Climate Change ([UNFCCC](#)) and the [Paris Agreement](#), [Annex VI to MARPOL](#), [Annex 16 to the Chicago Convention](#), and the [Montreal Protocol](#), including the [Kigali Amendment](#). However, these treaties seem to have had little bearing on ITLOS’ interpretation of UNCLOS. This is, again, unsurprising as cross-regime interaction is useful only to a limited extent. One reason is that the scope and goals of the UNFCCC and the Paris Agreement prevent them from being more specific or detailed than UNCLOS regarding marine environmental obligations. The findings of ITLOS thus resulted from an interpretation of UNCLOS alone and not from a joint reading of UNCLOS and the Paris Agreement. This does not mean that both treaties are conflicting. As Jaqueline Peel explained [here](#), the view of ITLOS is that obligations under both treaties are separate, but mutually reinforcing. Thus, while finding that UNCLOS and the Paris Agreement are aligned, ITLOS focused specifically on the provisions of UNCLOS to define States’ obligations with respect to protection and preservation of the marine environment in the age of climate change.

This point also explains one of the most interesting lines in the ITLOS advisory opinion, where the Tribunal stated that it “does not consider that the obligation under article 194, paragraph 1, [of UNCLOS] would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. [UNCLOS] and the Paris Agreement are separate agreements, with separate sets of obligations” (para 223). The goal of ITLOS, then, was to list and clarify a set of obligations deriving directly from UNCLOS (namely under Articles 194, 207 and 212) irrespective of what results from the Paris Agreement. In other words, it seems that the ITLOS did not consider cross-regime interaction with the UNFCCC and the Paris Agreement as being particularly helpful to define States’ obligations under UNCLOS.

Common but differentiated responsibilities and respective capabilities

The common but differentiated responsibilities (CBDR) principle is a cornerstone of the UNFCCC and the Paris Agreement—and also one of the most divisive topics among scholars and in international negotiations. This divisiveness results from disagreement among states regarding whether their ‘differentiated’ responsibility stems from past, current, or future GHG emissions, or from other criteria.

ITLOS, however, was not tasked with addressing States’ responsibility or liability (para 145 ff.), thus enabling it to apply the CBDR principle (implied in article 194 UNCLOS) (para 229) through a capacity-based lens. With respect to States’ obligation to take all necessary measures to address marine pollution, ITLOS sought to delineate differentiated State obligations, considering each State’s specific technological capabilities and available resources (para 205 ff.). Paradoxically, this produces a system of differentiated obligations akin to that of the Paris Agreement. Aware of this, ITLOS also pointed out that States do not draft their own obligations under UNCLOS and that these obligations evolve continuously (thus mirroring the progressive nature of States’ NDCs under the Paris Agreement).

In this context, ITLOS further explained that “the reference to available means and capabilities should not be used as an excuse to unduly postpone, or even exempt from, the implementation to take all necessary measures under article 194, paragraph 1” (para 226). In the view of ITLOS, “States with greater means and capabilities” “must do more” (i.e. must take the lead) to reduce their GHG emissions (para 227).

At this point, it is worth noting that one of the most difficult issues in human rights cases related to climate change is the notion of States’ jurisdiction, which requires qualified control over the victim of a human rights infringement (see [here](#), [here](#) and [here](#) for more detail). In international environmental law, however, States’ jurisdiction

is assessed in terms of control over the source of pollution, regardless of where the effects of that pollution are felt. GHG emissions are the best example of an activity producing damages at a global scale, extending far beyond a State's borders, as global warming results from the concentration of worldwide GHG emissions. Despite the difficulties in establishing causation or attributing a State's responsibility or liability for climate change, ITLOS clarified that the obligation under article 194, paragraph 2, to avoid transboundary pollution is individual and includes the duty to prevent, reduce and control GHG emissions (para 252). To that end, ITLOS also mentioned that emissions, for this purpose, are all those resulting from State or non-State actors' activities within a State's jurisdiction or control, thus including the territory, maritime areas under a State's spatial jurisdiction, and flagged vessels or aircraft (para 247). This obligation is also one of due diligence and varies according to a State's capacities.

Listing and clarifying obligations and the role of due diligence

The CBDR principle is intrinsically linked to the necessity for collective action, thus requiring legal obligations of cooperation and coordinated action (as extensively elaborated in the advisory opinion).

ITLOS recognized climate change as a collective action problem but still emphasized that the obligation to protect and preserve the marine environment in relation to climate change-related effects cannot be fulfilled merely through a State's cooperation or participation in international organizations. In fact, both individual and collective measures are necessary, but neither is inherently preferable to the other. "The 'appropriateness' of an individual or joint action depends on the particular circumstances in which measures are taken" (para 201). As a result, ITLOS concluded that "States are required to take all necessary measures, including individual actions as appropriate" (para 202).

The difficult part for ITLOS (as for the ICJ or any other court or tribunal), however, is to list and flesh out a set of sufficiently characterized legal obligations—having in mind that the concepts of "necessary" or "appropriate measures" may vary according to the circumstances of each country (as noted above) and do not entail the immediate cessation of all GHG emissions (para 199). Nevertheless, ITLOS clarified that climate change mitigation measures are "necessary" to prevent, reduce, and control marine pollution directly under UNCLOS (para 204). Moreover, it emphasized that States do not possess complete discretion in the choice or design of measures: these measures should (but not "shall") be determined objectively, informed by science, and inspired by the precautionary approach (but not "principle"), among other factors, such as States capacities (para 206 ff).

Although not aiming to be exhaustive, ITLOS referred to several obligations: adopting a regulatory framework to reduce GHG emissions and effectively enforcing that framework, conducting EIAs, implementing international rules and standards at the domestic level, fulfilling the obligation of global and regional cooperation with other States, and providing scientific and technical assistance to vulnerable States. These are obligations of conduct, not of result—but obligations of conduct are always results-oriented.

Furthermore, ITLOS elaborated on the doctrine of States' due diligence obligations. Due diligence obligations are “accessory” obligations. They serve as lenses to assess whether a State has properly fulfilled its primary obligations. In this regard, ITLOS did not innovate much compared to prior opinions ([here](#) and [here](#)). However, by qualifying obligations under Part XII of UNCLOS as due diligence, ITLOS affirms that it can assess how a State performs these obligations. This clarification is more important than it seems at first sight: even if the primary obligation is open-textured or challenging to define, it remains under some form of international judicial oversight. This explains why ITLOS added that “an obligation of due diligence can be highly demanding” (para 257).

The greater vulnerability of some States

ITLOS further developed its interpretation of the CBDR principle by addressing the obligations of assistance to developing States—narrowly defined as those with lesser capabilities and directly affected by the adverse effects of climate change (paras 326 and 330). The Tribunal indicates that States that are “better placed . . . to meet their environmental responsibilities” should, among other things, provide scientific, technical, educational and other necessary assistance to States “with lesser capabilities” (para 326 & 327). The overall goal is to provide “adequate scientific and technological knowledge to developing States” (para 332). ITLOS did not explicitly refer here to “technology transfer”, but it approached the concept. It will be interesting to observe how technologically developed States (even if legally qualified as developing States) react to this finding of the ITLOS.

Conclusion

While no advisory opinion can solve the climate crisis, the ITLOS decision does provide an important push for action, both globally and at the national level. It cleared the way for the ICJ's forthcoming opinion on climate change, demonstrating how a clear and solid line of arguments can be developed. Although the ICJ may decide differently due to variations in the questions posed and treaties interpreted, it is unlikely to diverge significantly from the ITLOS narrative or reject its findings on related topics.

Of course, the obligations listed and fleshed out by ITLOS are still open-textured and mere obligations of conduct, not of result. But Rome wasn't built in a day. The ITLOS findings, though short, provide a solid basis for future opinions and rulings from other international courts and tribunals—and will certainly stimulate scholarly discussion for years to come.

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