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REVIEW

Amicus Curiae before the International Tribunal for the Law of the Sea: The Prospect of an Advisory Opinion on Climate Change and the Law of the Sea

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SUMÁRIO

1. Introduction
2. The advisory competence of the ITLOS
3. The rules on access to the ITLOS
4. The access of *amicus curiae* to international courts and tribunals
5. The access of *amicus curiae* to the ITLOS. In particular, the advisory opinions and in climate change-related issues
6. Conclusion

Bibliography

1. Introduction

1. In Greek mythology, the 'Labours of Hercules' refer to the daunting challenges that hero had to overcome and that would eventually lead him to eternal greatness. These labours were assigned to Hercules since their performance required his demi-God strength. Mitigating and adapting to climate change is a contemporary version of this mythical tale, since climate change is "the defining issue of our age. It is defining our present. Our response will define our future."[1] There is a certain drama in these words – but the drama is not unmerited: climate change is affecting the planetary equilibrium and threatening the survival of the human species. But the reason to resort to the image of the Labours of Hercules lies not in the drama of climate change, but rather in the strenuous challenge that lies ahead of us: "climate change challenges just everything we know and care about;"[2] and mitigating and adapting to climate change requires profound transformations from individuals and communities, which affect our social interaction, political thinking and structures, economies, and even life options.

These new labours, however, are a collective enterprise, since climate change cannot be tackled through unilateral State action, or by local communities or other players acting in clinical isolation. The fact that our planet is, "literally, one world" implies that the first challenge we face is to adopt a "suitable form of governance for our world. It is a daunting moral and intellectual challenge but one cannot refuse to take up, for the future of the world surely depends on how well we meet it."[3]

2. If a collective action is needed, international law is the place par excellence to regulate such action. In that sense, one must look to international law, as a means of reconciling States' interests, to look for rules and principles that establish States' rights and obligations devised to mitigate or adapt to climate change – which include, first and foremost, the UNFCCC legal complex, composed of the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol, and the 2015 Paris Agreement.

However, in the light of the dismaying results of the several Conference of the Parties under the UNFCCC, there is a growing pressure for international

1 Ban Ki Moon, "Opening Remarks at the 2014 Climate Summit", 23 September 2014, available at https://www.un.org/sg/en/content/sg/speeches/2014-09-23/opening-remarks-2014-climate-summit (last accessed 23 December 2021).

2 Mayer (2018) p. 1.

3 Singer (2016) pp. 225-6.

climate litigation.[4] For instance, the Pacific Island States suggested the use of the advisory competence of the International Court of Justice (ICJ):[5] since international judges are usually sympathetic with climate policy goals, they assume the ICJ will agree that States' obligations under the UNFCCC legal complex have been under-complied. In addition, they rely on the idea that the *auctoritas* of an ICJ's advisory opinion (although deprived of a formal *potestas*) will be persuasive for all States.

Furthermore, the widespread effects of climate change are challenging the very fabric of international law *and* its special regimes. As a result of the expected impact of climate change on the marine environment, a good example of such widespread, cross-regime impact is the law of the sea. For that reason, the United Nations Convention on the Law of the Sea (LOSC) may also be used to identify climate change-related rights and duties of States (e.g., the duty to protect and preserve the marine environment), or to identify possible avenues for addressing climate change effects (e.g., the impact of sea-level rise, or deep-sea carbon storage). Accordingly, another option suggested is the use of the advisory competence of the International Tribunal for the Law of the Sea (ITLOS), in order to obtain an authoritative position on ocean affairs and climate change. For obvious reasons, this option was considered by disappearing island States, to whom climate-driven sea-level rise is an existential threat. Therefore, on 31 October 2021, at the COP21, Antigua and Barbuda and Tuvalu signed a Treaty on the Commission of Small Island Developing States on Climate Change and International Law,[6] with a view of requesting an advisory opinion to the ITLOS.[7] To that end, the treaty authorises the established Commission to request an advisory opinion on climate change, sea-level rise, the protection and preservation of the marine environment, and States' international responsibilities. The advisory opinion has not been requested yet, but clearly such prospect is not a figment of imagination. If cherry-picking is a normal operation of international dispute settlement, the ITLOS option has the advantage of circumventing the difficult majorities in the UN General Assembly. But whereas the ICJ has conquered a sociological and institutional reputation as *the* international court, it is not clear how an advisory opinion delivered by the ITLOS would be perceived by States and other members of the international community. *Amicus curiae* participation, however, could help boost the democratic and aristocratic legitimacy of the ITLOS, thereby helping an eventual advisory opinion to be a landmark in

4 Savaresi (2021) pp. 366-92.

5 See 50th Pacific Islands Forum (which took place on Funafuti, Tuvalu, between 13 and 16 August 2019). Forum Communiqué, § 16.

6 Hereinafter referred to as the 'Treaty on the Commission of Small Island States'.

7 See https://unfccc-cop26.streamworld.de/webcast/antigua-barbuda-tuvalu.

climate change litigation. In fact, climate change is perhaps the best example of an issue of international relevance but transcendent to States. Therefore, in the climate change domain the traditional State-to-State lenses makes less sense than, e.g., in the field of diplomatic relations. One cannot expect the entire world population to be party to a judicial proceeding of any nature, but a request for an advisory opinion on oceans and climate change and States' *ex ante* and *ex post* responsibilities, should be complemented with a broad *amicus curiae* participation, namely non-profit non-governmental organisations (NGOs) and/or academic institutions. Furthermore, the complexity of the science behind climate change needs to be addressed before considering the legal implications under the UNFCCC legal complex and other treaties. Courts have an expertise on legal issues but not on physics or climate science: *amicus curiae*, however, often share scientific credentials that can be used in order to provide for a scientifically solid and supported legal advisory opinion.

3. In this framework, the present article considers the likely request of an advisory opinion to the ITLOS and focuses on the participation of *amicus curiae*. Therefore, in § 2., this article briefly considers the advisory competence of the ITLOS. In § 3., this article mentions the rules on access to the ITLOS. In § 4., this article considers the access of *amicus curiae* to international dispute courts and tribunals. Finally, in § 5., this article assesses the access of *amicus curiae* to the ITLOS, having in mind, in particular, its advisory jurisdiction and the prospect of a request on climate change-related topics.

2. The advisory competence of the ITLOS

4. One of the most interesting innovations of the LOSC is the establishment of a very pragmatic and efficient dispute settlement system. An impressive innovation is the creation of a new international judicial body (the ITLOS), responsible for the enforcement of the LOSC hand in hand with other dispute settlement bodies. To that end, the LOSC provides for an intricated web of rules establishing voluntary and/or compulsory means of dispute settlement. Nonetheless, these latter provisions were created for the settlement of *disputes*, i.e., "a clash of opposing views and demands as to the facts and their legal appraisal"[8] in a case where two parties discuss their rights and duties *vis-à-vis* each other.

More relevant, for the purposes of this article, is the establishment of an advisory jurisdiction. Whereas contentious mechanisms settle disputes, advisory

8 Cassese (2005) p. 292.

opinions only clarify the law applicable: their purpose is not to adjudicate between parties but to enlighten the players in the international community on a particular reading of an international legal rule or principle. As a result, advisory opinions do not have binding effect (*potestas*) on a specific jural relation, but they still carry some institutional *auctoritas* to clarify the law existing and binding upon all States. Therefore, an advisory opinion cannot decide if a particular State is liable for past greenhouse gases (GHG) emissions or establish a causation link between such GHGs emissions and a particular loss, but it can explain *urbi et orbi* under what conditions such liability may arise. In other words, whereas settling disputes corresponds to the private and retrospective function of litigation, advisory opinions are the very definition of the public and prospective function of litigation, by providing clarification on the legal rules and principles applicable to virtually all future disputes regarding, e.g., liability for GHG emissions.[9]

I do not challenge that the primary function of courts is to settle disputes, not to make the law.[10] However, the difference between upstream and downstream production of law is subtle:[11] in practice, "*the distinction between author and interpreter* [*is*] *more a matter of different aspects of the same* [*mental*] *process*".[12] Accordingly, irrespective of one's position regarding the role of courts in the legal system, they do have an important role in unveiling and developing the law[13] – and that role is exercised through advisory opinions also. In fact, if the goal of an advisory opinion is to clarify the law, it may actually be preferable to a contentious case, where the analytical intricacies of the dispute may disturb future readings[14] – and if that is the case, then *amicus curiae* participation (aimed at informing the court on the better readings of climate change law) is particularly interesting. In the field of climate litigation, advisory opinions have also the advantage of allowing more States to bring their views on equal foot, and to allow the court to draft its reasons in more general terms, thus avoiding issues such as, e.g., the establishment of causation links. Furthermore, what explains the unveiling of the rules and principles by courts is not the *potestas* of their decisions but the *auctoritas* that both judgments and advisory opinions share on equal terms:[15] what is relevant, to that end, is the institutional prestige and the extent of its jurisdiction *ratione personae* and *ratione materiae* of the judicial body – and,

9 Lowe (2012) pp. 212-4.

10 See, e.g., Boyle & Chinkin (2007) p. 266; Harrison (2007) p. 284.

11 Oellers-Frahm (2011) p. 1046; Stephan (2011) p. 1587.

12 Dworkin (1998) p. 229.

13 See, *inter alia*, Boyle & Chinkin (2007) 268; Brabandere (2016) pp. 27-8; O'Connel (1970) p. 31; Rocha (2020) pp. 3182-3; Ulfstein (2009) p. 127.

14 See, *inter alia*, Oellers-Frahm (2011) 1046; Rocha (2020) pp. 3184-5.

15 Rocha (2020) pp. 3185-6.

once again, *amicus curiae* participation can boost that institutional reputation, since the ITLOS does not have a position similar to the ICJ in the international judiciary branch, as mentioned before.

5. In the framework of the LOSC, the advisory competence was originally afforded to the Seabed Disputes Chamber of the ITLOS only, but Article 138 of the ITLOS Rules extended it to the ITLOS itself in line with ITLOS' position in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* case,[16] where the ITLOS derived its advisory jurisdiction from Article 21 of the ITLOS Statute – but not without criticism.[17] Furthermore, Article 138 of the ITLOS Rules established the requirements for the request of an advisory opinion, following the terms of the *SRFC* opinion:[18] *(i)* there must be an international agreement establishing the advisory competence of the ITLOS (i.e., the LOSC itself is not a basis for such request); *(ii)* such agreement must relate to the purposes of the LOSC; and *(iii)* the request must be related to a *legal* question under the LOSC.

This means that, contrary to what one could expect, States parties to the LOSC cannot directly request an opinion to the ITLOS: there must be an *ad hoc* agreement between two or more States that specifically entrusts jurisdiction to the ITLOS and explicitly establishes the possibility of requesting an advisory opinion to the ITLOS. That explains why Antigua and Barbuda and Tuvalu, on the sidelines of the COP21, announced the adoption of the Treaty on Small Island States, because this was a necessary step to meet that formal requirement. Moreover, the advisory jurisdiction of the ITLOS can only be triggered if the *legal* question relates to the *purposes of the LOSC*. Climate change and GHGs emissions *per se* do not meet this second requirement, but their effects on the marine environment clearly fall within the purposes of the LOSC. In fact, Article 212 (1) of the LOSC is short but specifically mentions that "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere," thus confirming the intricate link between climate change, GHGs emissions, and the LOSC. As such, the ITLOS can only decide on law of the sea rules, but the interplay between special domains of international law and the need for cross-regime interaction[19] explains why the ITLOS may at least draft some basic notions on climate change and

16 Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) [Advisory Opinion, 2 April 2015] ITLOS Rep 4, §§ 37-69.

17 See, e.g., Lando (2016) p. 441; Ruys & Soete (2016) p. 155.

18 SRFC [2015] § 60.

19 Article 311 of the LOSC.

GHGs emissions when connected to the oceans, such as, *inter alia*, ocean acidification,[20] sea-level rise, or carbon sequestration and capture.

6. Having in mind that inter-State climate litigation is not likely, advisory opinions can help fill a gap and provide a roadmap for States. For example, in the absence of clear guidelines, an advisory opinion may be pivotal during the next Conferences of the Parties of the UNFCCC if it is able to establish the basic tenets of the climate change legal regime and, more specifically, what are States' *ex ante* and *ex post facto* responsibilities under those instruments. In fact, it is dismaying to notice how States do not share a common view on such basic legal regulation. An advisory opinion could at least clarify the law and establish a common ground for discussions[21] – although it would be important, in terms of conservation of institutional reputation, to avoid meddling in highly political or divisive topics.[22]

Although referring to a possible request to the ICJ, Daniel Bodansky points out the "elaboration of more specific criteria of due diligence" that can encourage States "to put forward more ambitious NDCs[23] in the future," thus helping in providing "a common language for discussing NDCs,"[24] a key obligation that is not sufficiently characterised under the Paris Agreement.[25] The same rationale is applicable to the ITLOS. In the same line, an advisory opinion could help to give flesh to principles such as the sustainable development, the common but differentiated responsibilities, or the duty to prevent transboundary harm. If requested, one can expect the ITLOS' advisory opinion will pronounce on more specific issues related to the oceans, such us geoengineering, carbon capture and storage, ocean acidification, or sea level rise.

If requested, an advisory opinion may also help circumvent some of the difficulties of international climate litigation, such as, for instance, issues of shared responsibility and, thus, of standing before international bodies. Moreover, the special *auctoritas* of an advisory opinion and the growing public perception of the importance of tackling climate change effects can help put pressure on States to reach a stronger agreement.[26] Even if that pressure is not successful, an authoritative statement by the ITLOS could help, as Daniel Bodansky referred

20 Boyle (2012) p. 832.

21 Bodansky (2017) p. 706.

22 Bodansky (2017) p. 711.

23 I.e., nationally determined contributions.

24 Bodansky (2017) p. 709.

25 Bodansky (2016) pp. 146-7.

26 Bodansky, Brunnée & Rajamani (2017) p. 289.

with regards to the ICJ, "to shape and stabilize normative expectations among the wider set of public and private actors engaged in climate-related work."[27]

Finally, an advisory opinion could be used as a guideline for future decisions. That is particularly important in the light of the current context of de-centralised climate change litigation,[28] mostly before the domestic level and special international bodies ao so, but also in terms of guidance for States when designing domestic policies and regulation: since international courts "occupy the large space in which global public consciousness is formed," they can play a special role in endorsing and shaping global values.[29]

7. Once instituted, an advisory proceeding before the ITLOS may be open to *amicus curiae*, who may bring their views on climate change and its effects in the marine environment. To understand if that openness exists, the next sections refer to the general rules on access to the ITLOS and, more specifically, to the rules on the access of *amicus curiae* to the ITLOS and other international judicial bodies.

3. The rules on access to the ITLOS

8. Access to the ITLOS is governed by Article 291 of the LOSC and Articles 20 and 37 of the ITLOS Statute. Pursuant to these provisions, "[a]ll dispute settlement procedures (…) shall be open to States Parties;"[30] the same procedures "shall be open to entities other than States Parties only as specifically provided for in [the LOSC]."[31] However, Article 291 of the LOSC refers only to *general* intervention pursuant to *Part XV* of the LOSC, but special cases exist where other entities are *ipso facto* admitted to dispute settlement proceedings under the LOSC: that is the case of the standing of non-State actors in deep seabed mining dispute settlement[32] and in prompt release proceedings. Plus, pursuant to Article 20 (2) of the ITLOS Statute, the ITLOS is open to other entities "in any case submitted pursuant to any agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the case:" under this provision, access to the ITLOS is open to an undefined plethora of potential entities.[33]

27 Bodansky (2017) p. 692.

28 Bodansky & Rajamani (2018) p. 184.

29 Sands (2016) p. 26.

30 Article 291 (1) of the LOSC and Article 20 (1) of the ITLOS Statute.

31 Article 291 (2) of the LOSC.

32 Articles 20 (2) and 37 of the ITLOS Statute.

33 Eiriksson (2000) p. 115; Tanaka (2019) p. 515; Treves (2017) p. 1881; Wolfrum (2008) pp. 143-5.

As a result, the LOSC and the ITLOS Statute do not follow the matrix of State monopoly enshrined in Article 34 of the ICJ Statute, since it is actually open to other entities. *Per se*, this fact already makes the ITLOS more representative of the international community than the ICJ,[34] which is important even for judicial bodies that rely on procedural legitimacy and acceptance by the recipients of their decisions. Nonetheless, it is far from clear what entities are included in the category of "other than States Parties."

Two minimalistic readings of this concept are possible: one option is to identify these entities as being the Authority, the Enterprise, and the non-State actors referred to in Articles 153 (2) (b) and 187 of the LOSC;[35] the second option is to conceive 'other entities' as being States that are not parties to the LOSC. Both are qualified as minimalistic, since they do not open access to the ITLOS in a liberal way, but rather to entities that fulfil the requirements of rather "being specifically identified in a *lex specialis* provision of the LOSC" or "being a State, although not party to the LOSC." On the opposite side, a maximalist reading would include any entity regarded by the international legal system as a legal person – including international organisations and private State actors such as NGOs.

Considering the semantic element of these provisions and bearing in mind that the wording of a provision is a distinctive interpretative element under Article 31 (1) of the 1969 Vienna Convention on the Law of the Treaties, an ultra-liberal conception of participation of non-State actors such as NGOs and academic institutions does not seem possible to advocate under the law of the sea rules. At most, what seems to be implied in Articles 291 of the LOSC and 20 and 37 of the ITLOS Statute is that the ITLOS is open to non-State actors, and particularly that the entities referred to in Articles 153 (2) (b) and 187 of the LOSC have access to the SDC;[36] that private State actors have a liberal right to submit applications for the prompt release of vessels and crews on behalf of their flag States;[37] that other States (which are not parties to the LOSC) might have access to the LOSC; and possibly, that any entity (including non-State actors) referred to in an agreement conferring jurisdiction to the LOSC might also have access to this court pursuant to the provisions of this special treaty.

As a result, since NGOs are technically qualified as a private entity constituted under the domestic law of a specific State and considering that they are not in any of the qualities mentioned in the previous paragraph, it is just logical to conclude that they do not have access to the ITLOS under Articles 291 of

34 Rao (2012) p. 1729.

35 Eiriksson (2000) p. 115.

36 Eiriksson (2000) p. 115; Tanaka (2019) p. 515; Treves (2017) p. 1880; Wolfrum (2008) pp. 143-5.

37 Rocha (2021) pp. 118-123.

the LOSC and 20 and 37 of the ITLOS Statute. But the apartheid of non-State actors from the ITLOS must have a consequence in terms of access as *amici curiae*, for it may be a means of filling this democratic deficit.

4. The access of *amicus curiae* to international courts and tribunals

9. Intervention mentioned in Articles 291 of the LOSC and 20 and 37 of the ITLOS Statute relates only to the possibility of being a party in the proceedings, not to the right of intervention as *amicus curiae*.[38] Even a minimalistic interpretation of those provisions says nothing about the right of non-State actors – as of any other entity – to submit their comments or views for the proper administration of justice. As a result, although the judicial machinery established by the LOSC was crafted in terms of State-to-State disputes, and although access of non-State actors to the ITLOS is very limited, that is not incompatible with enhanced non-State actors intervention as *amicus curiae* in a climate change-related advisory proceeding. Quite the opposite, a climate change-related proceeding is the very example of a case where *amici curiae* must be admitted in the interest of boosting the quality of the ITLOS' decision and providing it with reliable scientific data.

In fact, the purpose of Articles 291 of the LOSC and 20 and 37 of the ITLOS Statute is only to determine who can make claims before the ITLOS, not who can be invited or allowed to be heard by the court. An important difference between (third-)party intervention and *amicus curiae* needs to be highlighted. (Third-)Parties intervene in proceedings in order to protect an interest of their own – or their nationals', as might happen with States exercising diplomatic or flag State protection, or whenever they act on procedural replacement of their nationals under the operation secondary rules –, a right they hold and that allegedly has been infringed. Eventually, (third-)parties will obtain a gain or suffer a loss.[39] As a consequence, pursuant to Article 31 (1) of the ITLOS Statute, the entities that can request to intervene under this status are those who "[have] an interest of a legal nature which may be affected by the decision in the dispute."

For their part, *amici curiae* participate in the same proceedings to protect interests transcendent to them, with a view to promote the proper administration of justice, i.e., *amici curiae* have no interest of themselves at stake and no subjective right or duty held by them is being discussed, which justifies why

38 Regarding the different status, see Beyerlin (2001) p. 357; Dolidze (2013) p. 399. However, the boundaries between *amici curiae* and other types of participation – before both domestic and international bodies – are not always straightforward. [Shelton (1994) p. 611]

39 Beyerlin (2001) p. 363; Eckersley (2007) p. 340; Mackenzie (2005) p. 297; Shelton (1994) pp. 611-2.

amici curiae cannot make claims, control the course of the proceedings, or offer or examine witnesses or general evidence.[40] The reason why *amici curiae* might be invited or allowed to submit their views to the court is solely their presumed knowledge of facts, of the underlying issue at stake, or of the law applicable to the dispute, irrespective of not being parties to the dispute.[41] For instance, in a climate change-related case, the intervention of an NGO or an academic institution as *amicus curiae* is not meant to protect the subjective rights of that NGO or academic institution: it is rather a means of allowing those experts on the science behind climate change, or on international climate change law, to bring in their views and to better inform the ITLOS. This explains why third-parties have a *legal right* of intervention,[42] whereas *amicus curiae* might only be invited or allowed by the court to participate in the proceedings, deciding with broad discretion (unless, of course, a treaty-based rule specifically enshrines this right).[43] This solution is in line with the UNIDROIT's *Principles of Transnational Civil Procedure*, where it is set forth that "[w]ritten submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission."[44]

10. In international law, the practice of resorting to *amici curiae* briefs has been nurtured in the framework of human rights bodies and criminal courts,[45] where a specific provision of the relevant treaties squares the participation of the *amici curiae*. The European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights (IACHR) are good examples of such practice in the human rights field, whilst the International Criminal Court (ICC) is the best example in the field of international criminal law.

In the framework of the ECHR, the practice began when the European Court of Human Rights (ECtHR) realised that the effects of its decisions were having impact beyond the legal sphere of States Parties.[46] As a result, nowadays, Article 36 (2) of the ECHR explicitly enshrines the possibility of the President of the ECtHR, "in the interest of the proper administration of justice," to invite a third entity "to submit written comments or take part in hearings." This option was devised for cases where there is a systemic concern that goes beyond the

40 Eckersley (2007) p. 340; Lindblom (2005) p. 303; Shelton (1994) p. 612.

41 See also Hollis (2002) p. 238; Shelton (1994) pp. 611 & 616.

42 Although Article 31 of the ITLOS Statute subjects this right to ITLOS' discretion.

43 Beyerlin (2001) p. 363; Mackenzie (2005) p. 297.

44 See § 13.

45 See generally Mackenzie (2005) p. 297.

46 Dolidze (2015) p. 853.

parties to a particular case. Thus, even if no legal entitlement to submit their comments is conferred, NGOs have been very keen to submit their views on several cases before the ECtHR. For its part, the Inter-American Court of Human Rights (IACtHR) has developed a practice of admitting *amicus curiae* participation despite the absence of any reference to it on the IACHR or on its Rules of Procedure.[47] After an amendment in 2009, Article 44 (1) of the ACtHR Rules of Procedure establishes that "[a]ny person or institution seeking to act as *amicus curiae* may submit a brief to the Tribunal."

In the case of the ICC, Article 103 (1) of its Rules of Procedure establishes that '[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.'[48] The drafting of this provision is the broadest, since it includes both the initiative of the ICC to ask for *amicus curiae* intervention and these latter's initiative of asking for permission to intervene in the proceedings. Not surprisingly, this procedure has been used often by NGOs.

11. With respect to treaties where no such reference is made (e.g., the LOSC), one cannot infer from the silence of the treaty that the participation of *amicus curiae* is excluded. Quite the opposite, practice suggests that even with respect to these cases, *amicus curiae* participation is not uncommon. For example, the WTO Appellate Body accepted in the *Shrimp-Turtle* case the NGOs' participation as *amici curiae*: considering that the panel has authority to "'seek' information and technical advice from 'any individual or body' it may consider appropriate," it concluded that it is "within the province and the authority of a panel" to "accept or reject any information or advice which it may have sought and received."[49] Thus, even though disputes before the WTO are formally inter-State, the Appellate Body acknowledged that they are not neutral to non-State actors and thus provided them a special role in the system.[50]

For its part, the ICJ was the international judicial body less open to *amici curiae* participation, but the apartheid of non-State actors from dispute settlement has been criticised by scholars for it excludes "active members of the

47 Lindblom (2005) p. 355; Shelton (1994) p. 638.

48 See also Article 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Article 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Article 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, or Rule 33 of the Internal Rules of the Extraordinary Chambers of the Courts of Cambodia.

49 WTO, United States: Import Prohibition of Certain Shrimp and Shrimp Products (12 October 1998) WT/DS58/AB/R, § 104.

50 Orrego Vicuña (2001) p. 63.

'international civil society'."[51] As such, in 2004, the ICJ adopted Practice Direction XII, according to which briefs submitted by *amici curiae* are not to be considered as part of the case file, but can be used by the parties to the dispute in their written or oral statements, as publications in the public domain. In this sense, this opened a door for a broader *amici curiae* intervention in proceedings before the ICJ.

The result, if one can sum up in a few words, is that the practice of inviting or authorising the participation of *amici curiae* has become a widespread phenomenon in current international law, despite the lack of a pervasive acknowledgment of their role by States.[52] In the case of human rights and international criminal courts – where the role of *amici curiae* was first developed –, the early emergence of *amicus curiae* can be explained by the fact that in these cases individuals are more likely to be subjected to States' *majestas*, and thus to be in a position of weakness *vis-à-vis* States' machinery. In other international law domains (such as the law of the sea or climate change law), this weakness is not as notorious, and therefore *amicus curiae* participation is meant to promote the legitimacy of the adjudicating body's decision, the protection of the broadest set of interests possible, and the delivery of the best and fairest decision possible.

5. The access of *amicus curiae* to the ITLOS. In particular, the advisory opinions and in climate change-related issues

12. In the law of the sea domain, Article 84 of the ITLOS Rules sets forth a broader *amici curiae* participation, including intergovernmental organisations, but not non-State actors such as NGOs or academic institutions.[53] Nonetheless, in three cases submitted before the ITLOS, the question of *amicus curiae* was discussed.

The first case was the advisory opinion regarding the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*. In this case, the ITLOS asked the International Union for the Conservation of Nature and Natural Resources to submit a brief; and received a request from Greenpeace and the WWF to participate as *amici curiae*, but "decided not to grant that request" to these latter.[54] At least implicit in the ITLOS decision was

51 Dupuy (2012) p. 590; Jennings (1995) p. 504.

52 Dolidze (2013) p. 381 & Dolidze (2015) p. 877; Hollis (2002) p. 243.

53 Beyerlin (2001) p. 364; Bartholomeusz (2005) pp. 229-31; Dolidze (2013) p. 404.

54 Responsibilities and Obligations of States Sponsoring Persons and Activities with respect to Activities in the Area [Advisory Opinion, 1 February 2011] ITLOS Rep 10, § 14.

the idea that it *could* have granted that request, and thereby this decision represented a 'cautious welcome' to *amicus curiae* before the ITLOS.[55]

In the *Arctic Sunrise* case, Greenpeace also asked to submit its views on the factual and legal issues of the dispute.[56] The dispute was (and could have only been) between States (i.e., the Netherlands and the Russian Federation), but, in contrast with the former case, Greenpeace was involved in the facts of the dispute, which excluded its impartiality and distance towards the case. For that reason, the ITLOS consulted the parties to the dispute and decided not to accept the participation of Greenpeace as *amicus curiae*, although some of its members were heard as witnesses.[57] What the ITLOS missed was that whereas witnesses and experts can only make comments on the questions posed to them, *amicus curiae* can submit their opinion on all legal points they consider relevant,[58] and therefore the status of witness and *amicus curiae* are not interchangeable. In any case, implicit in the ITLOS' decision was still the idea that *amicus curiae* could have participated in the proceedings had the ITLOS so authorised and, in that case, Greenpeace actually had blind spots that could have not been ignored.

Finally, in the *SRFC* case, WWF asked again to submit its views on the case as *amicus curiae*. The ITLOS did not accept it to be participant in the proceedings, but notified the parties in the case and publicised WWF's views under the formal qualification of *amicus curiae*.[59] In the end, the incorporation of the WWF brief was subtle and tangential, perhaps because permanent international courts are prone to satisfy their clientele (the States) and are not yet ready to accept unreserved or broad *amicus curiae* participation.[60] But less implicitly, the ITLOS still acknowledged that non-State actors *can* participate as *amici curiae* in cases before it, provided that they are invited or authorised.

13. But even if the LOSC and the ITLOS' practice are not particularly or explicitly receptive to the participation of *amici curiae*, there are solid grounds to substantiate their participation and good policy reasons to uphold this solution.[61]

To begin with, two approaches have been used by courts to frame *amici curiae* participation, which could be translated into the LOSC's dispute settlement

55 Dolidze (2013) pp. 381 & 411.

56 Arctic Sunrise (Netherlands v. Russian Federation) (Provisional Measures) [Order, 22 November 2013] ITLOS Rep 230, § 15.

57 Idem, § 18.

58 Shelton (1994) p. 611.

59 SRFC [2015] §§ 13, 15, 23 & 27.

60 Beyerlin (2001) p. 367.

61 See, in general, Papanicolopulu & Rocha (2020) pp. 193-208.

system. One approach – developed by domestic courts[62] – is to derive the competence to invite or authorise *amicus curiae* participation in a general principle of law,[63] which is also applicable in international law under Article 38 (1) (c) of the ICJ Statute. A different approach – more often followed by international bodies – is to infer this competence from an implicit consensus of the States parties to a treaty that such implied competence of the court exists.[64] According to this approach, the power to invite or authorise *amicus curiae* briefs derives from the jurisdiction of the court itself, and it is conceived as a means available to the court to obtain better insights regarding facts and the law applicable and to deliver a better judgment. Despite the silence of the LOSC, according to this approach, the ITLOS always has the discretionary authority to invite or authorise non-State actors to participate as *amici curiae*.

14. On the other hand, in terms of policy, there are good reasons that justify *amicus curiae* participation, especially in a climate change-related case.

First, only seldom is international litigation restricted to reciprocal rights or duties of States.[65] For instance, in most cases, States do not possess the rights and/or duties conferred under international legal rules. The Vattelian premise, although appealing, is also misleading: in the international legal system, there is a system of separate "ownership of the claim at the level of primary and secondary law between two subjects,"[66] which entails that individuals may be the rights-holders or duty-bearers at the level of primary law but, in case of infringement, States may have the exclusive right of intervention at the level of secondary law.[67] In a climate change-related case, the issues at stake affect all humankind and imply profound change on our daily life as individuals. As such, one cannot say that the primary rights and duties at stake are confined to inter-State relations: quite the contrary, States only act at the level of secondary rules. However, if one cannot bring all individuals into the proceedings, at least *amici curiae* intervention can help closing the gap between the ITLOS and the individuals that are ultimately affected by its advisory opinion. Furthermore, even cases of, say, climate change effects in the oceans, or the implications of sea-level rise in the demarcation of maritime boundaries have a downstream

62 Hollis (2002) p. 238.

63 Hollis (2002) p. 238.

64 Hollis (2002) p. 239. See also Shrimp-Turtle [1998] § 110; WTO, United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (10 May 2000) WT/DS138/AB/R, § 39.

65 Shelton (1994) pp. 614-5.

66 Peters (2016) pp. 171-72. See also Roucounas (2002) pp. 113 & 347–48.

67 Rocha (2021) pp. 43-4.

impact on local communities and individuals. In these cases, the assessment of the special circumstances that ought to be weighed by the ITLOS might be better substantiated if *amicus curiae* from local communities bring their insights into the proceedings.

Second, but connected with this last argument, courts may have a democratic legitimacy by adjudicating "on behalf of the people," but they suffer from a democratic deficit when pronouncing on polycentric issues such as climate change.[68] Even if an advisory opinion proceeding allows all States to submit their views, there is still a gap between the decision-maker and the affected individuals. In these cases, bringing in *amici curiae* is a means of closing the gap between the ITLOS and the individuals that are ultimately affected by such decision or advisory opinion. In fact, the main concern with the absence of non-State actors in international dispute settlement is the under-representation of interests, rather because these interests are autonomous and not represented in the international sphere by States, or because their representation by a particular State is abated by political and diplomatic constraints. Allowing *amici curiae* access to the advisory proceedings of the ITLOS helps mitigate a problem of agency,[69] providing for a palliative effect and a relatively weak form of legitimacy based on transparency and public participation.[70]

Third, the procedural strategy of States might make them refrain from raising specific legal issues, since they might fear damaging diplomatic relations or retaliation in future proceedings; or they might just consider a specific point to be tangential within the general line of arguments.[71] For example, in most cases States ponder the chances that the same arguments will be used in future proceedings, and how and if they can be used against their interests.[72] For their part, *amici curiae* are freer to submit all points of law they consider appropriate for the better solution of the dispute: evidence suggests that non-State actors do not stand behind prior claims before international bodies, and do not have to fear future proceedings against them,[73] and they are more likely to withstand entrenched economic interests, and less likely to be captured by these interests.[74] This is a particularly important point, since short-termism of States' policymakers turn them more prone to the economic and social impact of climate policies. For that reason, it is important to demarcate the boundary of what is an

68 Bergkamp & Hanekamp (2015) p. 103; Bodansky (2017) p. 701.

69 Stephan (2011) pp. 1623-4.

70 Bodansky (1999) p. 619; Lindblom (2005) pp. 32-5; Peters (2009) p. 153.

71 Shelton (1994) pp. 611 & 615; Stephan (2011) 1641-2.

72 Stephan (2011) pp. 1641-2.

73 Stephan (2011) p. 1642.

74 Stephan (2011) p. 1617.

NGO and/or academic institution for this purpose resorting to the binary code 'non-profit' vs. 'for-profit' entities.

Finally, international bodies often face some logistic problems that might affect the quality of their decisions: an ever-growing case workload and scarce time of judges and law clerks to substantiate and write down decisions.[75] *Amicus curiae* briefs are a possible means of providing courts with free and possibly high-quality legal (and non-legal) insights on the dispute.[76] Evidence from human rights bodies suggests that *amicus curiae* participation is a very useful tool for courts to deliver a well-reasoned judgment,[77] meaning that *amicus curiae* participation is more in the interest of the court rather than of the *amicus* itself.[78] If this holds true for general litigation, the complexity of the science behind climate change justifies the *amici curiae* participation, since courts benefit with the contribution of NGOs and/or academic institutions that translate the complexity of scientific formulae and reasonings into simpler and clear-cut statements. In fact, the most obvious shortcoming of climate science is the necessarily technical speech, which hampers understanding by citizens, policymakers, and judges, leading to their alienation from the scientific ambience. However, one cannot expect judgments and advisory opinions to dwarf scientific knowledge: they cannot be 'a-scientific' but rather absorb and rely on empirical and scientific evidence.[79] Accordingly, the enhanced legitimacy of the ITLOS' decision will derive not only from a democratic argument of public participation, but also (and mostly) from the aristocratic expertise of the *amici curiae*.[80] That should not surprise: the science of climate change is very complex and hardly understood by laymen. This entails that it is difficult for the ITLOS and any judicial body to find and establish scientific facts that can be used to determine the legal implications under the UNFCCC legal complex; and accordingly, it is also difficult to translate and use such scientific facts in an understandable legal advisory opinion. *Amicus curiae* (NGOs and/or academic institutions) may be valuable in that task, by finding and providing reliable science to the ITLOS; and eventually translating such complexity into a clear, correct, reliable, and scientifically verified statement that can be used for legal purposes. This is not a minor remark: if an international court should avoid politically divisive topics, or making political statements, then "probably the single most important thing it could do – is to settle the scientific

75 Shelton (1994) p. 616.

76 Shelton (1994) p. 618; Wedgwood (1999) p. 33.

77 Lindblom (2005) p. 30; Shelton (1994) p. 40.

78 Bartholomeusz (2005) p. 274.

79 See, *inter alia*, Garcia (2007) p. 25.

80 Papanicolopulu & Rocha (2020) p. 197.

dispute."[81] But if judges are not scientists and have no expertise in climate science, the authority they have to establish facts may only be derived from the procedural intervention of *amici curiae*, namely NGOs and/or academic institutions who validate the conclusions drawn by the UN Intergovernmental Panel on Climate Change.

15. Despite the increasing participation of non-State actors under the umbrella of *amicus curiae*, some scholars advocate against its dissemination, being mostly concerned with the possible erosion of States' sovereignty.[82] Nevertheless, other concerns have been raised and should be borne in mind when framing the *amicus curiae* participation in the eventual climate change-related advisory proceeding before the ITLOS.

First, authors mention that legitimacy is a double-edged sword: *amici curiae* enlarge the circle of participants to accommodate more insights from civil society, but if every single person, NGO, or academic institution could submit its opinion on the facts or the law applicable, then "few members of the public would as a practical matter be able to participate."[83] Therefore, for practical reasons *amicus curiae* participation must be confined to a limited number of *amici*. This means that *amicus curiae* participation is ultimately a euphemism:[84] what is at stake is not the participation of the general public, but rather of specific entities (notably, NGOs)[85] which are not mandated to represent a people or an interest. In that sense, there is some truth in the idea that NGOs and/or academic institutions, when participating as *amici curiae* in judicial proceedings, they also act as 'Ombudsmen' of global values[86] as a result of their aristocratic legitimacy, i.e., based on knowledge with respect to the object of the decision, not their democratic legitimacy, which hardly exists.

Second, it follows then that a selection method must be established; but what makes one particular NGO or non-State actor more suitable to submit its views? States at least claim to represent their citizens, but NGOs ultimately answer to their associates.[87] If a clear-cut answer is not given, the legitimacy concerns will persist: for example, the ITLOS will need to explain why a particular NGO or academic institution is accepted to the proceedings whilst others are

81 Sands (n 2016) p. 29.

82 Charnovitz (2000) pp. 210-1.

83 Bodansky (1999) p. 619.

84 Bodansky (1999) p. 619.

85 For these entities are supposed to "represent the global civil society." [Peters (2009) pp. 219 & 231. See also Lindblom (2005) p. 17; Roucounas (2002) p. 100]

86 Tolbert (1991) p. 100.

87 Wedgwood (1999) pp. 28-9.

not. But the problem is not only in terms of relations among NGOs and academic institutions, but also between interests that ought not to be over- or under-represented. In fact, the complexity of climate change means also that adaptation and mitigation policies have a very high social and economic cost: that is the reason why I have metaphorically qualified such policies as the 'Labours of Hercules'. In that context, the ITLOS needs to consider how the different admitted *amici curiae* represent the different interest relevant to the case, including an environmental and climate perspective, but also the different perspectives on social, economic, cultural, and political impacts of adaptation and mitigation policies. This is related with a third reason, because participation of *amicus curiae* might entail a problem of Babel: the production of excessive information and noise that will be unhelpful for the delivery of good and reasonable decision (although the ECtHR and the WTO experiences are evidence that liberal participation of *amicus curiae* does not necessarily entail an unmanageable situation for the court).[88]

Finally, although evidence suggests that non-State actors (especially NGOs) are less likely to be captured by economic interests, they can actually be captured by a specific interest (economic or not) and still work as "new global potentates" which exert more pressure than some States,[89] and thus contribute for an unbalanced decision at the expense of general welfare:[90] these *amici curiae* can be "powerful pressure groups which besiege [States and international organisations] today with the support of mass media."[91] Some caution must exist to avoid their over-representation before the ITLOS.

16. This being said, the ITLOS has the discretion to invite or authorise *amicus curiae* participation in advisory proceedings. The fact that the LOSC, the ITLOS Statute or the ITLOS Rules are silent on this topic is not a definitive argument against this possibility: the silence means only that there is no entitlement to be accepted as *amicus curiae*, but the ITLOS has an implied power, deriving from its authority to decide the case, to authorise or invite *amicus curiae* to participate, aimed at the proper administration of the law of the sea justice (including, and especially, when related with climate change issues). If necessary, Article 82 of the ITLOS Rules could be used as the source of the ITLOS' authority to invite or authorise *amicus curiae* briefs from non-State actors.

Amici curiae participation should be excluded from cases where *only* reciprocal rights and duties of the parties to the dispute are at stake; only where

88 Orrego Vicuña (2001) p. 64.

89 Spiro (1996) p. 957.

90 With a close argument, see Stephan (2011) p. 1617.

91 Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion, 8 July 1996] ICJ Rep 226, 'Separate Opinion of Judge Guillaume', § 2.

the legal discussion involves interests that transcend the reciprocal jural relation between the parties to the dispute should *amici curiae* be allowed or invited to submit their views. In any case, it is not difficult to imagine that in most disputes an interest transcendent to the pure inter-State relation will exist, be it the protection of human dignity or subjective rights, the protection and preservation of the marine environment, or protection of local communities. However, that is not the case of an *advisory opinion* on *climate change obligations and the oceans*. To begin with, the very nature of an advisory opinion highly suggests that the issue at stake is not confined to the interests of the States parties, because there are no parties to the proceedings. The requirements established in Article 138 of the ITLOS Rules do not refer this explicitly, but advisory opinions make more sense if their object is a systemic question that may affect the entire international community. In this case, the participation of *amicus curiae* is even more pressing, for they may bring into the proceedings an alternative, non-State view of that issue. Furthermore, we all understand that the traditional matrix rooted in the Vattelian premise is in crisis, meaning that States are no longer the sole representatives in the international legal arena of all interests. Therefore, there may be requests for advisory opinion or disputes submitted before the ITLOS where the issues at stake transcend States' interests and States' capacity to represent those interests. If so, *amicus curiae* participation is a mechanism of bringing into the proceedings insights from all relevant interests and players: if all these interests are not represented, then the ITLOS – as any court or tribunal – will have access only to a fragment of the problem of life being discussed. Climate change is not an inter-State problem: it is rather a global concern that will affect every single individual on Earth, including unborn, future generations. For that reason, this is a case where the participation of NGOs or academic institutions as *amici curiae* is appropriate to better inform the ITLOS.

Furthermore, a core concern to bear in mind is procedural: if the floodgates were open and all human beings and corporations could intervene in the proceedings, these proceedings would be unmanageable.[92] Thereby, *amicus curiae* participation must be limited to those entities – e.g., NGOs, academic institutions, or local communities – that *(i)* request or are invited to participate in the proceedings, *(ii)* demonstrate why their insights will be relevant for the proper administration of justice, and *(iii)* seek to pursue specific interests on behalf of a collection of persons. As such, the ITLOS should always keep the power to decline participation of *amici curiae* in the proceedings if it is not convinced that it will enhance the proper administration of justice, if it distrusts the nature or

92 See generally Shelton (1994) p. 624.

competence of the *amici*, or if it considers that the interests at stake in the dispute are sufficiently represented by the parties to it.[93]

17. Framed in these terms, the *amicus curiae* participation cannot be configured as a right to be heard;[94] the sole rights assigned to non-State actors are the *right to request* and the *right to reply to an invitation to submit a brief*. Furthermore, being unable to control the path of the proceedings, or to submit their own claims, the status of the *amici* is weaker than any procedural right considered before. However, in a legal society concerned with the legitimacy of its institutions, one has to endorse a presumption in favour of submission of *amici curiae* briefs, implying at least that judges have a special duty to provide reasons for the rejection of their briefs.[95]

6. Conclusion

18. International climate change litigation is growing, but its use and effects are still very limited. In particular, despite the pressure from some small islands States, it has not been possible to resort to the ICJ under its contentious or advisory jurisdiction.

In that light, it has been suggested that the ITLOS may be an alternative avenue to seek international climate justice. A request to such advisory opinion looks very likely. One cannot ignore that the ITLOS can only pronounce on law of the sea issues, but climate change and the law of the sea are not separate planets: the impact of climate change at sea is concerning and well documented. This means that the ITLOS may take a position on law of the sea rules which are intertwined with climate change topics. Also, one cannot ignore that the wording of the LOSC is not clear in providing advisory jurisdiction to the ITLOS full composition, but the *SRFC* precedent emboldens future attempts of requesting an advisory opinion to the ITLOS.

The purpose of the present article is to demonstrate that *amici curiae* such as NGOs and academic institutions can be admitted into the proceedings in order to help and guide the ITLOS delivering a fair and balanced advisory opinion. The wording is not clear in admitting the access of *amici curiae* but the practice of the ITLOS, although slim, is straightforward and liberal with respect to cases where the questions at stake transcend States' interests: climate change is the very definition of one such case. Admission of *amici curiae* must be cautious but

93 Shelton (1994) p. 627.

94 Peters (2009) p. 231.

95 Peters (2009) p. 232.

is justified on several grounds (especially in a case at the intersection between the law of the sea and climate change): in short terms, it enhances the aristocratic legitimacy (by bringing in technical expertise on climate science) and the democratic legitimacy of the ITLOS (by shortening the gap between the court and the individuals affected by climate change) – therefore strengthening the institutional position and reputation of the ITLOS and the effective impact of the advisory opinion delivered.

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