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The International Tribunal for the Law of the Sea and the Request for an Advisory Opinion on Climate Change and its Effects: Potential Challenges and Opportunities

Julia Cirne Lima Weston

Ph.D. Candidate and Researcher at Católica Research Centre for the Future of Law (fully financed by the Portuguese Foundation for Science and Technology – Fundação para a Ciência e a Tecnologia – FCT)
ORCID No. 0000-0003-1747-4520

SUMMARY

Introduction

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS) (Commission of Small Island States on Climate Change and International Law, 2022). In its request, the COSIS asks the ITLOS to clarify the obligations of States Parties to the United Nations Convention on the Law of the Sea (UNCLOS) concerning the control and prevention of marine pollution and the preservation of the marine environment, in relation to the "deleterious effects of climate change" (Commission of Small Island States on Climate Change and International Law, 2022). States Parties were then invited by the ITLOS, in accordance with its rules, to submit written statements concerning the advisory opinion by May 2023 (International Tribunal for the Law of the Sea, 2022). 31 written statements from States Parties were received timely, whereas three were received after the deadline expired (International Tribunal for the Law of the Sea, 2023c). The written statements issued by States Parties will be considered by the current article in its analysis. Nevertheless, it is important to highlight that the current advisory opinion is by no means the only ongoing issue concerning climate change at this point. The International Law Commission (ILC) has been debating sea-level rise, a consequence of climate change, since 2018 (United Nations General Assembly, 2018). In a more recent development, 105 States endorsed the request for an advisory opinion to the International Court of Justice (ICJ) on the obligations of States concerning climate change (United Nations General Assembly, 2023). Climate litigation before domestic and regional courts has also gained momentum in the international scenario (United Nations Environmental Programme, 2023). In view of this apparent climate change momentum in Public International Law, it is ever as important to understand the ITLOS' jurisdictional limits and to reflect on the potential effects this advisory opinion might have, to verify the Tribunal' potential role in climate change-related case law. In order to perform this analysis, the current article will be structured as follows. First, it will contextualise the ITLOS' jurisdiction and its limits, especially its advisory jurisdiction. It will then move on to analysing the recent advisory opinion and its basis, as well as the main challenges it poses the Tribunal. Last, by analysing the 34 written statements submitted by States Parties to the UNCLOS in reaction to the advisory opinion, it will seek to identify the particular challenges the ITLOS will have to face and the opportunities it will have to determine its position as a potential forum for more advisory opinions and/or proceedings on climate issues to be submitted to.

The UNCLOS Dispute Settlement System and the International Tribunal for the Law of the Sea

The UNCLOS, also known as the "Constitution for the Oceans" (Tommy Koh, 1982), was revolutionary of its inception when it proposed, unlike the general norm in Public International Law, a compulsory dispute settlement mechanism (Karaman, 2012). It is no surprise that the Convention's dispute settlement system is, in fact, considered one of its greatest achievements (Karaman, 2012). Indeed, Article 286 of the UNCLOS establishes that any dispute concerning the interpretation or application of the UNCLOS shall be submitted to a court or tribunal with jurisdiction under Part XV of the Convention, at the request of any party, when it is not settled by other peaceful means (United Nations, 1982, Art. 286).

In order to define "peaceful means" (United Nations, 1982, Art. 279), the UNCLOS refers to the Charter of the United Nations' Article 33(1), which includes "[…] negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements […]" (United Nations, 1945, Art. 33). The mention of "other peaceful means" reflects the negotiators' attempt to strike a balance between judicial settlement and other means of settlement, subject to the choice of the parties (Romano, 2001, 320). Should those other peaceful means fail to settle a dispute, a court or tribunal will have jurisdiction over it, should it be referred by any of its parties (United Nations, 1982, Art. 286). The way this works is well-architected. Whenever a State has signed, ratified, or acceded to the UNCLOS, it will be free to choose, at any point in time, through a declaration, one or more of the dispute settlement fora listed by the Convention. Those include the ITLOS, the International Court of Justice (ICJ) or an arbitral tribunal instituted as per UNCLOS rules (United Nations, 1982, Art. 287). If two parties have chosen the same dispute settlement forum, the dispute will be referred to that specific court or tribunal (United Nations, 1982, Art. 287). However, if both parties have not chosen the same means of settlement, the dispute will be submitted to arbitration, unless both agree otherwise (United Nations, 1982, Art. 287).

All things considered, where does the ITLOS come into play? The ITLOS was a creation of the UNCLOS, triggered especially by a political need at the time of its negotiations: a particular distrust towards the ICJ as a dispute settlement forum arose amongst developing States (Karaman, 2012, p. 4). After all, the UN Conference which originated the UNCLOS, unlike its predecessors, was attended by 165 States, the largest number of States out of all Law of the Sea Conferences, most of them developing States (Rosenne/Gebhard, 2008). The ITLOS was then created as a specialised body, which only hears Law of the

Sea cases and as an institution that is more representative of the international community as a whole, since its geographical requirements make it such that most of its judges come from developing State backgrounds (Wasum-Rainer/ /Schlegel, 2005, p. 203-204). With this innovation, it is unsurprising that, at the time of writing of this article, out of the 59 States who have issued declarations considering the choice of dispute settlement forum according to Article 287, 43 have recognised the ITLOS as at least one of their accepted dispute settlement fora (United Nations Treaty Collection, 2023). Out of those 43, 25 are developing States (United Nations Treaty Collection, 2023). This shows a majority wish amongst those who have issued declarations, to accept the jurisdiction of the ITLOS. It is, thus, undeniable that the ITLOS is to have immense relevance when it comes to compulsory dispute settlement.

Concerning the ITLOS' jurisdiction, Article 21 of the Statute of the Tribunal establishes that "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" (United Nations, 1982, Annex VI, Art. 21). Article 22 of the Statute, on the other hand, establishes that if parties to another treaty or convention concerning the subject-matter covered by the UNCLOS agree, disputes concerning the application or interpretation of such treaty may be submitted to the ITLOS (United Nations, 1982, Annex VI, Art. 22). This leads one to believe that the Tribunal's jurisdiction will, nevertheless, focus on the subject-matter of the UNCLOS and, therefore, on the Law of the Sea. Both the Statute's articles do mean, however, that the ITLOS' jurisdiction may be called for by other agreements or treaties beyond the UNCLOS, which can therefore enlarge its scope of action and detail it, depending on the specificity of such treaties.

In terms of compulsory jurisdiction, therefore, there seems not to be much room for doubt as to the ITLOS' relatively wide scope of jurisdiction concerning matters covered by the UNCLOS. However, as we discuss an advisory opinion in the present article, it is important to consider the scope of the advisory jurisdiction of this Tribunal.

The ITLOS has, indeed, assumed advisory jurisdiction in two cases. The ITLOS' two advisory opinions thus far were issued by the Seabed Disputes Chamber (SDC) and by the full Tribunal, respectively. The SDC has specific jurisdiction to give advisory opinions according to the UNCLOS text itself, more precisely its Article 191 (United Nations, 1982, Art. 191). Therefore, jurisdiction was not an issue in the ITLOS' advisory opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (International Tribunal for the Law of the Sea, 2023d). The second advisory opinion request submitted to the Tribunal was submitted by the Sub-Regional Fisheries

Commission (SRFC), concerning Illegal, Irregular and Unreported Fishing and obligations related to it (International Tribunal for the Law of the Sea, 2015). In it, SRFC members submitted a request for an advisory opinion and the ITLOS concluded it had jurisdiction, by interpreting both Article 21 of the Statute of the ITLOS and Article 138 of the Rules of the Tribunal (International Tribunal for the Law of the Sea, 2015). Article 138 of the Rules of the Tribunal states that "The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion" (International Tribunal for the Law of the Sea, 1997, Art. 138). According to the ITLOS' reasoning, Article 21 of the Statute is also within the Convention and should have the same relevance as other articles within the Convention (International Tribunal for the Law of the Sea, 2015). In this sense, what would confer jurisdiction upon the Tribunal in Article 21 is not "all matters" submitted to the Tribunal, but "other agreements" which confer it advisory jurisdiction (International Tribunal for the Law of the Sea, 2015). Article 138 of the Rules would specify the requisites that should be satisfied in order for the Tribunal to exercise this advisory jurisdiction (International Tribunal for the Law of the Sea, 2015). In response to parties' submissions that the Tribunal would not have jurisdiction due to lack of consent of all States, the ITLOS stated that the advisory opinion did not have binding force and was given only to the SRFC members, providing them with guidance on the SRFC's own actions (International Tribunal for the Law of the Sea, 2015). It thus restricted its jurisdiction to the EEZs of SRFC member States (International Tribunal for the Law of the Sea, 2015, [69]).

Last, but not least, the newly negotiated Biodiversity Beyond National Jurisdiction Implementing Agreement (BBNJ Agreement), grants the Agreement's Conference of the Parties the competence to request the ITLOS for an advisory opinion on a legal question covered by the Agreement (United Nations, 2023a). The BBNJ Agreement, therefore, seems to accept the ITLOS' advisory jurisdiction on similar grounds to those echoed in the SRFC advisory opinion. How this will be implemented, however, remains to be seen, as the BBNJ Agreement has not yet entered into force. This will also be further analysed as a potential opportunity in the last subsection of this article.

Thus, in general, the ITLOS' jurisdiction is wide, Law of the Sea-based and, in terms of compulsory jurisdiction, fairly certain. When it comes to advisory opinions, however, this does not seem to be the case, which poses a certain level of uncertainty regarding the advisory opinion request at hand. As shall be showed further along this text, the current case's circumstances, which differ from those previously addressed by the Tribunal, may prove a challenge to its acceptance by the ITLOS.

The Request for an Advisory Opinion on Climate Change, its main issues and potential challenges

COSIS was established by Antigua and Barbuda and Tuvalu by an agreement (hereinafter the COSIS Agreement), which entered into force on 31 October 2021 (Antigua and Barbuda and Tuvalu, 2021). The COSIS Agreement was later acceded to by Niue, Palau, St Lucia, Vanuatu, St Vincent and the Grenadines, St. Kitts and Nevis and the Bahamas (International Tribunal for the Law of the Sea, 2023c), all of which identify as Small Island Developing States (SIDS) (United Nations, 2023b). The COSIS Agreement specifically empowers COSIS to request advisory opinions from the ITLOS, in conformity with the Tribunal's understanding in the SRFC advisory opinion (Antigua and Barbuda and Tuvalu, 2021, Art. 2). The request for an advisory opinion was thus submitted, through the consensus of COSIS' Parties on 12 December 2022 (Commission of Small Island States on Climate Change and International Law, 2022).

The questions asked by COSIS are twofold, although both refer to the UNCLOS' Part XII, which concerns the marine environment. The first question refers to the obligations of UNCLOS Parties under Article 194 UNCLOS, to prevent, reduce and control marine environmental pollution concerning the effects of climate change (e.g., ocean warming and acidification) caused by greenhouse gas (GHG) emissions (Commission of Small Island States on Climate Change and International Law, 2022). The second question refers to the obligations to protect and preserve the marine environment in relation to the same climate change impacts (Commission of Small Island States on Climate Change and International Law, 2022). Here are some of the main points which must be addressed by the ITLOS.

First of all, there are differences between the request submitted by COSIS and the ITLOS' previous advisory opinion jurisprudence. Something that differs the COSIS' request from the ITLOS' two previous advisory opinions is that the questions are broad enough to encompass all States Parties to the UNCLOS, not only COSIS Parties. It is noticeable that there was an attempt to establish, through the COSIS Agreement, jurisdiction over matters conferred to the ITLOS by an agreement, as was the case with the SRFC opinion. However, as things currently stand, the ITLOS has not dealt with a general advisory opinion before, as the first one was issued by the SDC, which had jurisdiction and the second one's decision was restricted to SRFC Parties. The ITLOS should, therefore, clarify its jurisdiction over advisory opinions and whether the consequences of the opinion requested by COSIS would extend beyond the COSIS Agreement's Parties. It is arguable that the ITLOS may use the "by an agreement" provision again to justify its jurisdiction, as it has in the SRFC Advisory Opinion. This could

also give a certain preview on how the ITLOS will approach the BBNJ Agreement and its advisory jurisdiction clause once the Agreement comes into force. Of course, that is if the ITLOS decides to assume jurisdiction over the advisory opinion, which we will have to see when it issues its decision.

Second, the subject-matter of the current request is the environmental provisions of the UNCLOS yet read according to climate change impacts. Thus far, the ITLOS has not dealt with agreements outside of the scope of the UNCLOS and its implementing agreements in its past advisory opinions. The advisory opinion on the Area concerned itself with the provisions of the Convention, as well as the 1994 Implementing Agreement on Part IX and the Rules and Regulations established by the International Seabed Authority, within the realm of those treaties (International Tribunal for the Law of the Sea, 2023d). The SRFC advisory opinion concluded that the ITLOS could use the UNCLOS, the Convention which based the request for an advisory opinion, as well as "other rules of international law not incompatible with the Convention" (International Tribunal for the Law of the Sea, 2015). However, in the case of the SRFC, the Tribunal only went into some issues of EU Law, as the EU was a Party to the Convention in question, as well as on Articles elaborated by the International Law Commission. In the request at hand, as it concerns climate change, the Tribunal might need to dwell into the climate regime, with the UNFCCC and other treaties. This is, indeed, seen as compatible with the UNCLOS by legal commentators (Tanaka, 2015; Rothwell/Stephens, 2016). However, some of the States Parties who have issued written statements disagree that the ITLOS would have the mandate to interpret said treaties (India, 2023; People's Republic of China, 2023).

Third, both questions in the request concern the UNCLOS' Part XII and the obligations contained therein concerning the marine environment. Article 192 UNCLOS is the broad umbrella, which generally states that "States have the obligation to protect and preserve the marine environment" (United Nations, 1982, Art. 192). Article 194 concerns question 1 of the request, or the control of pollution of the marine environment (United Nations, 1982, Art. 194; Commission of Small Island States on Climate Change and International Law, 2022). The article specifically establishes that States shall take all measures necessary to prevent, reduce and control marine pollution, including the prevention of transboundary harm from any activities happening under States' jurisdiction and pollution from any source (United Nations, 1982, Art. 194). Indeed, it is said that the general principles contained within Article 192 morph into State obligations in Article 194 and its following articles (Czybulka, 2017, 129). What remains to be seen is how climate change impacts will interact with the UNCLOS' environmental provisions and whether GHG emissions are to be considered, by the Tribunal, as sources of marine pollution or a threat to the marine environment. This might also require

looking into instruments beyond the UNCLOS, such as the UNFCCC. There is, however, as has been seen, disagreement amongst parties whether these agreements can be used, due to the ITLOS' mandate. These will all be matters that the Tribunal will have to establish to entertain the question posed by COSIS.

There are, thus, challenges which bring unforeseen issues to the Tribunal's jurisdiction. How it chooses to navigate them can define its future concerning the submission of new cases on the subject matter of climate change. The dimension of these challenges is further illustrated in the written statements submitted by parties, which this article will now briefly analyse.

Written Statements – What do They Tell us About the Challenges and Opportunities for the Tribunal?

The ITLOS, upon receiving the request for an advisory opinion, in its Order of 16 December 2022, invited interested parties, in conformity with the Rules of the Tribunal, to submit written statements on the questions posed by the advisory opinion of 16 May 2023 (International Tribunal for the Law of the Sea, 2022). The deadline was then extended by the ITLOS in its Order of 15 February 2023 to 16 June 2023, upon request for an extension by States Parties (International Tribunal for the Law of the Sea, 2023a). 31 written statements by States Parties were received by the deadline, whereas two were admitted by the ITLOS, albeit having been received after the established deadline (International Tribunal for the Law of the Sea, 2023b, 2023c). The timely written statements were submitted, by the Democratic Republic of the Congo, Poland, New Zealand, Japan, Norway, Germany, Italy, China, the European Union, Mozambique, Australia, Mauritius, Indonesia, Latvia, Singapore, the Republic of Korea, Egypt, Brazil, France, Chile, Bangladesh, Nauru, Belize, Portugal, Canada, Guatemala, the United Kingdom, The Netherlands, Sierra Leone, Micronesia and Djibouti (International Tribunal for the Law of the Sea, 2023c). The statements which the Tribunal received after the deadline were submitted by Rwanda, Vietnam and India, (International Tribunal for the Law of the Sea, 2023c). The content of the statements, as well as their length, is quite varied. Yet, those share common elements, which will be approached in the current section in their dimensions as challenges and/or opportunities for the ITLOS when deciding on the current advisory opinion. In this sense, it is important to highlight that this section will not deal with the written statements submitted by Intergovernmental Organisations and those submitted by Non-Governmental Organisations and think-tanks, although there have been 18 submissions in this regard. That is because, in the view of this author and not dismissing the importance of those written submissions, those made by States

Parties are relevant to determine what their State Practice on the issue is. As the opinion does concern States Parties to the UNCLOS, it is important to verify how the States Parties themselves react to it. Therefore, this shall be the focus of the current article. It is also important to clarify that the analysis focuses on the content of the statements themselves, rather than the academic state of the art on them, as it seeks to clarify the challenges and opportunities presented to the Tribunal in the view of States themselves.

The most relevant challenge to be faced, in the current author's view, is the divergence in States Parties' opinions concerning the ITLOS' advisory jurisdiction. Out of the 34 written statements, three objections were raised by China, Brazil, and India, three relevant developing States, to the ITLOS' jurisdiction of the full Tribunal over advisory opinions (Brazil, 2023; India, 2023; People's Republic of China, 2023). According to Brazil, India and China, the ITLOS' jurisdiction over advisory opinions is strictly limited to the SDC in the UNCLOS as per the wish of the negotiating parties and, therefore, the full Tribunal would not have jurisdiction to issue the current advisory opinion (Brazil, 2023; India, 2023; People's Republic of China, 2023). These States have pronounced themselves in the sense that, should jurisdiction be exercised, the advisory opinion decision effects should be restricted to COSIS' Parties and not extend to all States Parties to the UNCLOS (Brazil, 2023; People's Republic of China, 2023). This may seem somewhat irrelevant, considering that only three States out of 34 have voiced contrary opinions. It is important to highlight, however, that divergence concerning the effects of the decision, or the binding nature of advisory opinions, has also been voiced by other States. Indonesia emphasized in its position that advisory opinions are not legally binding and should serve as guidance to States (Indonesia, 2023), whilst Chile echoed the non-binding nature of advisory opinions (Republic of Chile, 2023). The United Kingdom, although it had rejected the ITLOS' jurisdiction in the SRFC advisory opinion, does not oppose to the Tribunal's jurisdiction in this case. Yet it highlighted that the advisory opinion would not be legally binding, as it was requested by a limited number of States without consulting others and, hence, lacked most parties' consent to it (United Kingdom, 2023). France highlighted the difference between advisory opinions and general international law in terms of coerciveness and that since this involves all States Parties and not only COSIS' Parties, this specific circumstance must be taken into consideration, by allowing for parties to manifest themselves as necessary (France, 2023). Australia emphasized that, should the ITLOS decide it has advisory jurisdiction, it should only focus on the questions asked and not on issues concerning the liability of States, which go beyond the scope of an advisory opinion (Australia, 2023). Nevertheless, over half the States who have submitted statements, 18 in total, still argue that the ITLOS is competent

to issue an advisory opinion and there would be no compelling reasons for it to reject its jurisdiction in this case (Belize, 2023; Democratic Republic of the Congo, 2023; European Union, 2023; Germany, 2023; Guatemala, 2023; Indonesia, 2023; Italy, 2023; Latvia, 2023; Mauritius, 2023; Micronesia, 2023, 2023; Mozambique, 2023; Nauru, 2023; New Zealand, 2023; Republic of Chile, 2023; Rwanda, 2023; Sierra Leone, 2023; United Kingdom, 2023; Vietnam, 2023).

Therefore, there seems to be divergence concerning the ITLOS' advisory jurisdiction, but also as to the effects of the advisory opinion on UNCLOS States Parties. This is particularly true in this case, because, contrary to that of the SRFC, where the decision restricted itself to SRFC Parties, the request is general enough as to encompass all UNCLOS States Parties. Nonetheless, whereas not all States have expressed clear opposition to the Tribunal's advisory jurisdiction, it is important to highlight that many statements said that the ITLOS should take the chance to clarify the grounds for its advisory jurisdiction (France, 2023; Guatemala, 2023; Japan, 2023; Norway, 2023; Poland, 2023; United Kingdom, 2023). Hence, regardless of how significant the divergence on whether there is advisory jurisdiction is to begin with, it is important that the ITLOS takes the chance to clarify the grounds of its advisory jurisdiction, as the case's peculiarities differ from those of the SRFC advisory opinion. This is certainly the first challenge to be overcome by the Tribunal, should it decide it has jurisdiction over the matter.

A second, yet important challenge to consider is whether the ITLOS can take into consideration rules which go beyond the UNCLOS, such as those under the UNFCCC, the Paris Agreement, Kyoto Protocol, etc. The responses to this also vary. Most States, 27 out of the 34, argue that the UNFCCC should be used by the ITLOS, even if only to interpret relevant provisions in the advisory opinion (Australia, 2023; Bangladesh, 2023; Belize, 2023; Canada, 2023; Democratic Republic of the Congo, 2023; Djibouti, 2023; European Union, 2023; France, 2023; Germany, 2023; Italy, 2023; Latvia, 2023; Mauritius, 2023; Micronesia, 2023; Mozambique, 2023; Nauru, 2023; New Zealand, 2023; Norway, 2023; Poland, 2023; Portugal, 2023; Republic of Chile, 2023; Republic of Korea, 2023; Rwanda, 2023; Sierra Leone, 2023; Singapore, 2023; The Netherlands, 2023; United Kingdom, 2023; Vietnam, 2023). Two arguments are used in this sense, one concerning the *renvoi* clauses in the UNCLOS and another incorporating UNFCCC rules through "generally agreed international rules and standards" (GAIRS). The argument used for renvoi clauses in the UNCLOS is that of using Articles 237, 293 and 311, as well as Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Article 237 UNCLOS specifically refers to obligations assumed by States in other agreements concerning the preservation of the marine environment "in furtherance of the general principles assumed under

the Convention" (United Nations, 1982, Art. 237). This, according to the written statements, would include the UNFCCC and other agreements which, albeit negotiated after the UNCLOS, serve to further its principles concerning the protection of the marine environment. Article 293 establishes the applicable law, saying that courts and tribunals are to apply the UNCLOS and other rules of international law not incompatible with it (United Nations, 1982, Art. 293). The main argument in the written statements concerning that is that the UNFCCC and its agreements are not incompatible with the UNCLOS and, in fact, both treaties have most of their parties in common. Last but not least, UNCLOS Article 311 establishes that the UNCLOS does not alter the rights and obligations of States which arise from other compatible agreements with the Convention (United Nations, 1982, Art. 311). Article 31(3)(c) of the VCLT is used by States claiming the need for there to be a "systematic integration" of UNFCCC concepts into UNCLOS provisions, saying that other relevant rules of international law applicable to the parties are to be used to interpret a treaty (United Nations, 1969, Article 31). Through this application of the VCLT, the written statements say that the obligations under the UNCLOS, especially Part XII, are to be interpreted according to UNFCCC rules, as they are the ones concerning climate change. However, some States argue that the ITLOS' jurisdiction in this case should regard only the Law of the Sea, manifested in the UNCLOS and its implementing agreements and that climate change issues should be solved within their own framework (Brazil, 2023; Indonesia, 2023; People's Republic of China, 2023). Hence, albeit a significant majority does say that the UNFCCC treaties can be used, the ITLOS will have to make its reasoning for it clear. Perhaps a way forward, as suggested by parties in their own written statements, would be to base itself on the systemic integration pursued in the *South China Sea Arbitration*, judged by an Annex VII Arbitral Tribunal in the Permanent Court of Arbitration (PCA) (Germany, 2023; Italy, 2023). In *South China Sea*, the Tribunal used both Article 293 UNCLOS and Article 31(3)(c) VCLT to argue that it could utilise the Convention on Biological Diversity to interpret the UNCLOS' environmental standards (Permanent Court of Arbitration, 2015 [176]). Another PCA-based Arbitral Tribunal has decided in similar terms, not concerning environmental provisions, but human rights. The Tribunal in the *Arctic Sunrise* case stated that it could have regard to general international law in relation to human rights to decide on the case's particular circumstances, basing itself on Article 293 of the UNCLOS (Permanent Court of Arbitration, 2015a [197-198]). Therefore, there has been some favourable reasoning from Law of the Sea tribunals which point towards the integration of the UNCLOS with other general rules of international law. How the ITLOS will solve the issue, however, remains to be seen and will constitute an important mark in how we are to interpret the UNCLOS in light of new developments, such as,

for instance, not only climate change but also human rights and other current issues.

Concerning the second argument, based on GAIRS, the UNCLOS itself refers to GAIRS that should be followed for States to adopt regulations to "prevent, reduce and control pollution of the marine environment" (United Nations, 1982). The concept means essentially that the rules and standards adopted by States themselves should refer to those internationally agreed in competent organisations (Tanaka, 2015). The argument made for utilizing GAIRS is based both on Article 207, on pollution from land-based sources and Article 212, on atmospheric pollution (see, for instance, European Union, 2023). According to statements, it is within the States' obligations under Part XII to adopt laws and regulations based on those GAIRS and that, in the case of climate change, those GAIRS are established within the UNFCCC framework, such as the Paris Agreement (Australia, 2023; Belize, 2023; Canada, 2023; Djibouti, 2023; European Union, 2023; France, 2023; Latvia, 2023; Mauritius, 2023; Micronesia, 2023; Mozambique, 2023; Nauru, 2023; Republic of Chile, 2023; Republic of Korea, 2023; Rwanda, 2023; Sierra Leone, 2023; Singapore, 2023; The Netherlands, 2023; United Kingdom, 2023). In this sense, States should follow the standards contained within the UNFCCC should they want to comply with their obligations under the UNCLOS and the referred GAIRS. Whether the Tribunal will address this and how so, if it does, also remains to be seen, but it is an interesting argument for including the UNFCCC into the UNCLOS without referring to interpretation rules under the Convention itself or the VCLT. An added layer of concern, however, considering the positions of those States which oppose to using the UNFCCC regime at all, is that the ITLOS would not have the mandate to interpret dispositions which are covered by the climate law regime itself (see India, 2023). This will also need to influence how the ITLOS approaches the climate law regime, should it choose to be it through systemic integration or the use of GAIRS.

Now that we have considered the major challenges, which are all but negligible, it is important to also consider the ITLOS' opportunities arising from this case. The first one is that most States, 22 out of the 33, argue that greenhouse gas (GHG) emissions would qualify as pollution under the UNCLOS' Articles 1 and/or 194 (Australia, 2023; Bangladesh, 2023; Belize, 2023; Canada, 2023; Democratic Republic of the Congo, 2023; Egypt, 2023; European Union, 2023; France, 2023; Latvia, 2023; Mauritius, 2023; Micronesia, 2023; Mozambique, 2023; Nauru, 2023; New Zealand, 2023; Portugal, 2023; Republic of Korea, 2023; Rwanda, 2023; Sierra Leone, 2023; Singapore, 2023; The Netherlands, 2023; United Kingdom, 2023; Vietnam, 2023). Therefore, it seems straightforward that the issue of GHG emissions could be considered under both the UNCLOS articles demanded by COSIS Parties and in a climate change context

without major opposition. How this will be interpreted, however, is important, as there is still full opposition by some parties to using the climate change regime in interpreting the UNCLOS (Brazil, 2023; Indonesia, 2023; People's Republic of China, 2023). How the ITLOS is to navigate this, therefore, can help define its future as a climate change dispute settlement forum. This is not a novel issue and has been brought up by commentators as a possibility, considering that the concept of pollution in the UNCLOS is quite wide, even such as to encompass carbon emissions due to climate change (Kirk, 2015; Stephens, 2015; Tanaka, 2015). Indeed, the UNCLOS defines pollution as:

> "[…] the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities; (United Nations, 1982, Art. 1(4))"

It, therefore, seems to be the case that GHG emissions, causing ocean acidification, would qualify as pollution under the UNCLOS (Stephens, 2015). This could, undoubtedly open some doors to analysing climate change within the Law of the Sea framework, by treating it as marine pollution. How that will be done and whether States will find that the ITLOS has the mandate to do so, or if the ITLOS itself will find it has such a mandate, needs clarification. This request can potentially give us an answer to these questions.

A potential hurdle to face when identifying GHG emissions as pollution, however, is that some parties also argue in their written statements that State Responsibility should apply to those States seen as responsible for those emissions (Democratic Republic of the Congo, 2023; Egypt, 2023; Mauritius, 2023; Micronesia, 2023). Considering the opposing statements of other States, which favour an approach without emphasis on liability or a binding nature of the decision (Australia, 2023; Brazil, 2023; France, 2023; Indonesia, 2023; People's Republic of China, 2023; United Kingdom, 2023), this can prove to be a difficult balancing act. Whether the ITLOS will touch on the issue of liability at all remains to be seen, however, in the view of the current author, due to it being somewhat politically charged, especially because of disparities in developing/developed world views and climate change-related principles, it might choose to abstain from deciding on this particular issue.

Another opportunity raised by some States is that of the potential impacts of the novel Biodiversity Beyond National Jurisdiction Implementing Agreement (BBNJ Agreement). Some States mention in their statements that the BBNJ

Agreement will serve to advance issues concerning climate change before the ITLOS, as it grants the Tribunal advisory jurisdiction and specifically mentions climate change and its principles (Egypt, 2023; Italy, 2023; Micronesia, 2023; Republic of Chile, 2023). This would be compatible even with the rationale that only the UNCLOS and its implementing agreements could be used to judge Law of the Sea cases, as advanced by Indonesia (Indonesia, 2023). How the BBNJ Agreement will be used, however, will first depend on whether it enters into force, which has not yet happened. In this sense, it is also important to emphasise that the clause which would allow for seeking an advisory opinion is limited in many respects. The BBNJ Agreement says that its Conference of the Parties *may* decide to request for an advisory opinion on a legal question on any matter within its competence (United Nations, 2023a). However, this is limited by the fact that a request shall not be sought on matters within the competence of other bodies, be they global, regional, subregional, etc., or on matters involving disputes over sovereignty or the legal status of areas within national jurisdiction (United Nations, 2023a). Therefore, the grounds are quite restricted even with this provision. In this sense, it will be interesting to see whether the ITLOS touches upon this, if at all. It can, however, be seen as a means of drawing the ITLOS and the Law of the Sea a bit closer to climate change issues. After all, the BBNJ Agreement's preamble already recognizes the need to address biodiversity loss, particularly due to climate change (United Nations, 2023a). It also includes within its general principles and approaches "An approach that builds ecosystems resilience, including to adverse effects of climate change […]" (United Nations, 2023a, Art. 5). Finally, it also puts as an objective of area-based management tools and other measures to protect and preserve ecosystems and strengthen their resilience to stressors, including climate change (United Nations, 2023a). There is, therefore, potential to bring climate change issues a bit closer to the UNCLOS, but the limitations for the submissions of advisory opinion requests contained within the Agreement itself may make it difficult, if we consider that climate change issues are covered by a global framework under the UNFCCC.

Last, but not least, it is important to highlight that many States Parties have brought forward different environmental principles, such as precaution, prevention and the no-harm principle (Democratic Republic of the Congo, 2023; European Union, 2023; Mauritius, 2023; New Zealand, 2023; Singapore, 2023; The Netherlands, 2023). How the ITLOS will develop these principles and incorporate them into its decision can help shed light on their validity in the international plane. This is not unheard of, as the ITLOS has expanded its analysis of certain environmental principles within the Advisory Opinion on the Area (International Tribunal for the Law of the Sea, 2023d). Whether it will keep up this rather progressive outlook will be interesting to verify.

In sum, this analysis tells us we can be concerned, yet hopeful. As seen above, the ITLOS was created as a response to make developing States more at ease, as compared to the ICJ's reputation before those States during negotiations. With three major developing States opposing its jurisdiction, how the Tribunal will balance that with the interests of other States which favour its jurisdiction over this case, such as SIDS, will be interesting to see. The ITLOS should, therefore, take the opportunity to clarify the grounds for its advisory jurisdiction, as the case's circumstances call for it more than the ones at the SRFC opinion did. It should also clarify, preferably by using the renvoi clauses in the UNCLOS and the VCLT, the possibility for it to consider other norms of international law beyond the Law of the Sea. This will not only help shed light on the ITLOS' potential as a climate change litigation forum, but also to its potential to analyse other international law issues which may arise, such as human rights-related cases. The fact that GHG emissions seem to be regarded as marine pollution can be seen as a good development for furthering the submission of climate change-related issues to Law of the Sea dispute settlement mechanisms, however. The optimism concerning the BBNJ Agreement, its mention of climate change issues, can also mean that there is potential for the ITLOS to receive more climate change-related cases in the future. This, however, does depend on how the Agreement is received by States in the first place and how its advisory jurisdiction clause is interpreted. The way that the ITLOS approaches the challenges and enjoys the opportunities put before it by the current request can help determine its availability and readiness to deal with current and emerging law of the sea developments. In this sense, it is important to accompany the advisory opinion's progress and the ITLOS' arguments concerning it.

Conclusion

COSIS' request for an advisory opinion raises current issues and poses multiple challenges to the ITLOS, but it also presents some opportunities. It poses challenges in a sense that the ITLOS will need to clarify the basis for its advisory jurisdiction, should it assume it has jurisdiction over the request, as the circumstances differ from those within the Tribunal's jurisprudence. The ITLOS will also be faced with the need to clarify the UNCLOS' compatibility and its jurisdiction's compatibility with the analysis of other treaties and conventions, which are not solely Law of the Sea related, such as the UNFCCC. The Tribunal's conclusions in this sense will not only determine how it will address climate change cases in the future, but also cases such as those involving other fields of international law, such as human rights. In terms of opportunities, there seems to be a general

convergence on GHG emissions being compatible with the definition of pollution within the UNCLOS. Should the ITLOS agree with this compatibility, that can potentially foment the submission of more cases to the ITLOS concerning climate change. States within their written statements have also suggested that the recently negotiated BBNJ Agreement can bring climate change cases closer to the ITLOS. There are, therefore, many opportunities for the ITLOS to establish itself as a potential forum to deal with emerging climate change issues, or at least as an interpreter of the UNCLOS in light of new developments.

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