insights

Volume: 29 Issue: 4

By: Dimitrios Dimitrakos

April 11, 2025

The ITLOS Advisory Opinion on Climate Change: A Brief Review

Introduction

On May 21, 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion on the obligations of states on climate change and international law (Opinion)[1] at the Request of the Commission of Small Island States on Climate Change and International Law (COSIS). COSIS had requested ITLOS to identify specific obligations of state parties to the United Nations Convention on the Law of the Sea (UNCLOS or the Convention),[2] including under Part XII. The Opinion identified several obligations, including in articles 192, 194, 207, 212, 213, and 222 of UNCLOS and analyzed the nature of these obligations. Specifically, it addressed whether these are due diligence obligations of conduct under which states are required to do their best to achieve a specific goal or objective, or obligations of result, under which they must achieve a specific result. This *Insight* primarily describes the general background and context surrounding the filing of the Request. Secondarily, it briefly comments on ITLOS' finding that many of these obligations are due diligence obligations of conduct.

Background

COSIS was established under the terms of an Agreement (COSIS Agreement)[3] concluded on October 31, 2021, by Antigua and Barbuda and Tuvalu that entered into force on the same date. At the time of filing of the Request (December 12, 2022), Palau, Niue, Vanuatu and Saint Lucia had become parties by accession, to be later joined by Saint Vincent and the Grenadines, Saint Kitts and Nevis, and the Bahamas. All these states are also parties to UNCLOS.

In its preamble, the COSIS Agreement depicts clearly the sense of environmental urgency shared among Small Island Developing States (SIDS). For instance, it reflects the parties' alarm as to the catastrophic effects of climate change notably impacting SIDS[4] by recognizing climate change as a "Common Concern of Humanity." It further echoes the parties' reliance for survival on the marine living resources in their maritime zones and reaffirms their need and intention to continue to consider their maritime boundaries—as well as claims and entitlements flowing from their maritime zones - unchanged notwithstanding any physical change potentially caused by sea-level rise (such change could cause a landward movement of the outer boundaries of their maritime zones). Importantly, the preamble points out the disproportionate burden of greenhouse gas emissions (GHGE), emitted by developed states, that overwhelms the capacity of SIDS to respond, and the consequent "fundamental injustice" facing SIDS in this context. Furthermore, it recognizes the "imperative necessity for "pursuing climate justice in accordance with…international law." Also, it points to the legal framework under UNCLOS and other pertinent treaties as well as "principles of international law" applicable to the protection of the climate system and the marine environment, as well as to the obligation of states to compensate injuries caused by internationally wrongful acts.

The actual filing of the Request, including the formulation of its questions, was decided at COSIS' third meeting on August 26, 2022.[5] The Request was filed with ITLOS on December 12, 2022, and, one day later, was communicated by the Tribunal to all UNCLOS state parties as well as to the UN Secretary-General. In addition to COSIS parties, ITLOS invited UNCLOS states parties and certain intergovernmental organizations (IGOs) to file written submissions, as they were "considered likely to be able to furnish information" on the questions.[6] Such IGOs included but were not limited to the United Nations, the European Union, the International Union for Conservation of Nature, the International Seabed Authority, the International Maritime Organization, the African Union and others.

Some 31 states, seven intergovernmental organizations (IGOs) and COSIS submitted timely written statements by June 16, 2023. ITLOS also received late statements from a few states and the Food and Agriculture Organization. Unsolicited were also received from statements from nine non-governmental organizations (NGOs) and three UN Special Rapporteurs (not formally invited by ITLOS); the latter ones, while not forming part of the case file, were nevertheless transmitted by ITLOS to COSIS and the other invited state parties and IGO participants. All submitted statements became accessible to the public through the Tribunal's website.[7]

Scientific Aspects

Early on, ITLOS noted the scientific aspects and the abundance of international instruments addressing climate change.[8] It also made reference to climate change being recognized by the U.N. as a "common concern of mankind" and to the joint action by the WMO and UNEP to establish the Intergovernmental Panel on Climate Change (IPCC),[9] numbering some 195 member states and providing "internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies."[10] In its 2023 Synthesis Report, the IPCC states that "[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred," and that "[h]uman-caused climate change is already affecting many weather and climate extremes in every region across the globe."[11] The same report states that human activities, principally through greenhouse gases "have unequivocally caused global warming."[12]

Citing to IPCC, ITLOS acknowledged "the accumulation of anthropogenic GHGs in the atmosphere has had numerous effects on the ocean"[13] including sea-level rise, ocean warming and acidification. It further highlighted some of IPCC's findings, notably that, "climate change is a threat to human well-being and planetary health," that "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected," and that "[h]uman communities in close connection with coastal environments … are particularly exposed to ocean and cryosphere change."[14]

International Legal Instruments

As part of the context, ITLOS mentioned specific international legal instruments shaping the international climate change regulatory framework, the core treaty being the 1992 UN Framework Convention on Climate Change (UNFCCC),[15] as supplemented by the 1997 Kyoto Protocol[16] and the 2015 Paris Agreement.[17] This framework also comprises non-legally binding instruments (e.g. the Sharm el-Sheikh Implementation Plan, which recognizes that "limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030.") Outside the UNFCCC framework, ITLOS noted other treaties addressing, if indirectly, climate change, GHGE and related challenges, such as MARPOL's Annex VI, dealing with air pollution from ships, the 1987 Montreal Protocol on ozone-depleting substances, [18] and the 1944 Chicago Convention on International Civil Aviation,[19] annex 16, which contains

international standards and recommended practices governing environmental impacts of international aviation.[20]

The Opinion's structure

Preliminary Issues

Having found that it has jurisdiction in this case,[21] that it is appropriate to render its Opinion,[22] and having identified the applicable law in this case,[23] ITLOS still had to consider two other preliminary issues, namely, the scope of the questions as posed in the Request and their inter-relationship.

With regards to the Request's scope, ITLOS, here, confined itself to identifying only the primary obligations (substantive law) and not the corresponding secondary obligations (responsibility or liability in the event of breach) because COSIS only "asked the Tribunal to identify specific "obligations" under the Convention.[24] Aside from that, ITLOS only addressed environmental obligations and no obligations pertaining to maritime zones or to any changes thereto caused by sea level rise.[25]

The Request asked ITLOS to opine on the specific UNCLOS obligations in relation to a) marine pollution regulation, and b) marine environmental prevention and preservation, as each of these contexts pertain to climate change impacts (including through ocean warming and sea level rise) and ocean acidification, caused by anthropogenic GHGEs. As to the relationship between the two sub-questions, ITLOS found that the obligation to protect and preserve the marine environment encompasses the obligation to prevent, reduce and control marine pollution.[26] As such, it also "extends to the protection of the marine environment from any negative impacts," meaning that "[w]hile control of pollution is certainly an important aspect of environmental protection, it is by no means the only one… Thus, implementing the obligation to prevent, reduce and control pollution of the marine environment does not exhaust the implementation of the obligation to protect and preserve it."[27] In other words, regulation of marine pollution is but one aspect of the overarching obligation to protect and preserve the marine environment.

Question 1 (Marine Pollution)

As ITLOS correctly pointed out, terms such as climate change and GHGE are not mentioned anywhere in UNCLOS.[28] Consequently, ITLOS first examined the threshold question whether UNCLOS obligations apply to climate change and ocean acidification

caused by GHGEs in the first place. Having concluded that GHGE meet the three identified criteria (i.e., (a) substance or energy that (b) is introduced into the marine environment by humans, and (c) whose introduction (likely) results in deleterious effects) required to constitute "pollution of the marine environment," ITLOS applied the following method in answering Question 1: first, it identified the specific obligations to prevent, reduce and control marine pollution under Part XII; second, it interpreted them only to the extent necessary to answer Question 1 and examined how they apply in relation to GHGE causing pollution of the marine environment; third, it set out the specific obligations of state parties in the context of climate change and ocean acidification.

It is worth noting that while many of the obligations enshrined in UNCLOS are addressed to "states," (arguably indicating their customary law status), the Opinion mostly refers to "state parties" because this is how COSIS' questions were framed.

In answering Question 1, ITLOS found as most pertinent the obligations enshrined in articles

- 194 paras. 1 and 2, as applicable to all sources of marine pollution,
- 207- 212, as applicable to specific sources,
- 213 and 222, as the enforcement obligations corresponding to the law-enactment, obligations relating to land-based (207) and atmospheric-based (212) marine pollution respectively, and
- 197 -201 (cooperation-related obligations).

The Tribunal found that obligations under article 194 are a main component of the broader obligation to protect and preserve the marine environment under article 192.[29] Also, in its view, "necessary" pollution-control measures must be broadly understood to include those that are "indispensable," requisite," or essential" [30] to achieve the mandated prevention, reduction and control of marine pollution from all sources.

Question 2 (Marine Environmental Protection and Preservation)

Addressing Question 2, ITLOS identified obligations under articles 192 and 194 para. 5, in Part XII. It also identified obligations outside of Part XII, namely, articles 61, 117 and 119.[31]

The Tribunal also found that "the obligation to take measures necessary to protect and preserve the marine environment requires States to ensure that non-State actors under

their jurisdiction or control comply with such measures. The obligation of the State, in this instance, is one of due diligence."[32] The requirement to take all necessary measures to protect and preserve the marine environment entails measures to regulate marine pollution.[33] Not only must states enact the necessary laws and regulations; they must ensure that regulated non-state actors comply with them, including through enforcement.[34] Therefore, ITLOS found that due diligence is a two-pronged obligation, including both the enactment and the enforcement of necessary laws, thereby reaffirming the ICJ's prior finding that "a certain level of vigilance in" the enforcement of enacted laws and the "exercise of administrative control applicable to public and private operators" form part of the due diligence obligation.[35]

Additionally, what laws and measures are "necessary" to prevent, reduce or control pollution (e.g., 194 para.1), or "to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" will depend on the situation but "are those which make it possible to achieve that objective."[36] While careful not to use the word "result," it appears that by using this wording, ITLOS ascribes results-driven nuances to the corresponding obligations of conduct. In other words, even obligations of conduct may not be completely separated from those of result, at least in the sense that certain objectives or results are in mind when determining what conduct is necessary in the context of marine environmental protection. This is further pointed out in ITLOS' statement that some of the due diligence obligations in Part XII are so formulated "as to prescribe not only the required conduct of States but also the intended objective or result of such conduct."[37]

The Nature of the Obligations

The issue of the nature/character of certain the identified obligations (i.e., whether they are due diligence obligations of conduct or obligations of result) was a point of some divergence of opinions, not only between the participants but between the judges. The Tribunal could have been more analytical in explaining its reasoning on why and how it concluded that the identified obligations are solely due diligence obligations of conduct. ITLOS dedicated only one or two sentences to this point. While acknowledging that the provisions of such articles as 194 are textually so formulated as to prescribe both the required conduct and the intended objective, it then found, in a somewhat self-contradictory manner, that the determination of their nature depends on whether the intended objective must, according to the text, be achieved.[38] Without more guidance or analysis from that point onward, ITLOS simply considered "that what is required . . . is not to achieve the prevention, reduction and control of marine pollution but to take all

necessary measures to that end." [39] However, this statement leaves out of the scope of the mandate of the provision "that end" (i.e., the prevention, reduction and control of marine pollution).

Additionally, while ITLOS acknowledges the importance of external treaty regimes and international rules and standards (external rules) underlined by UNCLOS' rules of reference,[40] it ultimately seems to have discounted their relevance here by concluding, without qualification, that the obligations are of due diligence. External rules may be of dynamic nature. If an applicable international rule or standard is quantitative (e.g. a specific reduction in GHGE within a specific timeframe), UNCLOS obligations referring to them would ultimately acquire a corresponding quantitative (results-based) character. Such would be, for instance, the case of article 207(1) specifically requiring states to take into consideration international rules, standards, recommended practices and procedures when adopting laws and regulations to regulate land-based marine pollution. Also, due diligence itself might dictate the necessity for achieving a specific result in certain context. Arguably then, the same due diligence obligation might be considered an obligation of dual character.

In this connection, Judge Kittichaisaree points out the reference made by ITLOS' former President, Judge Wolfrum, to obligations of conduct, of result and the -still developing - goal-oriented obligations, as well as those addressed to private entities (via states) "under which states encounter supplementary responsibilities," and finally, to obligations that are both of conduct and of result.[41] According to this view, an obligation can be of both result and conduct. He further addresses ITLOS' conclusions on the nature of the obligation to cooperate (art. 197) and the general obligation of article 192. He points to ITLOS' statement that the "results achieved…through cooperation may…be relevant in assessing States' compliance with the obligation to cooperate."[42]

It is also worth noting Judge Jesus' disagreement with ITLOS' conclusions on the nature of the obligation of article 194, paragraph 2.[43] In his view, the obligation of article 194, paragraph 2 "requires both measures of due diligence" but "also imposes the achievement of results." [44] Referring to the very wording of paragraph 2 that necessary measures must "ensure that activities…are so conducted as not to cause damage by pollution to other States and their environment,"[45] In this connection, Judge Jesus points to ITLOS' conclusion, in paragraph 238 of the AO, that "obligations…including under article 194, paragraph 2, are formulated in such a way as to prescribe not only" a required conduct but also a specific result.

Final Thoughts

A good part of the AO is dedicated to the identification of the pertinent regulatory framework and obligations under UNCLOS. The Tribunal could have been more analytical as to the significance of external rules in shaping the content of specific obligations in each context, and in its reasoning as to why, whilst it acknowledged the possibility of results-based circumstances or nuances, it concluded without further qualification that the identified obligations are due diligence obligations of conduct. Overall, the AO is the first of its kind on climate change obligations of states under UNCLOS. At the time of this writing, the international community is awaiting the issuance of ICJ's AO on the climate-change obligations of states under international law.[46] While the Request before the ICJ is formulated in different and broader terms from those of the Request before ITLOS, the Tribunal's AO of the latter will almost certainly influence the findings of the pending AO of the ICJ.

About the Author: Dr. Dimitrios Dimitrakos is a California attorney specializing in public international law, with emphasis in law of the sea, law of treaties, international water law, and international environmental law. He earned his JSD degree in international water resources law (award of excellence for highest GPA) from the University of the Pacific McGeorge School of Law. He earned his LLB from the University of Athens, and his LLM (merit) in Public International Law from the University of London. He researches, writes, and presents on law of the sea and other public international law.

---

[1] Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and international law [hereinafter Advisory Opinion].
[2] 1833 U.N.T.S. 397.
[3] 3444 U.N.T.S.
[4] For general information on SIDS' environmental vulnerability, see https://sdgs.un.org/conferences/sids2024
[5] Advisory Opinion ¶ 101.
[6] *Id.* ¶ 11.
[7] Publicized case records may be found on ITLOS' website, at https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.
[8] Advisory Opinion ¶¶ 45 et seq.
[9] *Id.* ¶ 47.
[10] *Id.*
[11] *Id.* ¶ 53.
[12] *Id.* ¶ 54.
[13] *Id.* ¶¶ 57 et seq.

[14] *Id*. ¶ 66.
[15] 1771 U.N.T.S. 107.
[16] 2303 U.N.T.S. 162.
[17] TIAS 16-1104
[18] *Id*. ¶ 79.
[19] (1994) 15 U.N.T.S. 295
[20] *Id.* ¶ 81.
[21] *Id.* ¶ 110.
[22] *Id.* ¶ 121.
[23] *Id.* ¶ 127.
[24] *Id.* ¶ 146.
[25] *Id.* ¶ 150.
[26] *Id.* ¶ 152.
[27] *Id*.
[28] *Id.* ¶ 157.
[29] *Id.* ¶ 188.
[30] *Id.* ¶ 203.
[31] *Id.* ¶ 411.
[32] *Id.* ¶ 396.
[33] *Id.* ¶ 402.
[34] *Id.* ¶ 405, in relation to art. 194, ¶ 5.
[35] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14, p. 79, ¶ 197.
[36] *Id.* ¶ 402.
[37] *Id.* ¶ 238.
[38] *Id*.
[39] *Id*.
[40] *See, e.g.*, *id.* ¶¶ 131, 134.
[41] Judge Kittichaisaree's Declaration, ¶12.
[42] *Id*. ¶ 18.
[43] Judge Jesus' Declaration, ¶ 12.
[44] *Id.*
[45] *Id.* ¶ 14(i).
[46] *See* https://www.icj-cij.org/case/187/request-advisory-opinion.