ITLOS' Climate Opinion: What's its significance?

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Professor Margaret Young, Professor Jacqueline Peel, Dr Ellycia Harrould-Kolieb, H.E. Janine Felson

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On 21 May 2024, the International Tribunal for the Law of the Sea ('ITLOS') delivered the first-ever climate advisory opinion issued by an international court. The opinion was requested by an organisation representing small island states—countries among the most vulnerable to climate impacts. What did ITLOS find and what is the significance for climate science, international climate law and the global climate implications?

ITLOS' climate advisory opinion

Background

ITLOS is an independent judicial body established under the 1982 United Nations Convention on the Law of the Sea ('UNCLOS'). It can hear disputes over the interpretation or application of UNCLOS and also has a power to issue non-binding 'advisory opinions' on certain questions. UNCLOS establishes broad obligations for its 168 state parties to protect and preserve the marine environment (UNCLOS Part XII) but does not specifically reference climate change or greenhouse gas ('GHG') emissions. Before the delivery of the ITLOS opinion on 21 May 2024, it was not clear whether UNCLOS required its states parties to take measures to reduce GHG emissions and to minimise climate impacts in order to safeguard ocean environments and marine biodiversity.

The request for a climate advisory opinion, brought to ITLOS by the Commission of Small Island States on Climate Change and International Law ('COSIS'), sought to test the scope for states' obligations under UNCLOS to extend to measures to protect the world's oceans from climate change. This is critically important for many small island states who depend heavily on oceans and a healthy marine environment for their peoples' lives and livelihoods. COSIS was established on the eve of the Glasgow COP26 summit by founding members Antigua & Barbuda and Tuvalu. It can be joined by any member of the Alliance of Small Island States ('AOSIS'). At the time of ITLOS' ruling, the Commission had 6 additional state parties beyond the founding members: Palau, Niue, Vanuatu, St Lucia, St Vincent & the Grenadines and St Kitts & Nevis.

Questions raised by the advisory opinion request

COSIS, in its request of 12 December 2022, referred two questions to ITLOS for its advisory opinion:

> *What are the specific obligations of States Parties to UNCLOS, including under Part XII:*
> *a) To prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic GHG emissions into the atmosphere?*
> *b) To protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.*

ITLOS found it had the authority ('jurisdiction') to answer this request and issued its advisory opinion on 21 May 2024. The opinion focused primarily on the answer to question (a), only covering aspects of the second question to the extent that they were not dealt with in ITLOS' response on the first question.

Below, we discuss key aspects of the findings ITLOS made, focusing on the use of climate science to interpret the scope of marine pollution obligations and the interpretative approaches used to 'unlock' UNCLOS as a tool for climate protection.

The ITLOS advisory opinion comes at a critical time for international climate litigation (with several other

international courts simultaneously considering climate claims) and for the global climate negotiations as we approach the deadline for countries to submit their new Nationally Determined Contributions ('NDCs') for 2035 under the Paris Agreement. We reflect on how the ITLOS opinion might shape other international climate cases and its relevance for, and potential influence on, other international climate cases and domestic climate litigation.

Greenhouse gas emissions as marine pollution

Are GHG emissions a source of marine pollution?

Before ITLOS was prepared to answer questions relating to state obligations, it first saw fit to 'address whether the obligations under the Convention apply to climate change and ocean acidification' and only then examine how they should be applied. In order to do this, ITLOS first addressed whether anthropogenic GHG emissions into the atmosphere fall under the definition of pollution, as defined by UNCLOS. ITLOS identified the three cumulative criteria that would all need to be satisfied to meet UNCLOS's definition of 'pollution of the marine environment', these being:

a) there must be a substance or energy;
b) this substance or energy must be introduced by humans, directly or indirectly, into the marine environment; and
c) such introduction must result or be likely to result in deleterious effects.

In its examination, ITLOS determined that both substances and energy, in the form of gases and heat, are entering the marine environment and are anthropogenic in nature, i.e. they are produced by humans. ITLOS noted that 'according to the science', such substances and energy are taken up by the ocean, both directly (GHGs) and indirectly (heat). ITLOS drew upon state practice and other instruments in observing that the marine environment has both spatial and material dimensions, including the physical, chemical, geological and biological components of the ocean. ITLOS concluded that anthropogenic GHG emissions satisfy the first and second criteria of 'pollution of the marine environment'.

However, for anthropogenic emissions of GHGs to be deemed marine pollution, it is necessary for their introduction into the marine environment to also result in or be likely to result in deleterious effects. To this end, ITLOS noted that such effects 'are not limited to the marine environment' and can include, for instance, effects on human health, marine activities or amenities. These aspects have all been argued to be impacted by ocean acidification.

ITLOS noted that UNCLOS does not qualify what constitutes the likelihood nor the level of effects occurring to be determined as being 'likely' or 'deleterious'. To this ITLOS responded that the deleterious effects on the marine environment are 'observed and explained by science and are widely acknowledged by States', including in international climate treaties, such as the UNFCCC, Kyoto Protocol and the Paris Agreement. It therefore determined that the question of 'resulting in or likely to result in deleterious effects' was settled knowledge and not of a controversial nature.

Thus, ITLOS concluded that 'through the introduction of carbon dioxide and heat (energy) into the marine environment, anthropogenic GHG emissions cause climate change and ocean acidification, which results in the deleterious effects illustrated in the definition of pollution of the marine environment'. This grounded ITLOS' finding that 'the anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment'.

Why is this significant?

ITLOS' conclusion that atmospheric GHGs constitute marine pollution is significant for several reasons.

First, this is the first time ITLOS has offered guidance on interpreting 'pollution of the marine environment' under UNCLOS and in doing so it has taken a broad approach in understanding the meaning of that concept. It has clearly outlined what constitutes the 'marine environment' and a three-stage test for determining pollution. This has implications beyond this case and will likely be important in moving forward, especially considering potential environmental pollution issues in the future.

Second, ITLOS explicitly utilised scientific findings to both establish definitions that are not contained within UNCLOS, such as 'climate change', 'GHGs', and 'ocean acidification', but also in determining to what extent the introduction of GHGs to the marine environment would or is likely to result in deleterious effects. In doing so ITLOS established the authority of scientific consensus and left no room for argument on scientific grounds. This has ramifications beyond this specific case suggesting that reports resulting from science-policy platforms, such as the Intergovernmental Panel on Climate Change ('IPCC') or Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ('IPBES'), offer important evidence to be drawn on in legal decision making.

Third, and perhaps most importantly in the context of this opinion, finding GHGs to be marine pollutants creates linkages between the law of the sea regime and others, including the climate regime, and works to close the governance gap through which ocean climate change and ocean acidification have otherwise largely fallen.

Unlocking the law of the sea for climate protection

Interconnected environment but fragmented law and governance

A long-standing conundrum of international environmental law is that the territorially-based, sectoral legal structures we have created to address environmental issues do not match the interconnected, interdependent nature of ecosystems. This problem is writ large in the climate context. Despite the ecological reality of deep interlinkages between issues of climate change, marine and terrestrial biodiversity loss, and ocean degradation, the international legal response is fragmented and uncoordinated. This gives rise to concerns of conflict and inconsistency between different international legal regimes, as well as the potential for 'forum shopping' in dispute settlement where different aspects of an environmental issue are presented to different judicial forums, which may reach differing conclusions on the interpretation of relevant international rules.

But the advisory opinion delivered by ITLOS points to a more hopeful outcome. It crafts a series of interlocking and mutually reinforcing obligations across international climate law and the law of the sea that may ultimately serve to strengthen states' duties to reduce GHG emissions and minimise the serious environmental harms resulting from climate change.

Interpretative tools for creating linkage

International law of the sea is not an obvious candidate as a major site for action on climate change. UNCLOS was concluded in 1982 before climate change became a prominent issue of international concern, and the treaty lacks express references to GHG emissions or climate impacts. As argued in some of the state submissions before ITLOS, this might have led to a conclusion that law of sea obligations should give way to those of the international climate regime in dealing with the question of states' obligations to address the impacts of GHG emissions on the marine environment.

Instead, ITLOS, in its advisory opinion, uses a series of interpretive 'keys' to unlock the potential of UNCLOS as a climate protection instrument. These included:

a) A 'broad' approach to interpreting treaty language and the scope of relevant provisions relating to protection and preservation of the marine environment; and

b) Seeking to ensure coordination and harmonisation between UNCLOS and "external rules" to "clarify and inform the meaning of the provisions of the Convention and to ensure that the Convention serves as a living instrument". In particular, ITLOS' reference to rules of international climate law allowed it to draw conceptual links between the animating concepts of climate law and the law of the sea.

ITLOS' broad interpretation of treaty language is illustrated by its analysis of whether anthropogenic GHG emissions to the atmosphere can be considered 'pollution of the marine environment' for the purposes of UNCLOS, as discussed above. ITLOS adopted a similar approach in its interpretation of UNCLOS provisions dealing with the obligation to protect and preserve the marine environment.

ITLOS' use of rules under international climate laws—particularly the Paris Agreement—to craft a coherent framework of climate protection across those rules and requirements of the international law of the sea is perhaps most evident in its analysis of the UNCLOS obligation to take all measures 'necessary to prevent, reduce and control pollution of the marine environment from any source' (UNCLOS, Article 194(1)).

ITLOS' reasoning on this question:

- *Pointed to consistency between the Paris Agreement's aim of reaching net zero emissions in the second half of the century and the pollution control objective of UNCLOS, Article 194(1);*
- *Found coherence between the kinds of measures suggested to manage marine pollution under UNCLOS and the "mitigation measures" to reduce GHG emissions specified by the international climate regime;*
- *Included "[i]nternational rules and standards relating to climate change" among the "various factors States should consider in their objective assessment of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions"; and*
- *Identified the Paris Agreement's temperature goal and its "timeline for emission pathways" as "particularly relevant" for informing the content of 'necessary measures' addressing marine pollution.*

Separate but complementary obligations

While ITLOS in its advisory opinion sought harmony between obligations under UNCLOS and the requirements of international climate law, it nevertheless staked out a clear space of operation for law of the sea provisions in addressing GHG emissions and marine-related climate impacts. It rejected arguments from some participants that compliance with the UNFCCC and Paris Agreement would satisfy the specific obligation under UNCLOS to take measures regarding pollution of the marine environment arising from anthropogenic GHG emissions, and that Part XII of UNCLOS should not be interpreted as imposing emissions reduction obligations that are inconsistent with, or go beyond, those agreed under international climate treaties.

Instead ITLOS found that the obligation under Article 194(1) of UNCLOS cannot be satisfied 'simply by complying with the obligations and commitments under the Paris Agreement'. This was because the Paris Agreement and UNCLOS 'are separate agreements, with separate sets of obligations'. Hence the relationship between the two is complementary as regards the obligation to regulate marine pollution from anthropogenic GHG emissions; 'the former does not supersede the latter'. Indeed, ITLOS indicated that the requirements of Article 194(1) of UNCLOS impose a distinct legal obligation on states parties 'to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions'. Accordingly, it found that if a state fails to comply with this specific obligation, its international responsibility would be engaged.

Why is this significant?

ITLOS' approach to interpretation of law of the sea obligations in a climate context is significant as it shows the potential for different international laws to work together to respond to climate change and its broad environmental effects. This more holistic vision of climate-relevant international law holds out the promise of a synergistic international legal response to climate change that better maps to the integrated and interconnected nature of the ecosystems at stake and to the multi-pronged regulatory effort that will be needed to safeguard our climate system.

Implications for international climate litigation

The ongoing case before the International Court of Justice

In March 2024, shortly after COSIS sought an advisory opinion from ITLOS, the United Nations General Assembly sought an advisory opinion from the International Court of Justice (ICJ) on legal questions about obligations of States in respect of climate change. These questions are related to the obligations under UNCLOS considered by ITLOS, but they concern a broader range of obligations. They also extend to questions about legal consequences of these obligations for States; as noted above, the ITLOS request did not cover issues of responsibility and liability. The ICJ proceedings are still at the preliminary stage (with interested parties currently submitting written comments on each others' statements), but an opinion is expected in the near future.

As the United Nations' primary judicial organ, the ICJ applies treaties and other sources of international law, including international custom. Thus, in addition to UNCLOS and the duty to protect and preserve the marine environment, the ICJ's advisory opinion is anticipated to draw on a range of climate, human rights and biodiversity treaties, the UN Charter, and customary rules on States' obligations to prevent significant harm to the environment. This contrasts with the ITLOS advisory opinion, which provided advice on obligations under UNCLOS for those States that have ratified UNCLOS (known as 'States Parties'), rather than obligations under international law more generally.

The ICJ has been asked the following questions:

a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

The ICJ's consideration of obligations under international law, including UNCLOS

The ICJ is likely to find much assistance from the ITLOS Advisory Opinion, particularly with respect to its interpretation of the specific obligations of States Parties to UNCLOS to prevent, reduce and control marine pollution caused by GHG emissions, and the related obligations to protect and preserve the marine environment in relation to climate change impacts.

In ruling on the obligations of States Parties to take necessary measures to prevent, reduce and control marine pollution, ITLOS noted that cessation of marine pollution from GHG emissions may be less immediate than reduction and control, as consistent with the approach of the Paris Agreement. International rules and standards (especially the 1.5°C temperature target of Paris, which was emphasised by the Tribunal instead of 2°C) were deemed as highly important in determining the necessity of measures. However, as noted above, the Tribunal was careful to emphasise that the approach of the Paris Agreement does not 'supersede' UNCLOS. In legal terms, the Paris Agreement was not lex specialis. The Tribunal's commitment to a systemic understanding of obligations (which in this case meant that UNCLOS's 'open character' supported other regimes while advancing its own goals), is likely to be replicated by the ICJ.

The Tribunal's ruling on the nature of obligations with respect to marine pollution, which requires States Parties to act with 'due diligence', is also instructive for the ICJ. The standard to act to prevent, reduce and control marine pollution was found by the Tribunal to be 'stringent', and the precautionary approach applies. The standard to act to ensure that the activities of States Parties are conducted so as not to cause damage can be even more stringent with respect to transboundary pollution.

In dealing with these obligations, the Tribunal was careful to emphasise that the standard of due diligence may differ among States Parties in accordance with the availability of means and capabilities. This is not an application of the principle of 'common but differentiated responsibilities' that is found in various iterations within the climate treaties, but is instead a recognition that implementing due diligence obligations is contextual and may vary in relation to several factors. A related point emphasised by the Tribunal is that one of the means of addressing inequity is to ensure the provision of 'scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change'. Once again, coexisting provisions of the Paris Agreement, the UNFCCC and UNCLOS were interpreted to support a finding of specific obligations to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions.

Why is this significant?

Although ITLOS's advisory opinion is not binding on States and is not a formal legal precedent for the ICJ, it is likely that the ICJ will be guided by its advice on obligations contained in UNCLOS, and on its quest to accommodate a constructive relationship between the climate treaties and other areas of international law. The advisory opinion from the ICJ is likely to go much further than the ITLOS advisory opinion because it has been asked to consider obligations under international law, and because it has been asked to consider legal consequences.

Indeed, when COSIS asked for an advisory opinion from ITLOS, it expressed support for the initiative of Vanuatu in advocating that the General Assembly seek an advisory opinion from the ICJ. COSIS is providing written statements to the ICJ along with a large number of other organizations and States. With oral proceedings slated for December this year, it is likely that COSIS and many other parties will refer to the ITLOS opinion in their oral submissions.

The careful and expansive reasoning of the ITLOS opinion, especially in rejecting lex specialis arguments, hardening the precautionary approach, raising the bar on due diligence, and dwelling on 1.5°C, will be given close attention in the ongoing ICJ proceedings.

Additional relevance for domestic litigation

While domestic litigation in Australia and elsewhere relates to obligations under Australian law, rather than international law, the ITLOS advisory opinion may have some relevance. In the past, advisory opinions from the ICJ have indirectly influenced Australian cases.

There are several notable findings within the ITLOS advisory opinion that could be relevant for Australian courts. For example, the Tribunal emphasised that the obligation to regulate marine pollution from anthropogenic GHG emissions requires states to act with 'due diligence', which includes enforcing national laws. This would be 'particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities'. It also noted that measures by states to address pollution to the marine environment could be joint or individual, as appropriate. This stands in contrast to a common refrain by domestic judges when dismissing lawsuits in climate matters, who consider that action on climate change must be pursued internationally (due to the collective nature of the problem of global warming) and are therefore not appropriate to litigate domestically.

The conduct of a States' planning process for activities leading to GHG emissions is another domestic matter for which the ITLOS opinion is relevant. The Tribunal found that the obligation under UNCLOS and customary international law to conduct environmental impact assessment (EIA) for planned activities that may cause pollution to the marine environment arises for activities, including land-based activities, that will result in significant or harmful changes to the marine environment through anthropogenic GHG emissions. Although it is for each State to determine the content of the relevant EIA in its domestic legislation, the Tribunal suggested that the cumulative impacts of the planned activities and other activities on the environment should be included. Such activities comprise both those planned by private entities and those planned by States. The conduct of EIA for GHG-emitting projects is often subject to judicial review in Australia, and while the ITLOS case will not be directly applicable, it provides guidance on what is expected of States internationally.

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