More than a Sink

The ITLOS Advisory Opinion on Climate Change and State Responsibility

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More than a Sink

The oceans absorb large quantities of the carbon dioxide emitted by human activities. This “sink” function is so significant that, until 1957, one objection to a causal link between anthropogenic emissions and global warming was that the oceans would absorb most of the excess CO2, thus breaking this link. That year, oceanographer Roger Revelle and chemist Hans Suess refuted this objection, demonstrating that the oceans’ absorptive capacity had limits and emissions would therefore lead to higher CO2 concentrations in the atmosphere. Subsequent research progressively shed light on the impacts of anthropogenic emissions of greenhouse gases (GHGs) on ocean chemistry and ecosystems, such as coral bleaching, marine biodiversity loss, and acidification. Yet, both the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement treat the ocean primarily as a sink of instrumental value to the climate system. This limited focus means the UNFCCC and the Paris Agreement in no way interfere with, and even less replace, the international law governing specifically the protection and preservation of the oceans and their ecosystems, most notably the United Nations Convention on the Law of the Sea (UNCLOS).

The difference between treating the oceans as a mere sink versus protecting them as a vital part of the environment has important implications under international law. These implications come to the fore when considering the relationship between the UNCLOS on the one hand and the UNFCCC and its Paris Agreement on the other. While the latter treaties in no way legitimize pollution of the marine environment, their focus on oceans as sinks could be misinterpreted to deprive UNCLOS and the customary rules it codifies of a meaningful role in addressing climate change. This effect is achieved where the UNFCCC and/or the

Paris Agreement are misconstrued as a *lex specialis* precluding the application of UNCLOS to climate change, or through a "harmonious interpretation" effectively leading to such a result.

In its advisory opinion rendered on 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) avoided this ambush. The opinion clearly states that complying with the Paris Agreement is not sufficient for compliance with UNCLOS (para. 223-224), and that anthropogenic emissions of GHGs do indeed constitute marine pollution (para. 179). Underpinning these findings is the recognition of the marine environment as deserving protection and preservation for its own sake, not merely as a tool for climate regulation. As both Jacqueline Peel and Christina Voigt note in their contributions to this symposium, precisely by aiming for harmonization and complementarity between UNCLOS and other relevant areas of international law, the Tribunal, in Peel's words, "unlocked the potential of UNCLOS as a climate protection instrument".

The basis for State responsibility: obligations, science, and breach

While not directly addressing the issue of State responsibility and liability, the opinion provides a clear basis for taking this additional step in the future. This is a crucial development, as establishing State responsibility is essential for holding States accountable for their contributions to climate change and its devastating impacts on the marine environment. It also opens the door to potential legal remedies and compensation for affected States, peoples, and individuals. In practice, taking this step would entail considering how States have, over time, polluted the marine environment through GHG emissions in breach of their relevant obligations. Judge Kittichaisaree emphasized this potential in his declaration, stating that "the pertinent question" is: "How do the obligations to prevent and preserve the marine environment and the obligations to prevent, reduce and control pollution apply to climate change and how can they be breached?" (para. 31). He stressed that a violation of the obligations under the Convention, as explained in the opinion, would necessarily give rise to a violation of UNCLOS Article 235 on responsibility and liability (para. 32).

Crucially, the Tribunal refrained from directly addressing State responsibility and liability not due to a lack of evidence or any fundamental obstacle, but simply because of how the Commission for Small Island States on Climate Change and International Law (COSIS) had formulated the request (para. 146). In this regard, the request submitted to ITLOS differs fundamentally from the UN General Assembly's request for an advisory opinion from the International Court of Justice (ICJ), as the latter explicitly asks about "legal consequences" for "injured" and "specially affected" States, peoples, and individuals.

The obligations are specific enough

The ITLOS opinion provides a stepping stone towards establishing State responsibility through its comprehensive analysis of the obligations of States under UNCLOS in relation to anthropogenic emissions and their impact on the marine environment. It clarifies the scope and content of these obligations, the standard of due diligence required, and the factors States should consider in determining necessary measures to prevent, reduce, and control marine pollution from such emissions.

For instance, the Tribunal found that under Article 194(1) of UNCLOS, States have the specific obligations to take all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions and to endeavor to harmonize their policies in this connection (para. 243). Similarly, under Article 194(2), States have the specific obligation to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment and that pollution from such emissions does not spread beyond the areas where they exercise sovereign rights (para. 258).

While not speaking directly to the temporal scope of the relevant State conduct, the Tribunal has provided important guidance to enable the assessment of this conduct over time in light of UNCLOS obligations. Particularly significant is the Tribunal's confirmation that the standard of due diligence evolves over time as scientific knowledge advances and the risks associated with a particular activity become more foreseeable. The Tribunal noted that "the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent" given the "high risks of serious and irreversible harm to the marine environment from such emissions" (para. 241). The Tribunal further recognized that States must apply the precautionary approach in regulating marine pollution from anthropogenic GHGs, thus requiring regulatory measures even in the absence of full scientific certainty (para. 213). As the Tribunal explained, "the precautionary approach is implicit in the very notion of pollution of the marine environment, which encompasses potential deleterious effects" (para. 213).

The science is clear and settled

The development of scientific knowledge and governmental awareness of climate change alongside the historical and ongoing cumulation of GHG emissions is a question not fully considered by the Tribunal, but one that emerges as part of an assessment of the legality of States' conduct over time. As early as 1832, scientific evidence about "chemical changes" caused by "the combustion of fuel" that were "constantly increasing the atmosphere by large quantities of carbonic acid [CO2] and other gases noxious to animal life" started to emerge.

At this early state of scientific knowledge about pollution, with only nascent evidence concerning its potential negative impact, the standard of due diligence reflected what, at the time, were plausible indications of potential risks. In contrast, by the 1960s, the causal link between anthropogenic GHG emissions and observed climate change was well established in both scientific and policy circles, as were the potentially catastrophic effects if such

interference with the climate system remained unmitigated. As the Tribunal's explanation of the nature of due diligence makes clear, this consolidated scientific consensus leads to a higher standard of due diligence. With this high level of knowledge predating the adoption and entry into force of UNCLOS, the obligations arising under UNCLOS have always involved a high standard of diligence, with the standard heightening further as scientific knowledge of the risks continued to evolve.

The Tribunal's findings, read in light of the evolving scientific knowledge, provide a solid basis for assessing the conduct of States in relation to their obligations under UNCLOS and parallel obligations under customary international law. If a State has failed to meet the applicable standard of due diligence at any point in time, it will have breached its international obligations. The opinion itself underscores that in such a scenario, "international responsibility would be engaged for that State" (para. 223).

Just one more step

The contribution of the ITLOS advisory opinion to the question of State responsibility could not be more timely, given the separate advisory proceedings pending before the ICJ. As noted earlier, the ICJ has been asked by the UN General Assembly to determine the "legal consequences" under a range of obligations arising for States from acts and omissions that have, over time, caused significant harm to the climate system and other parts of the environment. The Court is asked to have "particular regard" to, amongst other sources, UNCLOS, and the customary duty to protect and preserve the marine environment.

By shifting the focus on the oceans from mere "sinks" to an inherently valuable part of the environment to be protected and preserved, the ITLOS advisory opinion signals that causing significant harm to the climate system and other parts of the environment – including the hydrosphere and the marine environment – is, in principle, inconsistent with international law. This breach of obligations triggers legal consequences with respect to two categories of victims: States injured or specially affected by or particularly vulnerable to the adverse effects of climate change, and peoples and individuals of present and future generations affected by such adverse effects.

In conclusion, the ITLOS advisory opinion provides a significant step towards establishing State responsibility for the conduct which is the cause of climate change and its adverse effects. By clarifying the scope and content of States' climate obligations under UNCLOS, including the "stringent" standard of due diligence based on the best available science, the opinion provides a framework for assessing State conduct over time. This in turn lays the groundwork for holding States internationally responsible for acts and omissions that have caused climate change and related devastation of the marine environment. As the international community continues to grapple with the urgent need for climate action, the

ITLOS advisory opinion embodies legal progress in its most basic, and most powerful, form. By making explicit what is implicit, the opinion unveils that conduct hiding in plain sight under cover of lawfulness is, on closer inspection, unlawful.

The authors serve as Counsel for the Republic of Vanuatu in the advisory proceedings on climate change before the International Court of Justice. Margaretha Wewerinke-Singh also served as Counsel and Advocate for the Commission of Small Island States on Climate Change and International Law before the International Tribunal for the Law of the Sea. The views expressed in this piece are in our strict academic capacity

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