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# The Salience of Salt Water: An ITLOS Advisory Opinion at the Ocean-Climate Nexus

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## Abstract

As the Commission of Small Island States on Climate Change and International Law has communicated its request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS), the Tribunal finds itself in a unique position to interpret the law of the sea in light of pressing, global challenges. This article explores how the ITLOS advisory opinion could support international efforts to combat climate change and ocean acidification, and encourages an evolutionary and mutually supportive interpretation that integrates the law of the sea with international legal systems concerning climate change, human rights, and biodiversity. Despite its non-binding character, the effects of this advisory opinion would then by no means be negligible. By embracing its judicial function, ITLOS could therefore – within the boundaries of the prevailing legal framework – offer guidance on climate change and ocean acidification that is backed up by the authority of the law.

## Keywords

climate change – ocean acidification – advisory opinion – International Tribunal for the Law of the Sea

## Introduction

Climate change and ocean acidification have significant adverse impacts on the marine environment.<sup>1</sup> Although they are distinct issues, they share the same cause in excessive anthropogenic greenhouse gas emissions. Several international legal frameworks – foremost the law of the sea and international climate change law – may be apt to address these deteriorating effects, but their interplay remains insufficiently developed; thus, the ocean falls between two stools.<sup>2</sup> On the one hand, the 1982 United Nations Convention on the Law of the Sea (LOSC) predates the common awareness of climate change and ocean acidification,<sup>3</sup> which are consequently not explicitly recognised in its provisions. However, as a ‘living’ instrument, the LOSC can respond to emerging issues through evolutive interpretation.<sup>4</sup> International climate change law, on the other hand, develops only stagnantly and has been reluctant in its recognition of the repercussions on the ocean,<sup>5</sup> notwithstanding recent advancements in the 2021 Glasgow Climate Pact.<sup>6</sup> As these systems fail to offer

- 1 The author wishes to thank Elisa Morgera, Mitchell Lennan, and Hilde Woker for their insightful comments. See Intergovernmental Panel on Climate Change (IPCC), *Special Report on the Ocean and Cryosphere in a Changing Climate* [H-O Pörtner, DC Roberts, V Masson-Delmotte et al. (eds)] (IPCC, 2019), specifically chapters 4–6; United Nations General Assembly (UNGA) Res 76/72 (20 December 2021), Oceans and the Law of the Sea, UN Doc A/Res/76/72, paras 206–220.
- 2 United Kingdom Parliament, International Relations and Defence Committee, *UNCLOS: The Law of the Sea in the 21st Century* (HL 2021–22, 159-11), paras 134–135; S Lee and L Bautista, ‘Part XII of the United Nations Convention on the Law of the Sea and the duty to mitigate against climate change: Making out a claim, causation, and related issues’ (2018) 45(1) *Ecology Law Quarterly* 129–156, at p. 132.
- 3 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3 [LOSC].
- 4 See, e.g., J Barrett and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL, London, 2016).
- 5 Although Article 1(3) of the United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994) 1771 *UNTS* 107 explicitly includes the ocean as part of the climate system.
- 6 Conference of the Parties (COP) to the Paris Agreement, Decision 1/CP.26, Glasgow Climate Pact (13 November 2021), UN Doc FCCC/CP/2021/12/Add.1 (8 March 2022), paras 60–61; COP serving as the meeting of the Parties to the Paris Agreement, Decision 1/CMA.3, Glasgow Climate Pact (13 November 2021), UN Doc FCCC/PA/CMA/2021/10/Add.1 (8 March 2022); relatedly, the recently adopted Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (UN Doc A/CONF.232/2023/4, 19 June 2023, not yet in force) has recognised the interrelation between the marine environment and climate change in the preamble and Articles 7(h) and 17(c) [BBNJ Agreement].

adequate regulatory solutions, vulnerable States are resorting to litigation to promote climate action.<sup>7</sup>

During the 2021 United Nations Climate Change Conference, Tuvalu and Antigua and Barbuda announced the establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)<sup>8</sup> as part of a broader initiative by the Alliance of Small Island States.<sup>9</sup> In December 2022, its request for an advisory opinion on climate change was communicated to the International Tribunal for the Law of the Sea (ITLOS or Tribunal).<sup>10</sup> As such, the Tribunal has the opportunity to clarify the scope and content of States' obligations under the LOSC in the context of climate change and ocean acidification.

This article explores how the ITLOS advisory opinion could support international efforts to combat both climate change and ocean acidification; the two aspects brought forward in COSIS' request. After some brief preliminary procedural considerations, an analysis of the substantive contribution that ITLOS can make, and the potential effects of the advisory opinion, will elucidate its opportunities and challenges. Herein, the focus lies on making the case for an evolutionary and mutually supportive interpretation of the LOSC that integrates the international legal frameworks concerning climate change, human rights, and biodiversity. Doing so will demonstrate the interconnectedness between the various regimes, as well as between the numerous impacts of the climate crisis. An ITLOS advisory opinion at the ocean-climate nexus can be a valuable piece of the complex puzzle of international efforts against the climate crisis – especially if the Tribunal adopts an integrated approach.

7 M McCreath, 'The potential for UNCLOS climate change litigation to achieve effective mitigation outcomes' in J Lin and DA Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP, Cambridge, 2020) 120–143, at p. 142.

8 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (Edinburgh, 31 October 2021, in force 31 October 2021) [COSIS Agreement], available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-0800002805c2ace.pdf>; all websites accessed 1 June 2023.

9 As of 1 June 2023, the other Member States of COSIS are Niue, Palau, St. Lucia, and Vanuatu.

10 Letter of the Commission of Small Island States on Climate Change and International Law, 'Request for Advisory Opinion' (12 December 2022), available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request\\_for\\_Advisory\\_Opinion\\_COSIS\\_12.12.22.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf); ITLOS has lodged the case in its docket as Case No. 31 and set 16 June 2023 as the deadline for written statements, see International Tribunal for the Law of the Sea, Order 2023/1 (15 February 2023) on Case No. 31: *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*.

## Preliminary Considerations

### *Advisory Jurisdiction and Discretionary Power*

An advisory opinion is an authoritative statement or interpretation of international law by virtue of which international courts assist international organisations in carrying out their tasks and complying with their obligations.<sup>11</sup> Whether ITLOS can render such an advisory opinion has been the source of controversy, as it is not explicitly provided for in the LOSC.<sup>12</sup> Nevertheless, in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS asserted that Article 21 of its Statute<sup>13</sup> provides for advisory jurisdiction, while Article 138 of the Rules of the Tribunal<sup>14</sup> – which does explicitly acknowledge advisory opinions – merely devises its prerequisites.<sup>15</sup> Manifest authors have already discussed these prerequisites in relation to COSIS' request,<sup>16</sup> and the general consensus seems to be that the questions presented are of a sufficiently legal nature and the COSIS Agreement *prima*

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- 11 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, p. 4, paras 76–77; *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment, 28 January 2021, ITLOS Case No. 28, para 202; *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017), paras 23–24.
- 12 Y Tanaka, 'The role of an advisory opinion of ITLOS in addressing climate change: Some preliminary considerations on jurisdiction and admissibility' (2023) 32 *Review of European, Comparative & International Environmental Law (RECIEL)* 1–11, at pp. 3–4.
- 13 LOSC (n 3), Annex VI.
- 14 *Rules of the International Tribunal for the Law of the Sea*, adopted 28 October 1997, last amendment 25 September 2018, ITLOS/8.
- 15 *SRFC Advisory Opinion* (n 11), paras 53–59; but cf., e.g., *SRFC Advisory Opinion* (Declaration of Judge Cot of 2 April 2015), paras 3–4 who does not agree with the legal reasoning of the Tribunal.
- 16 See, *inter alia*, R Barnes, 'An advisory opinion on climate change obligations under international law: A realistic prospect?' (2022) *Ocean Development & International Law* 1–34; B Mayer, 'International advisory proceedings on climate change' (2023) 44(1) *Michigan Journal of International Law* 41–115; CA Cruz Carrillo, 'The advisory jurisdiction of the ITLOS: From uncertainties to opportunities for ocean governance' in FM Platjouw and A Pozdnakova (eds), *The Environmental Rule of Law for Oceans: Designing Legal Solutions* (CUP, Cambridge, 2023) 236–251; D Freestone, R Barnes and P Akhavan, 'Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)' (2022) 37(1) *International Journal of Marine and Coastal Law (IJMCL)* 166–178; RJ Roland Holst, 'Taking the current when it serves: prospects and challenges for an ITLOS advisory opinion on oceans and climate change' (2022) *RECIEL* 1–9; A Miron, 'COSIS request for an advisory opinion: A poisoned apple for the ITLOS?' (2023) 38(2) *IJMCL* 249–269; Tanaka (n 12).

*facie* relates to the LOSC, but it may be challenging to prove that COSIS is an authorised body.<sup>17</sup>

To protect the integrity of its judicial function, ITLOS can decline an advisory opinion request for compelling reasons, even if it has jurisdiction.<sup>18</sup> As a procedural framework circumscribing this discretionary power is currently absent, abuse of ITLOS' advisory jurisdiction is possible – especially if States institute an agreement specifically to seek an advisory opinion to 'gain an advantage over third States';<sup>19</sup> a defensible argument regarding COSIS' request if it was mainly concluded to determine the climate-related obligations of non-requesting States.<sup>20</sup> Although ITLOS itself has clarified that the consent of implicated, but non-requesting, States is irrelevant,<sup>21</sup> the absence of such 'state consent'<sup>22</sup> could be problematic in this specific advisory opinion. Climate change and ocean acidification are global problems that affect all States, and a pronouncement on the character of the *erga omnes* obligation to protect and preserve the marine environment would inevitably be of interest to non-requesting States, which makes the procedural legitimacy of an advisory opinion on this matter requested by only a cluster of States dubious.<sup>23</sup> Consequently, it would be prudent for ITLOS to carefully set out its considerations on jurisdiction and discretion. An ambiguous procedural basis could undermine the legitimacy and credibility of both the Tribunal and its advisory opinion, which would, in turn, subvert its contribution to international climate action.<sup>24</sup>

### *The Advantage of Advice*

Why then would COSIS institute advisory rather than contentious proceedings if ITLOS must be cautious in framing and exercising its jurisdiction? Advisory proceedings provide a unique opportunity for the advancement of efforts

17 See, e.g., Tanaka (n 12), at pp. 6–7; Barnes (n 16), at pp. 14–16.

18 Article 138 Rules of the Tribunal (n 14) uses the verb 'may'; *SRFC Advisory Opinion* (n 11), para 71; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Reports 95, para 64.

19 *SRFC Advisory Opinion* (Declaration of Judge Cot) (n 15), para 9.

20 Mayer (n 16), at pp. 72, 86; Cruz Carrillo (n 16), at pp. 248–249.

21 *SRFC Advisory Opinion* (n 11), para 76; although the International Court of Justice has taken a more moderate approach, see *Western Sahara*, Advisory Opinion (16 October 1975) ICJ Reports 1975, p. 12, paras 31–33.

22 See further Mayer (n 16), at pp. 81–84; Barnes (n 16), at pp. 10–11; however, opinions on the existence of this requirement are divided, see *SRFC Advisory Opinion* (Separate Opinion of Judge Lucky of 2 April 2015) (n 15), para 22.

23 Roland Holst (n 16), at pp. 2–4.

24 Barnes (n 16), at p. 11; Mayer (n 16), at p. 68.

against the climate crisis, because they are non-confrontational, inclusive, and expeditious. Where contentious disputes often polarise and stigmatise, especially when global interests form the subject matter, an advisory opinion puts ITLOS in a position to interpret the law detached from particular circumstances and without attributing blame on any particular State.<sup>25</sup> Advisory opinions are therefore pre-eminently suitable to clarify the law *per se* and specify the legal obligations of States in respect to politically sensitive issues.<sup>26</sup> Furthermore, the advisory proceedings at ITLOS allow for the inclusion of an array of views, as the Tribunal can be informed by all States Parties or international organisations likely to furnish information.<sup>27</sup> In practice, civil society can also partake by virtue of ITLOS' expansive view on participation in advisory proceedings. The Tribunal accepts *amicus curiae* briefs and comments from non-governmental organisations, although these are not part of the official case file.<sup>28</sup> Advisory proceedings can thereby indirectly accommodate a constructive debate about multilateral rules. As such, the impact that interested parties – which, in the case of climate change and ocean acidification in all probability means most States Parties and organisations – have is more substantial than in a contentious case.<sup>29</sup> Lastly, advisory proceedings are oftentimes conducted faster than their contentious counterparts, especially when it concerns questions of an urgent character.<sup>30</sup>

For all-encompassing issues like climate change and ocean acidification, an advisory opinion would thus be beneficial because of its prospective gaze, extensive participation possibilities, and urgent procedure: no superfluous luxuries in the face of significant deleterious impacts on the marine environment.

25 Cruz Carrillo (n 16), at p. 237; R Wolfrum, 'Advisory opinions: An alternative means to avoid the development of legal conflicts?' in H Ruiz Fabri (ed), *International Law and Litigation: A Look into Procedure* (Nomos Verlagsgesellschaft, Baden-Baden, 2019) 99–106, at p. 106.

26 R Wolfrum, 'Advisory opinions: Are they a suitable alternative for the settlement of international disputes?' in R Wolfrum and I Gätzschnmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Berlin, 2013) 35–123, at pp. 39–40; A Savaresi, K Kulovesi and H van Asselt, 'Beyond COP26: Time for an advisory opinion on climate change?' (*EJIL:Talk!*, 17 December 2021) available at <https://www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/>.

27 Rules of the Tribunal (n 14), Articles 133, 138(3); Roland Holst (n 16), at p. 4; Mayer (n 16) at pp. 43–44.

28 For example, ITLOS published an *amicus curiae* brief of the WWF along with its *SRFC Advisory Opinion* (n 11).

29 Wolfrum (n 25), at p. 105.

30 *Ibid.*; Rules of the Tribunal (n 14), Article 132.

## The Substantive Contribution

### *Linguistically Broad, Legally Narrow*

If ITLOS decides to render the advisory opinion, it will be guided by the questions that COSIS posed to it on 12 December 2022. These are as follows:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the '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 greenhouse gas 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?<sup>31</sup>

The phrasing of these questions is linguistically broad, but legally narrow in scope. They merely contemplate the substance of Part XII of the LOSC, even though other international legal regimes are also pertinent when indicating States' obligations concerning climate change and ocean acidification – one may think of international climate change law, human rights law, and biodiversity law. However, COSIS' restrictive legal scope seems sensible, as requests for advisory opinions should not lead ITLOS to stray into the territory of law-making, which would undermine its judicial integrity.<sup>32</sup> Notably, the first question pertains to Article 194 of the LOSC, whereas the second question relates to Article 192. The latter contains the overarching obligation to protect and preserve the marine environment, while Article 194 asserts more specifically that States should take measures to prevent, reduce, and control pollution. The order of the questions – from specific to general – thus seems a curious choice.<sup>33</sup>

As of now, it seems unsettled whether ITLOS has the capability to rephrase the questions posed to it – an issue exacerbated by limited legislation and underdeveloped case law. Roland Holst argues that the Tribunal does indeed have this power, as follows from the word 'may' in Article 138 of the Rules of the

<sup>31</sup> COSIS Letter (n 10).

<sup>32</sup> Barnes (n 16), at p. 3.

<sup>33</sup> Mayer (n 16), at p. 70.



Tribunal,<sup>34</sup> while former Judge Wolfrum contends that ITLOS is ‘restricted to answering the specific legal question as stated in the request’.<sup>35</sup> As ITLOS has demonstrated a tendency to draw on jurisprudence from other international courts,<sup>36</sup> it might be expected to follow in the footsteps of the International Court of Justice (ICJ) and allow for rephrasing if it deems it necessary.

### *The Applicable Law: Part XII of the LOSC*

The underlying premise of the questions evidently presumes that the excessive emission of greenhouse gasses equals pollution in accordance with Article 1(1)(4) of the LOSC, although ITLOS will have to verify this assumption. ‘Pollution of the marine environment’ is therein defined as the introduction by man of substances or energy into the ocean, (likely) resulting in harm to the marine environment. The deposition of carbon dioxide (CO<sub>2</sub>) and the absorption of heat generated by global warming in all likelihood fall within this definition, as they result in lowering pH-levels and rising temperatures of the water, respectively.<sup>37</sup> Consequently, Part XII of the LOSC, concerning the protection and preservation of the marine environment, will be the focal point of the advisory opinion on climate change and ocean acidification.

Article 192 constitutes Part XII’s core framework provision that necessitates an evolutionary interpretation and thereby enables the LOSC to be a ‘living’ instrument.<sup>38</sup> Its content is informed by the other provisions of Part XII and general international law.<sup>39</sup> Foremost, Article 192 should be read in conjunction with the obligation for States to take all necessary measures to prevent, reduce, and control marine pollution from *any* source.<sup>40</sup> This entails an obligation to undertake due diligence to not let activities under State jurisdiction harmfully pollute other States and their environment, as evidenced by the term

34 Roland Holst (n 16), at p. 3.

35 Wolfrum 2019 (n 25), at p. 104.

36 For example, in *SRFC Advisory Opinion* (n 11), para 71, ITLOS adopted the ICJ’s discretionary test of ‘compelling reasons’.

37 A Boyle, ‘Litigating climate change under Part XII of the LOSC’ (2019) 34(3) *IJMCL* 458–481, at p. 463; J Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (OUP, Oxford, 2017) 255.

38 Lee and Bautista (n 2), at p. 140; C Redgwell, ‘Treaty evolution, adaptation and change: Is the LOSC ‘enough’ to address climate change impacts on the marine environment?’ (2019) 34(3) *IJMCL* 440–457, at pp. 446–450.

39 *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, Permanent Court of Arbitration, PCA Case No 2013-19, para 941.

40 LOSC (n 3), Article 194(1).

‘to ensure’ in Article 194(2).<sup>41</sup> In the undertaking of these necessary measures, specific concern should be had for fragile ecosystems, especially in the context of ocean acidification, which exacerbates the deterioration of already weakened ecosystems.<sup>42</sup> Moreover, LOSC Articles 207 and 212, concerning pollution from land-based sources and pollution from and through the atmosphere respectively, also encompass States’ emissions. These provisions contain rules of reference by virtue of which States have to account for international rules relevant to conducting their obligations – once again, reference should here be made to, *inter alia*, international climate change law, human rights law, and biodiversity law. Although the rather weak phrasing of ‘taking into account’ makes the stipulation of additional binding obligations unlikely, ample opportunity remains for ITLOS to clarify how the interplay between different obligations from these legal systems should be construed.<sup>43</sup> Lastly, the fundamental duty of cooperation in the prevention of pollution, together with Article 197 of the LOSC, can provide further stimulus for climate action;<sup>44</sup> especially considering that ‘the global nature of climate change calls for the widest possible cooperation by all countries’.<sup>45</sup>

Collectively, these provisions from Part XII of the LOSC constitute a due diligence obligation for States to regulate greenhouse gas emissions that will likely damage the marine environment – including from the private sector.<sup>46</sup>

### *A Characterisation of Due Diligence*

The Tribunal has defined obligations of due diligence as ‘an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain [a certain] result’.<sup>47</sup> This notion forms the core of most environmental

41 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, paras 110–113 [*Activities in the Area*].

42 LOSC (n 3), Article 194(5); see also *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, Permanent Court of Arbitration, PCA Case No 2011-03, paras 320, 538.

43 Roland Holst (n 16), at p. 6.

44 *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, 3 December 2001, *ITLOS Reports 2001*, p. 95, para 82; N Klein, ‘Adapting UNCLOS dispute settlement to address climate change’ in J McDonald, J McGee and R Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing, Cheltenham, 2020) 94–113, at pp. 105–106.

45 UNFCCC (n 5), preamble.

46 Boyle (n 37), at pp. 465–466.

47 *Activities in the Area* (n 41), para 110.

obligations,<sup>48</sup> and has crucially been developed in the two previous advisory opinions from ITLOS and the Seabed Disputes Chamber. These declared that due diligence constitutes a variable concept of which the specific obligations may change with time, the risk involved, and in light of the scientific and technical knowledge available.<sup>49</sup>

The main advantage of a due diligence obligation is its open-ended nature, which establishes the parameters while leaving exact duties for States to be assessed on a case-by-case basis.<sup>50</sup> Accordingly, if ITLOS formulates a due diligence obligation to regulate greenhouse gas emissions to protect the marine environment, the content of this obligation can progressively be developed within its normative context.<sup>51</sup> In addition, due diligence obligations specifically invite an integrated interpretation of the LOSC in conjunction with other sources of international law.<sup>52</sup> In a climate change context, this is apparent from *Daniel Billy v. Australia*, where the United Nations (UN) Human Rights Committee upheld the authors' belief that 'treaties should be interpreted in the context of their normative environment' – an approach easily transplanted to the LOSC.<sup>53</sup> Committee Member Zyberi specifically found that climate change treaties and the Nationally Determined Contributions under the Paris Agreement<sup>54</sup> are an 'important starting point' to flesh out the content of the due diligence obligation to protect human rights and take appropriate measures to achieve their realisation in light of climate change.<sup>55</sup> The UN Committee on the Rights of the Child similarly confirmed that climate change treaties are relevant to the interpretation of human rights treaties in the context of the climate crisis<sup>56</sup> and that the human rights due diligence obligations

48 *The Environment and Human Rights* (n 11), para 124.

49 *Activities in the Area* (n 41), para 117; *SRFC Advisory Opinion* (n 11), para 129.

50 Roland Holst (n 16), at p. 7.

51 *Ibid.*

52 *Ibid.*

53 Human Rights Committee, *Daniel Billy et al v. Australia* (22 September 2022), UN Doc CCPR/C/135/D/3624/2019, citation at paras 5.6, 7.5.

54 Paris Agreement under the United Nations Framework Convention on Climate Change (Paris, 12 December 2015, in force 4 November 2016) 3156 *UNTS*.

55 *Daniel Billy v. Australia* (n 53), Annex 2, para 3; see also B Baade, 'Due diligence and the duty to protect human rights' in H Krieger, A Peters and L Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP, Oxford, 2020) 92–108, at p. 92; *The Environment and Human Rights* (n 11), para 123.

56 Committee on the Rights of the Child, 'Draft General Comment No. 26, Children's Rights and the Environment with a Special Focus on Climate Change' (9 December 2021), para 10, available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and>.

warrant protection from environmental harm.<sup>57</sup> Other sources of international law can thus be drawn on to shape and concretise the due diligence obligation to protect the marine environment from greenhouse gas emissions.

However, the main disadvantage of formulating a due diligence obligation is that ITLOS' pronouncement will have to remain equivocal, and cannot explicate the exact action required of States in relation to climate change and ocean acidification.<sup>58</sup> As such, the resulting advisory opinion may merely restate infamous abstract principles and elements of due diligence instead of providing genuine guidance.<sup>59</sup> Nevertheless, the advisory opinion can support international climate efforts if ITLOS explicitly confirms the due diligence obligation to prevent, reduce, and control greenhouse gas emissions while fleshing out the content of this obligation with reference to other relevant sources of international law.<sup>60</sup>

### *Making the Case for an Integrated Approach*

The question then remains *how* ITLOS could carve out the scope of this due diligence obligation. In this article it is argued that the Tribunal should take an integrated approach in which it focusses on the interconnected character of international law related to the marine environment<sup>61</sup> and presents a holistic interpretation of the legal frameworks regarding climate change and ocean acidification. As ITLOS has proven willing to progressively shape the law in the environmental realm,<sup>62</sup> it may be susceptible to a progressive approach. Contrarily, if the Tribunal renders an advisory opinion which only engages with the LOSC and not with other relevant regimes, it would testify to the separation of international law, which inherently counteracts its application to polycentric issues. As both climate change and ocean acidification are global challenges inextricably intertwined with a multiplicity of international treaties, it would be convoluted to pretend that these issues can be solved through the application of only one.

57 *Ibid.*, para 76.

58 Roland Holst (n 16), at p. 8.

59 Mayer (n 16), at pp. 47, 59.

60 Similar to ITLOS' approach in *SRFC Advisory Opinion* (n 11), para 130.

61 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Separate opinion of Judge Cançado Trindade) *ICJ Reports 2014*, p. 226, paras 25–26.

62 SW De Herdt and TM Ndiaye, 'The International Tribunal for the Law of the Sea and the protection and preservation of the marine environment: Taking stock and prospects' (2020) 57 *Canadian Yearbook of International Law* 353–385, at p. 356; Klein (n 44), at pp. 111–112.

ITLOS can justifiably take this avenue for three reasons. Firstly, Article 293(1), applied analogously, stipulates that ITLOS shall take into account other rules of international law not incompatible with the LOSC. Accordingly, both primary and secondary rules of international law can be utilised to ensure proper interpretation and application of Part XII of the LOSC.<sup>63</sup> Secondly, ITLOS should provide a dynamic interpretation of the relevant provisions to safeguard the adaptability of the LOSC to changing circumstances. As mentioned above, the content of Article 192 is informed by general international law, and Articles 207 and 212 assign a role for other internationally agreed rules. The interpretation of these provisions in light of climate change and ocean acidification thus necessitates a reading of other legal regimes. These rules of reference also effectively call for the third justification that ITLOS can rely on:<sup>64</sup> systemic interpretation.<sup>65</sup> This entails that relevant rules of international law that are applicable between parties may be used to interpret ambiguous provisions.

An important caveat, however. The possibilities of an integrated approach are confined by the limits of ITLOS' role as settler of disputes and developer of law;<sup>66</sup> it would be ill-advised to pursue the role of legislator, as overstepping these boundaries would seriously endanger the judicial legitimacy of the Tribunal.<sup>67</sup> ITLOS' mandate is founded upon State consent, and as the Tribunal lacks the legitimacy and deliberative character of international negotiations, it can only affirm and interpret existing law to position it within the overall system – not create new law.<sup>68</sup> Furthermore, ITLOS' expertise lays in the law of the sea, not international climate change law, human rights law, or biodiversity law. Especially considering that two other advisory opinions on climate change have been requested at the ICJ and the Inter-American Court of Human Rights

63 *Arctic Sunrise Arbitration (Netherlands v. Russia)*, Merits, 14 August 2015, Permanent Court of Arbitration, PCA Case No 2014-02, paras 188–192.

64 E Morgera and M Lennan, 'Strengthening intergenerational equity at the ocean-climate nexus: Reflections on the UNCRC General Comment No.26' (2022) 52(5–6) *Environmental Policy and Law* 445–459, at pp. 446–447.

65 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) 1155 *UNTS* 331, Article 31(3)(c).

66 V Lowe, 'The complementary role of ITLOS in the development of ocean law' in HN Scheiber and J Paik (eds), *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (Martinus Nijhoff, Leiden, 2013) 29–36, at pp. 29–30.

67 American Society of International Law (ASIL), 'Remarks by Alan Boyle' in *Proceedings of the Annual Meeting vol. 109, 2015: Adapting to a Rapidly Changing World* (CUP, Cambridge, 2015) 198, 201; see also *SRFC Advisory Opinion* (n 11), paras 73–74.

68 ASIL (n 67), at p. 198; however, D Bodansky, 'The role of the International Court of Justice in addressing climate change: Some preliminary reflections' (2017) 49 *Arizona State Law Journal* 689–712, at pp. 702–703, argues that negotiations equally lack legitimacy when addressing matters of global externalities.

(IACtHR), it may be prudent for ITLOS to leave open certain questions that are better answered by those tribunals. Although ITLOS should take other international rules into account, it cannot be requested or expected to exceed its mandate. After all, as the IACtHR eloquently put it, advisory opinions cannot possibly explicate ‘exhaustively or in great detail’ the specific obligations of States under *all* environmental treaties.<sup>69</sup>

Historically, ITLOS has not adopted an integrated approach in the advisory realm. In the *SRFC Advisory Opinion*, the Tribunal did not refer to the UN Fish Stocks Agreement or other relevant (soft law) instruments. Judge Paik criticised this refusal in his separate opinion, as he observed that although the UN Fish Stocks Agreement was both relevant to the questions posed – at least to the extent that its provisions concern areas within national jurisdiction – and compatible with the LOSC, its contents were not utilised.<sup>70</sup> Contrarily, the tribunal in the *South China Sea Arbitration* aptly demonstrated the potential of an integrated approach for the protection of the marine environment. When qualifying the environment where the harmful activities conducted by Chinese fishing vessels took place, the arbitral tribunal observed that Article 194(5) LOSC uses the term ‘ecosystem’, despite the absence of a definition.<sup>71</sup> It therefore incorporated the internationally accepted definition from Article 2 Convention on Biological Diversity (CBD)<sup>72</sup> to establish that certain regions of the South China Sea constitute fragile ecosystems.<sup>73</sup> The arbitration thus referred to another environmental treaty regime to inform the content of States’ obligations under Part XII LOSC.

In essence, an integrated approach allows ITLOS to intertwine Part XII of the LOSC with other widely ratified rules of international law to properly flesh out the content of the due diligence obligation to prevent, reduce, and control greenhouse gas emissions.<sup>74</sup> In this regard, ITLOS should be careful to ensure a significant – if not complete – overlap between States Parties to the LOSC and the other treaties it draws on. Notable contenders would be the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, to grasp the intentions and obligations of States regarding mitigation

69 *The Environment and Human Rights* (n 11), para 126.

70 *SRFC Advisory Opinion* (n 11) (Separate Opinion of Judge Paik of 2 April 2015), paras 3–4.

71 *South China Sea Arbitration* (n 39), para 945.

72 Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) 1760 UNTS 79, Article 2.

73 *South China Sea Arbitration* (n 39), para 945.

74 Similar to what Judge Paik suggests in *SRFC Advisory Opinion* (Separate Opinion) (n 70), para 36.

and adaptation.<sup>75</sup> Additionally, international human rights law could intertwine the law of the sea with rights-based considerations. The deteriorating impacts of climate change on the ocean may result in violations of, *inter alia*, the right to food due to depletion of marine resources and salinification of the soil, the right to a healthy environment due to destruction of marine and coastal ecosystems, and the right to culture due to sea water flooding and loss of living space – specifically for ocean-dependent communities.<sup>76</sup> Moreover, international biodiversity law could shed an alternative light on the issue of ocean acidification, which devastates the biodiversity of marine ecosystems and the goods and services that they provide. In this regard, the CBD, as well as the newly adopted Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction should be considered.<sup>77</sup>

### *About Climate Change*

When carving out the content of Part XII's due diligence obligation with regards to climate change, ITLOS can be guided by the UNFCCC and the Paris Agreement. The latter requires States to determine their own increasingly ambitious emission reduction targets.<sup>78</sup> An interpretation through the frame of these treaties would require States to lower, and eventually stabilise, their greenhouse gas emissions.<sup>79</sup> While ITLOS could declare that States have to comply with their obligations under the Paris Agreement – which do not consist of achieving their emission reduction targets, but rather of setting and communicating them – to fulfil their due diligence obligation under the LOSC, this would not significantly alter the current situation considering the Paris Agreement's nearly universal ratification. Still, this assertion would validate the interconnectedness of these legal systems. ITLOS could also explore the stronger argument that the self-imposed targets under the Paris Agreement are not stringent enough to constitute the 'necessary measures' required under Article 194(1) of the LOSC to prevent, reduce, and control marine pollution.<sup>80</sup> Considering that these targets are clearly insufficient to regulate emissions

75 UNFCCC (n 5); Paris Agreement (n 54).

76 *Daniel Billy v. Australia* (n 53), paras 2.3–2.6; Morgera and Lennan (n 64), at p. 449.

77 The latter explicitly mentions ocean acidification, see, e.g., BBNJ Agreement (n 6), Articles 7(h), 17(c).

78 Paris Agreement (n 54), Articles 4(2), 4(3).

79 Boyle (n 37), at p. 466.

80 *Ibid.*, at pp. 472–474.

in a way that prevents the repercussions on the marine environment,<sup>81</sup> it would be convoluted to argue that these targets *do* constitute the required due diligence.<sup>82</sup> However, it is unlikely that ITLOS would contend that Part XII of the LOSC compels States to go beyond the Paris Agreement, as this would undermine the principles of sovereignty, *lex specialis*, and *lex posterior*.<sup>83</sup>

Another lens that ITLOS may employ is that of international human rights law. A rights-based approach to the protection and preservation of the marine environment would safeguard the rights of ocean-dependent and other communities.<sup>84</sup> ITLOS could rely on the recent recognition of the human right to a clean, healthy and sustainable environment to promote the view that marine pollution from greenhouse gasses interferes with the enjoyment of human rights;<sup>85</sup> especially considering that the IACtHR has previously established that the protection of the marine environment is an element of this right.<sup>86</sup> Specific regard should therein be had for indigenous peoples and other communities that enjoy a cultural or spiritual connection to the ocean, as they are most vulnerable to marine pollution and ecosystem depletion.<sup>87</sup> ITLOS could therefore recommend the development of international measures to address the permanent loss of ocean territories and ecosystems.<sup>88</sup> In addition, the Tribunal could align its views with the UN Committee on the Rights of the Child by proposing the development of a ban on (in)direct introduction of substances into the ocean that are harmful to both children's health and marine ecosystems.<sup>89</sup>

81 UNFCCC, Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat, UN Doc FCCC/PA/CMA/2022/4 (26 October 2022), paras 9–19.

82 KN Scott, 'Ocean acidification' in E Johansen, SV Busch and IU Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (CUP, Cambridge, 2020) 104–128, at p. 122.

83 Boyle (n 37), at pp. 471–472.

84 UNGA, The Human Right to a Clean, Healthy and Sustainable Environment: A Catalyst for Accelerated Action to Achieve the Sustainable Development Goals, Note by the Secretary-General, UN Doc A/77/284 (10 August 2022), para 78.

85 UNGA Res 76/300 (28 July 2022), The Human Right to a Clean, Healthy and Sustainable Environment, UN Doc A/RES/76/300; UN Human Rights Council Res 48/13 (8 October 2021), The Human Right to a Clean, Healthy and Sustainable Environment, UN Doc A/HRC/RES/48/13.

86 *The Environment and Human Rights* (n 11), para 62.

87 UNGA Res 66/288 (27 July 2012), The Future We Want, UN Doc A/RES/66/288, para 197.

88 UNGA, Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation, UN Doc A/77/226 (26 July 2022), para 92.f.

89 Draft General Comment No. 26 (n 56), para 73.f.



### *About Ocean Acidification*

Ocean acidification – a dire challenge that has not received similar international attention<sup>90</sup> – is a global problem concurrent with climate change. The decrease of ocean pH-levels caused by greenhouse gas emissions has resulted in decreased calcium carbonate in seawater and impacts multiple marine species.<sup>91</sup> With no international legal regime specifically regulating the issue, it seems to fall into a ‘governance gap’;<sup>92</sup> an integrated interpretation could thus enhance the relevance of the LOSC as a framework governing ocean acidification.<sup>93</sup>

ITLOS could find that the due diligence obligation from Part XII of the LOSC includes a duty to address ocean acidification holistically by preserving the current state of the marine environment, and preventing future damage.<sup>94</sup> In contrast to climate change, ocean acidification is primarily caused by the deposition of CO<sub>2</sub> into the ocean and not as much by other greenhouse gasses. Since climate change law only requires States to decrease their greenhouse gas emissions in general,<sup>95</sup> States could in theory comply with their climate commitments without lowering CO<sub>2</sub> emissions by merely lowering emissions of other greenhouse gasses. In its advisory opinion, ITLOS could rectify this ‘loop-hole’ by stipulating that the due diligence obligation under Part XII requires regulation of *all* pollution sources, including CO<sub>2</sub>; a reading that is supported by Article 194(3) of the LOSC.<sup>96</sup>

Furthermore, ITLOS should interpret States’ obligations in light of international biodiversity law, because such law has been outspoken about both the causes and the deteriorating effects of ocean acidification, and has long encouraged States to adopt measures to conserve marine biodiversity.<sup>97</sup> Lowering

90 Harrison (n 37), at p. 254; DL VanderZwaag, N Oral, and T Stephens, ‘Introduction to the *Research Handbook on Ocean Acidification Law and Policy*’ in DL VanderZwaag, N Oral, and T Stephens (eds), *Research Handbook on Ocean Acidification Law and Policy* (Edward Elgar Publishing, Cheltenham, 2021) 1–9, at pp. 2–3.

91 Scott (n 82), at pp. 106–108.

92 Roland Holst (n 16), at p. 6; but see (n 77).

93 *Ibid.*

94 ER Harrould-Kolieb, ‘The UN Convention on the Law of the Sea: A governing framework for ocean acidification?’, (2020) 29(2) *RECIEL* 257–270, at pp. 260–262.

95 Although the Glasgow Climate Pact (n 6), para 17, does explicitly mention CO<sub>2</sub>.

96 Harrison (n 37), at pp. 257, 273–274; Scott (n 82), at p. 122.

97 See, e.g., COP to the CBD, Decision X/29, Marine and Coastal Biodiversity, UN Doc UNEP/CBD/COP/DEC/X/29 (29 October 2010), paras 13(d), 63–67; CBD Subsidiary Body on Scientific, Technical and Technological Advice (CBD SBSTTA), An Updated Synthesis of the Impacts of Ocean Acidification on Marine Biodiversity, UN Doc UNEP/CBD/SBSTTA/18/INF/6 (19 June 2014).

pH-levels jeopardise not only marine animals and ecosystems, but also human welfare.<sup>98</sup> Accordingly, the 2020 Global Biodiversity Framework calls for minimisation of the impacts of ocean acidification on biodiversity through mitigation, adaptation, and disaster risk reduction actions.<sup>99</sup> To guide States Parties in this goal, the CBD Conference of Parties has listed specific actions.<sup>100</sup> This list could assist ITLOS in carving out the specific duties of States – such as the duty to devise and implement coastal water quality management plans that identify and attempt to restrict pollution sources.<sup>101</sup>

Lastly, the depletion of marine biodiversity brings human rights law into the picture, as coral reef species impacted by ocean acidification are key elements of the marine food chain. Their inability to flourish due to excessive CO<sub>2</sub> emissions has repercussions for, specifically, the right to food of communities reliant on marine living resources.<sup>102</sup> Protection of human rights therefore also requires the conservation, protection, and restoration of biodiversity.<sup>103</sup> In light of this interplay, ITLOS could, for example, clarify that States should cooperate in information sharing or recommend that they negotiate a pH-level stabilisation goal similar to the temperature goal in the Paris Agreement. Such measures would have positive effects on marine ecosystems and organisms, as well as on the livelihoods and food security of ocean-dependent communities.

In conclusion, the advisory opinion could emphasise the general due diligence obligation to regulate greenhouse gas emissions to prevent harm to the marine environment, while narrowing the degree of State discretion under it. To this end, a synchronistic interpretation of relevant international legal systems should be adopted as this promotes the presence of a coherent network of obligations, rather than a separation of rules and regimes. Clarifying the convergence of the law of the sea with international climate change law, human rights law, and biodiversity law can stimulate climate action that accounts for all deleterious impacts on the marine environment – even without a need for ITLOS to stray into the territory of law-making.

98 CBD SBSTTA (n 97), para 5.4.2.

99 COP to the CBD, Decision 15/4, Kunming-Montreal Global Biodiversity Framework, UN Doc CBD/COP/DEC/15/4 (19 December 2022), Target 8 at p. 10.

100 COP to the CBD, Decision XII/23, Marine and Coastal Biodiversity: Impacts on Marine and Coastal Biodiversity of Anthropogenic Underwater Noise and Ocean Acidification, Priority Actions to Achieve Aichi Biodiversity Target 10 for Coral Reefs and Closely Associated Ecosystems, and Marine Spatial Planning and Training Initiatives, UN Doc UNEP/CBD/COP/DEC/XII/23 (17 October 2014), Annex, paras 8–11.

101 *Ibid.*, para 8.2.b.

102 Morgera and Lennan (n 64), at pp. 454–455.

103 Draft General Comment No. 26 (n 56), para 73.e.

## The Potential Effects of an Advisory Opinion

Ultimately, the real-life effects of the advisory opinion will determine its actual contribution to international efforts against climate change and ocean acidification. Advisory opinions are legally non-binding, which has led certain authors to argue that they are ineffective in diminishing greenhouse gas emissions.<sup>104</sup> Non-bindingness, however, does not equal devoid of legal effect.<sup>105</sup> Advisory opinions ‘merely’ indicate what the law is and what States’ obligations are, without imposing it upon them or sanctioning them for infringements.<sup>106</sup> Nevertheless, they carry comparable weight and authority to contentious judgments.<sup>107</sup> Especially in light of the inadequate compliance with, and restricted enforceability of, (environmental) contentious judgments, the non-binding nature of advisory opinions does not signify much difference in practice.<sup>108</sup>

### *Direct Effects*

The direct effects are those adjustments in the legal sphere that follow straightforwardly from clarifications of the law. Firstly, an advisory opinion on climate change and ocean acidification could elucidate the position of the law of the sea vis-à-vis international climate change law, biodiversity law, and human rights law.<sup>109</sup> In taking an integrated approach, ITLOS can positively identify linkages between these systems, which can contribute to the progressive development of international law.

Secondly, the clarification and contextualisation of States’ obligations under Part XII of the LOSC can encourage States to adopt or amend their domestic policies to bring them in line with the advisory opinion, especially in States that want to be regarded as responsible international actors.<sup>110</sup> This aspiration to ‘conform’ to advisory opinions has been observed after both previous ITLOS advisory opinions, in both requesting and non-requesting States.<sup>111</sup> The response can follow two patterns. On the one hand, States can adhere to ITLOS’ concretisation of what international law requires; for example, if ITLOS prescribes the minimum conduct necessary to protect human rights under the

<sup>104</sup> Lee and Bautista (n 2), at pp. 152–154.

<sup>105</sup> *SRFC Advisory Opinion* (Declaration of Judge Cot) (n 15), para 11.

<sup>106</sup> Wolfrum (n 26), at p. 72.

<sup>107</sup> *Mauritius/Maldives* (n 11), paras 202–205.

<sup>108</sup> Wolfrum (n 26), at p. 67; Mayer (n 16), at p. 44.

<sup>109</sup> Savaresi, Kulovesi and Van Asselt (n 26).

<sup>110</sup> McCreath (n 7), at p. 141; Cruz Carrillo (n 16), at p. 238.

<sup>111</sup> De Herdt and Ndiaye (n 62), at pp. 374–376.

due diligence obligation to protect the marine environment, or that this obligation involves a duty to adopt a national marine adaptation plan or mandatory assessments of the marine environmental impacts from industrial projects. On the other hand, if ITLOS contextualises how fields of law are intertwined in the context of climate change and ocean acidification, States could use the advisory opinion as a springboard to integrate the mosaic of international rules into climate mitigation and adaptation policies. An excellent example would be the (further) inclusion of ocean-related or rights-related measures in States' Nationally Determined Contributions.<sup>112</sup>

Lastly, an advisory opinion that clarifies the law can enable solidarity between international actors, which, in turn, expedites State cooperation.<sup>113</sup> Such cooperation, like capacity-building or technical and scientific information sharing, is imperative to deal with global issues. The advisory opinion could thus not only stimulate individual State action, but also convergent collective action.

### *Indirect Effects*

The potential indirect effects of the advisory opinion are threefold. Firstly, an advisory opinion can contribute to future negotiations on the topic, as a constructive tool that sets the terms of the debate or establishes the broader framework in which specific norms can be developed.<sup>114</sup> One may think here of negotiations at the Paris Agreement's Conference of Parties that could further embed rights-based or biodiversity-related language<sup>115</sup> into the climate regime – similar to the ocean-focussed language visible in the Glasgow Climate Pact.<sup>116</sup> A more ambitious objective could be the negotiation of a global goal on lowering pH-levels in the context of ocean acidification. Considering that an advisory opinion can constitute a legal juncture, a favourable political context could elevate such a judicial pronouncement from a non-binding interpretation of the law to the starting point for a more progressive course of climate action.<sup>117</sup> If ITLOS aims to bridge the law of the sea with other relevant legal

<sup>112</sup> Roland Holst (n 16), at p. 8.

<sup>113</sup> P Sands, 'Climate change and the rule of law: Adjudicating the future in international law' (2016) 28(1) *Journal of Environmental Law* 19–35, at pp. 31–32; McCreath (n 7), at p. 141.

<sup>114</sup> Bodansky (n 68), at p. 706; but cf. Mayer (n 16), at p. 112.

<sup>115</sup> H Van Asselt, 'Managing the fragmentation of international environmental law: Forests at the intersection of the climate and biodiversity regimes' (2010) 44(4) *New York University Journal of International Law and Politics* 1205–1278, at p. 1259 states that the climate change regime has been passive on the issue of biodiversity.

<sup>116</sup> See (n 6).

<sup>117</sup> Wolfrum (n 26), at p. 71.

regimes, the advisory opinion can provide a more inclusive way forward, in which international negotiations on emission reductions account for the (marine) environment *per se*, as well as human beings.

Secondly, ITLOS has a potential role in raising and shaping the international consciousness on global matters, which is inherently linked to altering social norms and values.<sup>118</sup> The advisory opinion could draw attention to the importance of regulating greenhouse gas emissions, thereby increasing the global demand for action and putting moral pressure on States to strengthen their laws and implementation.<sup>119</sup> As such, it would provide (civil) society with tools to pressure States into further action, which would, in turn, increase the reputational costs of 'non-compliance' with the advisory opinion.<sup>120</sup>

Thirdly, the advisory opinion can prove useful for climate litigation. Internationally, courts frequently incorporate the reasoning of other courts' advisory opinions in their own judgments.<sup>121</sup> This notion of cross-fertilisation can inform future (contentious) litigation, as ITLOS' advisory opinion can provide benchmarks for adequate behaviour and sufficient regulation.<sup>122</sup> Cross-fertilisation is especially apposite nowadays due to the two other advisory opinions on climate change unfolding at the ICJ and the IACtHR. As ITLOS will, in all likelihood, deliver the first advisory opinion, the ICJ's advisory opinion could build upon these pronouncements, especially because the resolution questions refer to the LOSC.<sup>123</sup> The same holds true for the IACtHR as a specialised human rights court that could amplify and develop ITLOS' assertions about the marine environment in light of human rights. Non-judicial processes, like human rights monitoring bodies or the CBD Conference of Parties, could draw on the advisory opinion in a similar manner. Domestically, the advisory opinion can provide courts with the tools to scrutinise governmental (in)action regarding greenhouse gas emissions.<sup>124</sup> Additionally, it can provide novel avenues because the law of the sea and ocean-based human rights do not yet constitute

118 Sands (n 113), at pp. 24–26.

119 International Relations and Defence Committee (n 2), para 142; McCreath (n 7), at p. 142.

120 Mayer (n 16), at p. 11; Sands (n 113), at p. 26.

121 *Chagos Archipelago Advisory Opinion* (n 18), para 62; this is perceivable in, e.g., *The Environment and Human Rights* (n 11) which refers to both ITLOS advisory opinions, see paras 90, 103.

122 See further U Linderfalk, 'Cross-fertilisation in international law' (2015) 84(3) *Nordic Journal of International Law* 428–455.

123 UNGA Res 77/276 (29 March 2023), Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, UN Doc A/RES/77/276.

124 Savaresi, Kulovesi and Van Asselt (n 26).

prominent bases for domestic climate cases.<sup>125</sup> Similarly, ample opportunity exists to integrate established biodiversity litigation with climate lawsuits.<sup>126</sup> The increasing amount of domestic climate litigation makes this contribution especially fruitful.

In conclusion, although an advisory opinion on climate change and ocean acidification cannot supplant diplomacy and international negotiations, it can provide States with further impetus to increase their implementation and law-making efforts. However, there is a flip side of this coin: if ITLOS provides a weak reading of what the law requires, the advisory opinion will undermine the underlying intention because States will see it as evidence that their current climate action is sufficient.<sup>127</sup> An advisory opinion merely restating the well-known general principles might make it seem as if the law of the sea is extraneous to climate change.<sup>128</sup> Alternatively, if States regard ITLOS' advisory opinion as overreaching,<sup>129</sup> they will be significantly less inclined to amend their emission reduction policies – especially because the stakes in the climate crisis are high. The Tribunal thus finds itself tasked to find the equilibrium between these extremes, as it strives for development of the law in an integrated approach that does not overstep the boundaries of its role as an international court. ITLOS should therefore aim to harmoniously combine the legal regimes that intersect with climate change and ocean acidification; even if the advisory opinion might then not directly induce emission reductions, it still holds great potential to develop the law of the sea at the ocean-climate nexus and stimulate international efforts against climate change and ocean acidification.

## Conclusion

Climate change and ocean acidification severely affect the marine environment and should be addressed accordingly, yet the prevailing international rules and their implementation remain inadequate. Although the relevant regimes are growing closer, the actual reduction of greenhouse gas emissions

125 E Johansen, 'The role of the law of the sea in climate change litigation' (2020) 11(1) *The Yearbook of Polar Law* 141–169, at pp. 151–152.

126 G Futhazar, S Maljean-Dubois and J Razzaque, 'Biodiversity litigation: Review of trends and challenges' in G Futhazar, S Maljean-Dubois and J Razzaque (eds), *Biodiversity Litigation* (OUP, Oxford, 2023) 359–399, at pp. 384–386, 397.

127 McCreath (n 7), at pp. 141–142.

128 Mayer (n 16) calls this an 'identificatory opinion', at pp. 57–58.

129 Mayer (*ibid.*) calls this an 'applicatory opinion', at pp. 58–59.

leaves rather a lot to be desired. Legal avenues outside of this regulatory framework, like litigation, may therefore prove vital. As humanity has come to a critical crossroads, an authoritative statement on the scope and content of States' legal obligations might prove influential – or it might just be grasping at straws.

This article has aimed to assess the value of an ITLOS advisory opinion for the continuous, but strenuous, international efforts to combat climate change and ocean acidification. With COSIS' request for an advisory opinion, it may be time to let ITLOS provide a 'living' interpretation of the due diligence obligation of Part XII of the LOSC. Herein, the Tribunal should take an integrated approach to account for all relevant international rules governing these polycentric issues. Not the law of the sea in isolation, but the entire mosaic of international rules should be drawn from. The focus here was specifically on the contributions that international climate change law, human rights law, and biodiversity law could make to the interpretation of Part XII. Although the Tribunal should remain aware of judicial overreaching, it has a unique opportunity to emphasise the interplay between these international legal systems and carve out the scope of the due diligence obligation to regulate greenhouse gas emissions in protection of the marine environment. Despite its non-binding character, the effects of this advisory opinion – both direct and indirect – would then by no means be negligible. Although it would not directly quantify States' obligations to lower their greenhouse gas emissions, ITLOS might be able to provide a useful contribution to the global debate and efforts surrounding the climate crisis. By embracing its function, ITLOS could therefore – within the boundaries of the prevailing legal framework – offer guidance on climate change and ocean acidification that is backed up by the authority of the law.

In the end, the only certain solution to excessive anthropogenic greenhouse gas emissions is to increase ambition and compliance in *all* relevant international regimes – the law of the sea, the climate change regime, the biodiversity regime, and human rights law. The protection of the marine environment therefore depends on States' willingness to effectively implement the necessary measures, but a pronouncement on the scope and content of legal obligations under the law of the sea can bring these issues into the limelight and provide impetus for States to act on their promises.