

CASE COMMENT:

THE INTERNATIONAL TRIBUNAL FOR THE
LAW OF THE SEA ADVISORY OPINION ON
CLIMATE CHANGE AND INTERNATIONAL
LAW

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1. INTRODUCTION

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) requested the International Tribunal for the Law of the Sea (ITLOS) to issue an Advisory Opinion on States Parties' obligations under international law on climate change.¹ Small Island Developing States (SIDS) bear the brunt of the effects of climate change despite the fact that they are least responsible for this development. To combat existential threats – including the risk of total submersion due to rising sea levels – Antigua and Barbuda and Tuvalu signed the Agreement for the Establishment of the COSIS (COSIS Agreement), which was then registered with the United Nations in 2021.² In the face of rising global temperatures, the COSIS sought this Advisory Opinion in hopes of reminding States Parties to the United Nations Convention on the Law of the

¹ Commission of Small Island States on Climate Change and International Law, 'Re: Request for Advisory Opinion' sent to Registrar, International tribunal for the Law of the Sea (12 December 2022)

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf accessed 25 September 2024 ('COSIS Request').

² Commission of Small Island States on Climate Change and International Law, 'About' (*Commission of Small Island States on Climate Change*) <https://www.cosis-ccil.org/about> accessed 25 September 2024.

Sea (UNCLOS) of their obligations to protect and preserve the world's oceans from climate change impacts, such as ocean warming, sea level rise and ocean acidification.

Members of the COSIS include low-lying, developing island states, representing some of the most climate-vulnerable nations in the world.³ After establishing the jurisdiction of the Court to entertain the advisory opinion request, the COSIS proceeded to request the ITLOS to clarify specific obligations under the UNCLOS to prevent, reduce and control marine environment pollution.⁴ This request reflected the COSIS' growing concerns about ocean warming, rising sea levels and ocean acidification – all of which are effects of greenhouse gas emissions by many States Parties. Additionally, the COSIS also asked the ITLOS to interpret whether States Parties to the UNCLOS have an active duty not only to protect but also to preserve the marine environment.⁵

In its preamble, the COSIS Agreement recognises that SIDS bear a 'disproportionate and overwhelming burden of the adverse effects' of climate change.⁶ It further notes that such adverse effects are caused by the emission of greenhouse gases (GHGs), to which SIDS' contribution is negligible.⁷ Hence, it is the responsibility of States Parties to help SIDS fight off the adverse environmental effects that they are already experiencing. Article 1(3) of the COSIS Agreement explicitly lays out the COSIS' mandate to promote and implement State obligations to protect and preserve the marine environment and to take responsibility for injuries arising in case of failure to do so.⁸ Due to its criticism of the 'endless' climate discussions on international

³ IPCC, 'Working Group II: Impacts, Adaptation and Vulnerability' (*The Intergovernmental Panel on Climate Change*) [https://archive.ipcc.ch/ipccreports/tar/wg2/index.php?idp=671#:~:text=Among%20the%20most%20vulnerable%20of,\(in%20the%20Indian%20Ocean\)](https://archive.ipcc.ch/ipccreports/tar/wg2/index.php?idp=671#:~:text=Among%20the%20most%20vulnerable%20of,(in%20the%20Indian%20Ocean)) accessed 3 June 2024.

⁴ COSIS Request (n 1).

⁵ Client Alert, 'The International Tribunal for the Law of the Sea's Advisory Opinion on Climate Change and its Implications' (*Gibson Dunn*, 13 June 2024) <https://www.gibsondunn.com/international-tribunal-for-law-of-the-sea-advisory-opinion-on-climate-change-and-its-implications/> accessed 27 September 2024.

⁶ Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, adopted 31 October 2021, 3444 UNTS <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf> accessed 25 September 2024.

⁷ *ibid*.

⁸ *ibid* art 1(3).

platforms, the COSIS approached the ITLOS in hopes of harnessing the potential of international law to protect the climate-vulnerable States against the existential threats of climate change and sea level rise.⁹

The COSIS request relied upon Article 21 of the Statute of the ITLOS¹⁰ and Article 138 of the Rules of the Tribunal¹¹ to illustrate the ITLOS' express jurisdiction to entertain their application. The COSIS posed a two-part question to the ITLOS. It requested the ITLOS to shed light on the specific obligations of States Parties to the UNCLOS to prevent, reduce and control pollution of the marine environment.¹² It further focused its question on the deleterious effects resulting or likely to result from climate change through instances of ocean warming and rising sea levels, as well as ocean acidification. The question also acknowledged that such adverse effects were caused by the large-scale emission of anthropogenic GHGs into the atmosphere. The second part of the question inquired about State Party obligations to protect and preserve the marine environment in relation to the impacts of climate change.

Even though an advisory opinion by the ITLOS is not legally binding, it plays an important and influential role in the development of international law and practice.¹³ The much-anticipated advisory opinion was published on 21 May 2024, in which it answered the COSIS' primary queries.

2. THE ITLOS' FINDINGS ON JURISDICTION

The main procedural obstacle before the ITLOS regarding the COSIS request was whether it had advisory jurisdiction to entertain the request in the first

⁹ Isabella Kaminski, 'Small islands slam 'endless' climate talks at landmark maritime court hearing' (*Climate Home News*, 2023) <https://www.climatechangenews.com/2023/09/11/small-island-leaders-climate-negotiations-un-maritime-court/> accessed 5 June 2024.

¹⁰ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 ('UNCLOS'), Annex VI.

¹¹ International Tribunal for the Law of the Sea, 'Rules of the Tribunal' (ITLOS/8, 17 March 2009) https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf accessed 23 December 2024.

¹² COSIS Request (n 1).

¹³ Polly Botsford, 'Climate crisis: ITLOS Advisory Opinion 'effectively' creates new international legal obligations on signatories' (*International Bar Association*, 31 July 2024) <https://www.ibanet.org/climate-crisis-itlos-advisory-opinion-effectively-creates-new-international-legal-obligations-on-signatories#:~:text=Although%20it's%20advisory%20and%20not,emissions%20on%20the%20world's%20oceans.> accessed 2 September 2024.

place. The COSIS preferred to submit a request for an advisory opinion specifically as it sought clarification by the ITLOS on the obligations of States Parties to the UNCLOS.¹⁴ The reputation of the international court or tribunal with which such a request is filed often determines the weight an advisory opinion issued by it would carry in developing international law and custom.¹⁵ As the COSIS was concerned about issues such as rising sea levels and ocean acidification, the ITLOS – which was established under Annex VI of the UNCLOS – was the most appropriate forum.

The ITLOS' advisory jurisdiction had already been challenged in the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) in 2015.¹⁶ This challenge was based on the fact that no explicit reference is made to advisory jurisdiction in the UNCLOS. However, ITLOS rejected these arguments as the wording of Article 21 of the ITLOS Statute allows any matter, whether contentious or advisory, to be raised before the ITLOS if it is related to the UNCLOS' purposes.¹⁷ Secondly, Article 138(1) of the Rules of the ITLOS allows it to give an advisory opinion on a legal question if an international agreement related to UNCLOS' purposes 'specifically provides for the submission to the [ITLOS] of a request for such an opinion.' In this manner, the ITLOS argued that even though the UNCLOS did not include any reference to the ITLOS' advisory jurisdiction, *ad hoc* treaties related to the purposes of the UNCLOS could still confer advisory competence to the ITLOS.¹⁸

In light of this finding, the COSIS Agreement was signed by Antigua and Barbuda, and Tuvalu to request that the ITLOS render an Advisory Opinion for clarification on States Parties' obligations to protect and preserve the environment. To put it simply, the COSIS Agreement does not give member

¹⁴ COSIS Request Letter (n 1).

¹⁵ Armando Rocha, 'A Small but Important Step: A Bird's-Eye View of the ITLOS' Advisory Opinion on Climate Change and International Law' (*Climate Law*, 27 May 2024) <https://blogs.law.columbia.edu/climatechange/2024/05/27/a-small-but-important-step-a-birds-eye-view-of-the-itlos-advisory-opinion-on-climate-change-and-international-law/> accessed 27 September 2024.

¹⁶ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law: Advisory Opinion* (2024) International Tribunal for the Law of the Sea (Case No. 31) ('Advisory Opinion'), [85].

¹⁷ *ibid* [107]-[108].

¹⁸ *ibid*.

States any other rights or obligations regarding maritime activities. It was signed by the States as an *ad hoc* law of the sea treaty to enable them to file a request for an advisory opinion from the ITLOS.¹⁹

Establishing advisory jurisdiction was crucial for the ITLOS as this function allowed it to spearhead a growing movement to ensure accountability for climate change.

3. THE ITLOS' FINDINGS ON STATE OBLIGATIONS TO PROTECT AND PRESERVE THE ENVIRONMENT

The main issue highlighted by the COSIS was the question of what obligations States Parties have with regard to preventing, reducing, and controlling pollution of the marine environment.²⁰ The issues framed were not only limited to asking the ITLOS to reinforce the negative duty of States Parties to cut down GHG emissions but also requested the ITLOS to clearly outline States Parties' positive duty to protect and preserve the marine environment.²¹

After unanimously deciding that it did, in fact, have the jurisdiction to respond to the COSIS' request, the ITLOS proceeded to answer the first part of the COSIS's query. It referred to Article 1(1)(4) of the UNCLOS to establish that GHG emissions into the atmosphere did indeed constitute pollution of the marine environment.²² It then referred to Article 194 of the UNCLOS to highlight States Parties' obligations to take all measures necessary to prevent, reduce and control marine pollution triggered by GHG emissions.²³ The ITLOS noted that States were only accountable to the extent of their means and capabilities, the best available science and relevant international rules and standards.²⁴ This allowed the ITLOS to emphasise the unequal distribution of resources across States Parties and require them to act according to the best of their abilities. Article 194 was highlighted as one of paramount importance due to the stringent standard of due diligence it sets

¹⁹ *ibid.*

²⁰ COSIS Request (n 1).

²¹ *ibid.*

²² Advisory Opinion (n 16) [179].

²³ *ibid* [180].

²⁴ *ibid* [194], [212].

out.²⁵ Such a strict standard was meant to emphasise the risk of ‘serious and irreversible’ harm to the marine environment lest States hesitate to reduce emissions to the best of their abilities.²⁶

In its response to part (b) of the COSIS’ request, the ITLOS highlighted States Parties’ obligations under Article 192 of the UNCLOS to actively take measures to restore marine habitats and ecosystems where they had been degraded.²⁷ It further reminded States Parties of their obligation under this Article to anticipate risks relating to climate change impacts depending on the circumstances.²⁸ The importance of this duty was emphasised through Articles 61 and 119 of the UNCLOS, which impose an active duty on States Parties to take necessary measures to conserve living marine resources threatened by climate change impacts.²⁹

4. INTERNATIONAL RESPONSIBILITIES AND OBLIGATIONS OF STATES PARTIES

The ITLOS highlighted the extent of States Parties’ responsibilities not only to cut down GHG emissions within their own territory, but also to establish regional cooperation to ensure the same.³⁰ It also clearly emphasised their duty to assist those States less capable than themselves in terms of funds or technical expertise to allow them to achieve the same environmental protection.³¹

This provision was also relied upon by the ITLOS to highlight that these obligations are transboundary in nature – States Parties are required to ensure that any pollution caused by an activity does not transcend their sovereign territory.³² The ITLOS referred to Articles 207 and 212 of the UNCLOS to stress the need for the establishment of regional rules, practices, and standards.³³ While Articles 211, 213, 217 and 222 focus on the domestic

²⁵ *ibid* [235].

²⁶ *ibid* [213].

²⁷ *ibid* [386].

²⁸ *ibid* [427].

²⁹ *ibid* [417].

³⁰ *ibid* [311].

³¹ *ibid* [339].

³² *ibid* [250].

³³ *ibid* [279].

practices States Parties must adopt, the UNCLOS also emphasises the need for regional and international cooperation to achieve its goals. The Advisory Opinion made it a point to repeat this aspect by referring to Articles 197, 200 and 201 of the UNCLOS, which specifically require States Parties to cooperate continuously and meaningfully to mitigate marine pollution in shared natural bodies and ecosystems.³⁴ Highlighting these provisions served to emphasise the ITLOS' objective of directing the international community to prioritise the protection of the natural environment and to coordinate uninterrupted efforts to ensure this.

Finally, the ITLOS acknowledged the COSIS' concern of becoming increasingly vulnerable to the effects of climate change. They did so by highlighting Article 202 of the UNCLOS, which requires States Parties to assist developing States in switching to sustainable practices and effectively managing the effects of climate change.³⁵ This aspect of the advisory opinion is of great importance in this context. This Article requires States Parties to assist other parties in their capacity-building efforts to protect their marine environment and combat the harmful effects of climate change.³⁶ This is particularly important as the COSIS which submitted this request for an advisory opinion consists of SIDS which contribute little to GHG emissions but are disproportionately impacted by the negative effects of climate change.³⁷ More developed States Parties not only bear greater responsibility for climate change through higher GHG emissions but also possess a greater number of resources to protect themselves from its effects. Additionally, the ITLOS further recognised the vulnerable circumstances faced by COSIS members by highlighting Article 203 of the UNCLOS which refers to the preferential treatment to be given to developing or climate vulnerable States in funding, technical assistance, and services from international organisations.³⁸

Finally, the ITLOS elaborated on how State Party obligations to the UNCLOS should be monitored. It referred to Article 204 of the UNCLOS

³⁴ *ibid* [319].

³⁵ *ibid* [339].

³⁶ *ibid*.

³⁷ *ibid* [327].

³⁸ *ibid* [329].

to highlight that States Parties have an active duty to monitor and evaluate the risks posed by pollution from GHG emissions on the marine environment.³⁹ In addition, Article 206 requires States Parties to assess the impact of planned activities on the marine environment before initiating any activities in their territory that they have reasonable grounds to believe may cause substantial pollution.⁴⁰ Article 205 also provides for their accountability by asking them to publish such findings.⁴¹ Articles 204, 205 and 206 provide a measure for continued accountability of States Parties as the UNCLOS requires them to publish updated reports on the state of their compliance.⁴² Not only does this build an expectation for Parties to make an active effort to stay alert on the state of their marine environments, but it also engages the public and the international community who are interested stakeholders.

5. ANALYSIS

The ITLOS' Advisory Opinion has been impactful in many important ways. Firstly, it is pertinent to recognise the ITLOS' influence as the judicial body responsible for the enforcement of the UNCLOS, which 168 States Parties have ratified. Advisory opinions by the ITLOS are not legally binding; however, they play a major role in the interpretation of the UNCLOS and can eventually develop into international customary law. Therefore, the following points of the ITLOS' recently published Advisory Opinion are relevant to discuss: firstly, the express recognition that States Parties must act to the best of their abilities, and secondly, the emphasis placed on regional cooperation.

Firstly, the language used in the ITLOS' opinion is very clear-cut and does not allow room for speculation. It explicitly clarifies the illegality of releasing unchecked pollutants which serve to negatively impact the environment. Additionally, it clearly emphasises an explicit duty noted in the UNCLOS for States Parties to make a conscious effort to reduce and control any such emissions. It is also important to mention that the ITLOS acknowledges the

³⁹ *ibid* [367].

⁴⁰ *ibid*.

⁴¹ *ibid*.

⁴² *ibid*

uneven distribution of resources as it makes it a point to highlight that a State must act to the best of its abilities.

Secondly, the opinion reinforces the importance of international cooperation to successfully protect the marine environment. It is unfair for States to engage in their individual economic development while their neighbours share in the costs of worsening climate conditions. For instance, local Indian fishermen have been known to cross over into Sri Lankan maritime territory to capture fish during fish breeding seasons.⁴³ Similarly, Pakistani waters have also been victims of overfishing by foreign trawlers despite national laws disallowing fishing activities during fish breeding season. Hence, these examples help shed light on the importance of increasing regional cooperation to protect shared natural resources and the environment.

Finally, the ITLOS' opinion also reminds States Parties of their obligations to assist less developed nations in achieving their climate goals in conjunction with the UNCLOS. Even though States, like the members of the COSIS, do not contribute much to climate change activities, they bear the greatest burden and are most vulnerable to its impacts, especially rising sea levels. SIDS are often heavily reliant on industries like tourism and fishing with culinary cuisines and cultures often shaped by their proximity to the sea. Hence, rising ocean levels, changing ocean temperatures and ocean acidification not only increase the likelihood of flooding but further threaten their lives as marine life is increasingly put at stake. The ITLOS recognises that more developed or technically capable nations have a responsibility to help other States which may not possess the same level of resources or skills. This can be interpreted as an attempt to bridge disparity and help States achieve the same goal; more developed States then become responsible for protecting smaller States from climate change.

It can also be noted that the language of the ITLOS, while specific in listing obligations required by the UNCLOS, adopts a very general and vague tone at various points. This includes sections where the ITLOS reminds States

⁴³ Press 'Trust of India, '19 fishermen detained by Sri Lanka to return home: Indian High Commission' (*Business Standard*, 3 April 2024) https://www.business-standard.com/india-news/19-fishermen-detained-by-sri-lanka-return-home-indian-high-commission-124040301065_1.html accessed 13th June 2024

Parties of their obligations to control and prevent emissions and assist other Parties in their efforts. Hence, it does not specify the States being referred to, nor does it lay down a clear criterion for what exactly it means when requiring States to act to the best of their abilities. It also adopts very diplomatic language and does not explicitly note that members of the COSIS and others like them are not to blame for the climate crisis. Therefore, the vague and politically meek tone plays a significant role in lessening the impactful nature of the Opinion.

6. CONCLUSION

The ITLOS' Advisory Opinion is a significant step in international environmental law and its intersection with the law of the sea. It has far-reaching consequences on an international scale and is highly likely to influence upcoming directives on similar matters, which will hopefully not shy away from specifying issues leading to climate hazards. The ITLOS Advisory Opinion has served as an important push for action at both the global and national levels. It has also offered arguments and a line of thinking that may be considered by the International Court of Justice and the Inter-American Court of Human Rights in their upcoming advisory opinions.⁴⁴

⁴⁴ Advisory Opinion (n 16) [107]-[108].