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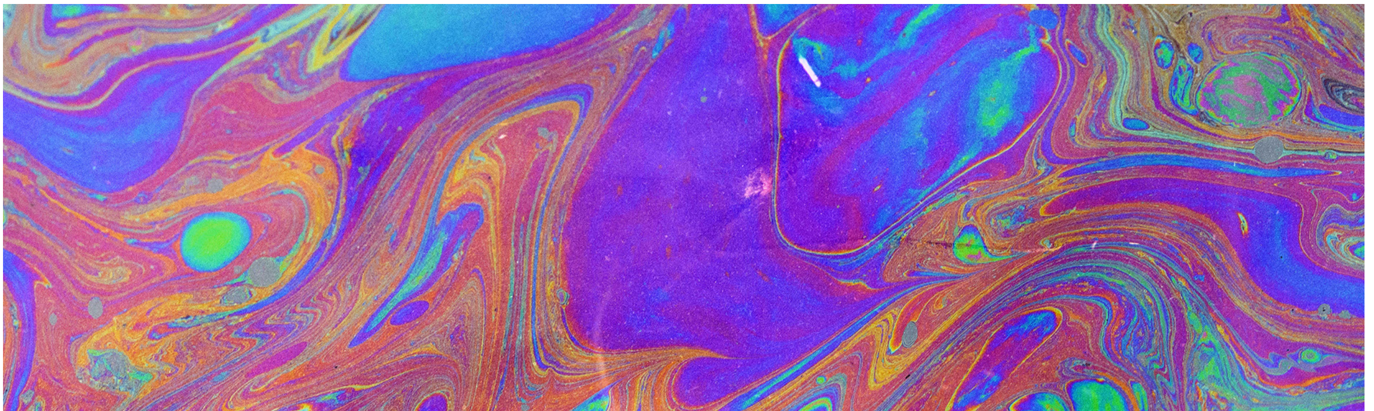

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Climate Change and Proceedings before the ICJ and ITLOS

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Climate Change and Proceedings before the ICJ and ITLOS

There has emerged a rich body of case law concerning climate change and the rights and obligations of private parties — either *vis-à-vis* State actors, or *vis-à-vis* other private parties. Such disputes have been heard in a range of national and international fora, from domestic administrative courts to regional and United Nations human rights bodies. But, to date, there has been no consideration of climate change issues by international courts or tribunals whose jurisdiction is exclusively over inter-State proceedings.

This post addresses means by which proceedings concerning climate change may be brought before the International Court of Justice (**"ICJ"** or **"the Court"**) or an international court or tribunal deriving its jurisdiction from the United Nations Convention on the Law of the Sea 1982 ("**UNCLOS**"). In the latter case, this may be the International Tribunal for the Law of the Sea ("**ITLOS**" or "**the Tribunal**"), an arbitral tribunal established under Annex VII of UNCLOS, a special arbitral tribunal or even the ICJ, depending on which forum the parties choose to resolve their dispute.

The ICJ has the power both to determine contentious cases and to issue advisory opinions. Similarly, in addition to providing for the resolution of contentious disputes in a forum of the parties' choosing, UNCLOS empowers ITLOS to issue advisory opinions in certain circumstances. This post addresses the jurisdictional requirements for each type of proceeding and the possible substantive issues which may arise.

Contentious cases before the ICJ

The ICJ is the principal judicial organ of the United Nations. Its Statute enables it to exercise jurisdiction over contentious proceedings between two or more States parties (Articles 34–36). In a contentious case concerning climate change, the Court's jurisdiction is likely to have one of three foundations.

First, the Court may exercise jurisdiction over "*all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force*" (ICJ Statute, Article 36(1)). In other words, the Court may exercise jurisdiction on the basis of a 'compromissory clause' in an international treaty expressly providing for disputes to be resolved by it. None of the major international climate agreements contain a mandatory compromissory clause. Article 14 of the United Nations Framework Convention on Climate Change ("**UNFCCC**") enables States parties to make a declaration consenting to the submission of any disputes arising under the UNFCCC to the ICJ or to arbitration. Article 24 of the Paris Agreement states that "[t]*he provisions of Article 14 of the* [UNFCCC] *on settlement of disputes shall apply mutatis mutandis to this Agreement*". To date, only the Netherlands has accepted the Court's jurisdiction over disputes arising in relation to the UNFCCC (see here) or the Paris Agreement (see here).

Even in the absence of a compromissory clause contained in a climate change-specific treaty, it may be possible for a dispute to be submitted to the ICJ on the basis of an international treaty providing for the resolution of international legal disputes to the ICJ without limitation as to their subject matter. One example of such a convention is the Pact of Bogotá, which is in force between numerous Central and South American States and which contains a compromissory clause at Article XXXI which is sufficiently broad to include a dispute concerning climate change.

Secondly, the Court may exercise jurisdiction on the basis of a so-called 'optional clause declaration' which a State has made pursuant to Article 36(2) of the Statute, whereby a State recognises the Court's jurisdiction as compulsory *ipso facto* and without special agreement (but potentially subject to reservations). More than 70 States have made such declarations, including many high-emission States such as India, Canada, Japan and the United Kingdom, although many other such States, such as the United States, China and Russia, have not. The scope of the Court's jurisdiction in such a case would depend on the extent of the relevant declarations. For example, some States (including, for example, India) accept the jurisdiction of the Court in relation to the interpretation or application of a multilateral treaty only if all States parties to the treaty are also parties to the case before the Court, which would in practice rule out a claim under, for example, the UNFCCC or Paris Agreement.

Thirdly, the Court may exercise jurisdiction on the basis of a special agreement (ICJ Statute, Articles 36(1), 40). In practice, special agreements are typically concluded where both States have an interest in having their dispute resolved, such as where it relates to a determination or delimitation of a land or maritime boundary. It is more difficult to imagine that such an agreement may be concluded in a case where one State alleges that the other has breached its obligations by contributing to climate change, in which case the putative respondent State may have little incentive to conclude a special agreement and expose itself to the risks of ICJ adjudication.

Depending on the scope of a respondent State's submission to ICJ jurisdiction, a claim before the ICJ could concern whether a respondent State has breached provisions of a particular climate change-related treaty. Examples of obligations within the Paris Agreement that might be made the subject of such cases include the obligations to prepare and maintain nationally determined contributions and to pursue domestic mitigation measures to achieve the objectives of such contributions (Article 4); and for developed States to provide financial resources to assist developing States with mitigation and adaptation in continuing of their obligations under the UNFCCC (Article 9).

Aside from treaty obligations, States also have relevant obligations under customary international law which might be the subject of a claim before the ICJ. For example, a State is under an obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States. This obligation, with its foundation in the ICJ's decision in the *Corfu Channel case* (in a context entirely unrelated to environmental harm), might be argued to have developed to encompass principles on

transboundary harm reflected in the 1992 Rio Declaration on Environmental and Development. In particular, Principle 2 of the Rio Declaration (generally considered to be reflective of customary international law) provides that States must ensure that "*activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*". A similar obligation is provided by the Draft Articles on the Prevention of Transboundary Harm prepared by the International Law Commission ("**ILC**") at Article 3.

A State advancing a claim based on transboundary harm related to climate change would likely face several hurdles. In the first place, a respondent State may advance various objections to the determination of claim by the ICJ, not all of which can be addressed here. By way of example, a respondent State might argue that, given that several States are responsible for the harm suffered by the applicant (such as emitting greenhouse gases), the Court would be required to pronounce on the responsibility of States not present before it, which (following the *Monetary Gold case*) is a basis on which the Court may find the claim inadmissible. However, it is far from certain that such an objection would succeed. For example, in the *Certain Phosphate Lands case* (which concerned the exploitation of certain natural resources in Nauru prior to its independence), Australia argued that a claim could proceed against it only if the claim was also brought against New Zealand and the United Kingdom, which were also responsible for administering Nauru as a trust territory. The Court rejected this objection on the grounds that the *Monetary Gold* (or "indispensable party") doctrine only applies in cases where the Court has to determine the rights or responsibilities of an absent third state as a necessary prerequisite to determining the case before it. It held in the *Certain Phosphate Lands* case there were no reasons that a claim could not be brought against Australia just because it shared its obligations with the United Kingdom and New Zealand.

If a case were to proceed to the merits phase, a key problem in any such case would consist of linking the harm suffered by the applicant State to action taken by the respondent State in breach of its obligations. Some forms of transboundary pollution have a clear and direct link between their source in one State's territory and their harmful effects in another's. For example, in the *Trail Smelter arbitration*, the ad hoc arbitration tribunal settled a dispute between the United States and Canada over sulphur dioxide pollution from a smelter located in British Columbia which had a harmful transboundary effect in Washington, USA. In contrast, climate change arises by accretion and is the product of emissions in the territory of all States; it is impossible to attribute responsibility for the harm suffered by any particular State to any other particular State. The problem of establishing the extent to which the respondent state may be said to have 'caused' harm to the applicant would be particularly acute if the former was seeking compensation for such harm.

Contentious cases under UNCLOS

As stated above, there is a variety of fora (including, among others, ITLOS and the ICJ) which may be called on to resolve disputes arising under UNCLOS. Article 288 of UNCLOS confers jurisdiction over "*any dispute concerning the interpretation or application of this Convention*" (Article 288(1)) and "*any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention*" (Article 288(2)).

There are various provisions of UNCLOS which may give rise to a claim involving climate change.

Perhaps most obviously, a dispute may arise between two or more States parties in relation to obligations relating to the preservation and protection of the marine environment, which are subject to a number of wide-ranging duties in Part XII of UNCLOS. Under UNCLOS Article 192, States have a general obligation to "*protect and preserve the marine environment*", which has been held to encompass the living resources of the sea. Pursuant to Article 193, States' rights to exploit their natural resources must be undertaken "*in accordance with*" that duty. Under Article 194, measures taken to protect and preserve the marine environment must deal with "*all sources of pollution of the marine environment*". Although these obligations do not directly mention the release of greenhouse gases into the environment, it is noteworthy that Article 194(3)(a) requires States to take measures designed to minimise "*the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping*".

In an appropriate case, it might be argued that the release of greenhouse gases by a State (even a landlocked State) into the atmosphere which causes damage to the marine environment could constitute a violation of UNCLOS. For example, given the link between the release of greenhouse gases and damage to coral reefs, there may well be an argument that a State facing substantial harm to its coral reefs can bring a case under UNCLOS against a pollutant State. However, such a claim would give rise to similar issues concerning causation to those indicated above in relation to contentious proceedings before the ICJ.

An applicant State may consider that the urgency of the climate emergency justifies a request for an order for provisional measures against the polluting respondent State, pursuant to UNCLOS Article 290. Under Article 290(1), a court or tribunal deriving its power from UNCLOS "*may prescribe any provisional measures which it considers appropriate under the circumstances … to prevent serious harm to the marine environment, pending the final decision*". It is unlikely that climate change was in the drafters' minds when this provision was being negotiated (including because at the time of the UNCLOS negotiations the threat of extreme weather events was not seriously considered as an international matter). Nonetheless, the power to prescribe provisional measures to prevent serious harm to the marine environment is sufficiently broad that it could conceivably be used as a mechanism for curbing certain emitting activities, at least in the short term. By way of comparison, ITLOS has previously used this power to prevent new oil exploitation in a disputed area, while noting that a cessation of oil exploitation which had already commenced could itself be harmful to the marine environment. Further, ITLOS has consistently applied Article 290(1) according to a *"precautionary approach"*.

It is also possible that the consequences of climate change will arise in other contexts in disputes based on UNCLOS. For example, with rising sea levels as a result of global warming, disputes may arise as to how a coastal State's baselines should be measured for the purposes of determining the outer limits of its maritime areas and/or how its base points should be ascertained for the purposes of a maritime delimitation. The ILC is considering these complex and important issues as part of its work on the consequences of sea-level rise in relation to international law, in relation to which a number of States and international organisations have submitted formal comments.

Advisory proceedings before the ICJ

The ICJ's jurisdiction to issue advisory opinions is grounded in Article 96 of the Charter of the United Nations and Article 65 of the ICJ Statute. Under Article 96, the United Nations General Assembly ("**UNGA**") or United Nations Security Council may request an advisory opinion on "*any legal question*", whereas other organs of the United Nations and specialized agencies may request an advisory opinion "*on legal questions arising with the scope of their activities*". Under Article 65, the Court "*may*" give an advisory opinion when it receives a request authorised under Article 96.

A significant challenge in procuring an advisory opinion from the ICJ lies in persuading a sufficient number of States with voting rights in a relevant body to vote in favour of referring questions to the ICJ. It is perhaps unsurprising that small island developing States, which are highly vulnerable to and already experiencing some of the grave effects of climate change, have to date taken the initiative in political efforts to marshal support for an advisory opinion. Pulau failed to garner sufficient UNGA votes in favour of its proposed referral in 2012. Vanuatu is spearheading a current movement to obtain UNGA support for a request for an advisory opinion. Recently, it has gained support from 1,500 civil society groups from 130 States.

Unlike in contentious proceedings, the purpose of an advisory opinion is not to resolve a dispute or, for example, to establish the responsibility of any State for a breach of an international legal obligation, let alone the reparations that it may owe to any other State as a result of such breach. Thus, the questions referred to the ICJ could potentially substantively overlap with those addressed above in relation to contentious proceedings, but without any individual State needing to establish that all relevant respondents are parties to the claim or that it has suffered loss caused by any other specific State. An advisory opinion may also encompass a wide range of international legal obligations owed to actors other than States, such as human rights obligations owed to individuals, including in light of resolutions passed by the United Nations Human Rights Council and the

UNGA concerning access to a clean, healthy and sustainable environment as a universal human right. An advisory opinion would not bind any States in the same way as the decision of the Court in a contentious case has binding force between the parties (under ICJ Statute, Article 59). It would, however, constitute an authoritative statement of rights and obligations under international law.

Advisory proceedings before ITLOS

Under Article 21 of the ITLOS Statute, ITLOS has jurisdiction over over "all disputes and all applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". The reference to "any other agreement" has been held by ITLOS (para. 58) to include a power to issue advisory opinions requested on the basis of such agreements and in accordance with the prerequisites for such advisory opinions which are set out in Article 138 of the ITLOS Rules. Article 138, states that ITLOS may give an advisory opinion "*on a legal question if an international agreement related to the purposes of the Convention* [i.e. UNCLOS] *specifically provides for the submission to the Tribunal of a request for such an opinion*". To date, very limited guidance has been given on when an international agreement will be considered to be "*related to the purposes of the Convention*". In the only advisory opinion rendered to date by ITLOS (other than the Seabed Disputes Chamber), the Tribunal held without elaboration that a convention which envisaged greater cooperation in fisheries met this requirement.

At the start of the COP26 meeting in Glasgow in 2021, the two small island States of Antigua and Barbuda and Tuvalu signed the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law ("**the COSIS Agreement**"). Article 2(2) of this treaty specifically authorises the Commission to seek an advisory opinion from ITLOS "*on any legal question within the scope of* [UNCLOS]". It is also notable that Article 2(1) states that the Commission shall assist in the "*definition, implementation and progressive development of international law … including through the jurisprudence of courts and tribunals*" (emphasis added), suggesting that the pursuit of an advisory opinion may be among its priorities. The COSIS Agreement has been registered with the United Nations Secretariat, which does not record that any other States have signed or otherwise acceded to it, although there is no minimum number of States which must be party to an agreement in order for an advisory opinion to be sought under Article 138 of the ITLOS Rules.
An advisory opinion could cover the UNCLOS-derived substantive matters outlined in relation to contentious cases above, and (as in ICJ advisory proceedings) would not be required to be based on any particular dispute or attempt to establish the responsibility of any given State for a breach of international law or reparations owing as a result, although principles concerning an obligation to compensate States harmed by climate change may be articulated. The COSIS Agreement refers in Article 1(3) to the Commission having a mandate to advance international law relating to, among others, "*the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations*", suggesting that this could be the focus of a request for an advisory opinion.

Conclusion

There are several means by which issues relating to climate change might be brought before the ICJ and ITLOS, whether in contentious or advisory proceedings. Although there are practical and legal issues facing any potential contentious or advisory proceedings, it is likely only a matter of time before those issues are tested.

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