The climate change advisory opinion request at the ITLOS

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1. *Climate change at the ITLOS*

Successfully addressing climate change and its consequences constitutes one of the major challenges of current times. Moving beyond the initial normative approach, which has resulted in the adoption of the UNFCCC[1] and the Paris Agreement,[2] states and other actors are now turning to national and international courts.

This article will discuss the request presented to the International Tribunal for the Law of the Sea (ITLOS) to render an advisory opinion concerning the duties of states to protect the marine environment in the face pf climate change.[3] The request was submitted to the ITLOS on 12 December 2022 by the Commission of Small Island States on Climate Change and International Law ('COSIS' or 'Commission').[4] The Commission is an international organisation created by an Agreement signed on 31 October 2021 by Antigua and Barbuda and Tuvalu. The Bahamas, Niue, Palau, Saint Kitts and Lewis, Saint Lucia, Saint Vincent and the Grenadines, and Vanuatu have also acceded to the Agreement.

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[1] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, 165.

[2] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

[3] Other two requests are pending at the moment in front of the International Court of Justice and the Interamerican Court of Human Rights. See the articles by Margaretha Wewerinke-Singh and Monica Feria-Tinta in this issue.

[4] Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (Glasgow, 31 October 2021).

The request submitted by COSIS asks the Tribunal to provide an advisory opinion on the following question:

> 'What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XJI:
> (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?'.[5]

Building on the jurisdiction of the ITLOS, which relates to interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS), the request raises important issues concerning both the interpretation of the UNCLOS and the relationship between the law of the sea and climate change (law).[6] In order to discuss this request, the article will first briefly recall the previous instances in which the ITLOS exercised its advisory functions, and the main points raised by these. It will then identify the relevant legal framework for the rendering of the advisory opinion, dwelling on the jurisdiction of the Tribunal, the concept of pollution, the nature and content of due diligence obligations, differentiated responsibilities, and the relevance, if any, of other legal instruments and regimes of international law. It will conclude with a few

[5] The request is available on the website of the ITLOS at <www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf>. The ITLOS website also contains all the documentation of the proceedings, including the written and oral statements by States and other entities intervening.

[6] M Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention' (2006) 37 Ocean Development & Intl L 319; A Boyle, 'Law of the Sea Perspectives on Climate Change' (2012) 27 Intl Journal of Marine and Coastal L 831; A Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 Intl J of Marine and Coastal L 458; M McCreath, 'The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes' in J Lin, D Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP 2020) 120-143.

general remarks on the relevance of the future advisory opinion for the law of the sea and beyond.

2. *Climate change, the oceans and the UNCLOS*

One may wonder why should a request that relates to climate change be submitted to a tribunal dealing with the law of the sea. The reply is easy: oceans are key in climate management and, at the same time, climate change produces significant adverse effects on oceans. The ocean is in fact a climate regulator, due to its uptake and redistribution of anthropogenic carbon dioxide and heat, and is a vital component of the hydrological cycle. However, the seas and oceans can be negatively affected by climate change and anthropic emissions of greenhouse gasses (GHGs). The raise in the temperature is reflected on marine waters, as well as on the rest of the earth's surface, and in combination with CO2 emissions and emissions of other GHGs may cause heat waves, deoxygenation, acidification and rising sea level. These, in turn, affect marine species and ecosystems, and may produce adverse effects for human both at sea and on shore.[7]

The nexus between GHG emissions, climate change and the oceans, which is so evident today, was little know when the UNCLOS was negotiated and adopted. The Convention does not therefore mention climate change or GHGs. However, it contains an entire part, Part XII, dedicated to the protection and preservation of the marine environment, which provides fundamental rules concerning the duties of states in this respect.

In the first place, Part XII provides the general obligation of states to protect and preserve the marine environment.[8] This is a very broad provision, which furthermore is couched in absolute terms. In reality, law of the sea courts have recognised that this norm provides for a due diligence duty which requests states to do the utmost to try and reach its aim, without however being objectively responsible in case the aim is not achieved. Part XII UNCLOS furthermore contains provisions concerning

[7] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP 2022) 75.

[8] Art 192 UNCLOS.

prevention, reduction, and control of pollution of the marine environment;[9] protection of vulnerable ecosystems and habitats of endangered species;[10] the duty not to transfer damage or hazards or transform one type of pollution into another;[11] the duty to test new technologies;[12] the duty to cooperate;[13] and duties of monitoring and environmental assessment.[14] The Convention also includes a provision about responsibility and liability of states and other actors concerning harm to the marine environment,[15] as well as binding dispute settlement.[16]

As the above mentioned provisions demonstrate, Part XI UNCLOS constitutes one of the most advanced and protective international environmental legal framework.[17] It includes general principles, as well as a number of other provisions which aim at distributing the burden of adopting and enforcement measures to protect and preserve the marine environment against pollution. Furthermore, Part XII is complemented by a number of other provisions, spread throughout the Convention, which also provide for jurisdiction of coastal and other states and for measures to protect the marine environment and address pollution. The UNCLOS could therefore be an ideal framework within which to search for states' duties concerning climate change effects on the oceans – it is just a matter of identifying if and how the UNCLOS provisions relate to climate change.

3. *The previous requests*

The request for an advisory opinion submitted to the ITLOS is the third since the creation of this tribunal. The first request that reached the Registry was actually addressed not to the full Tribunal, but to the Seabed Disputes Chamber (SDC), a special permanent chamber established

[9] Art 194 UNCLOS.
[10] Art 194(5) UNCLOS.
[11] Art 195 UNCLOS.
[12] Art 196 UNCLOS.
[13] Art 197 UNCLOS.
[14] Art 204 UNCLOS and art 206 UNCLOS.
[15] Art 235 UNCLOS.
[16] Part XV UNCLOS.
[17] At least on paper; implementation of the regime is still far from being complete.

within the ITLOS on the basis of Part XI, Section 5 of the United Nations Convention on the Law of the Sea (UNCLOS). The SDC was asked to identify the duties of states sponsoring activities in the Area. Since the competence of the SDC to provide advisory opinions is expressly established by Article 191 UNCLOS, there was little discussion on the jurisdiction of the Chamber. The SDC thus focused on the substance of the matter and gave an innovative yet balanced opinion, which developed the concept of due diligence and provided concrete guidance on states' environmental obligations that extends beyond the field of deep seabed mining.

The second request for an advisory opinion was submitted by the Sub-Regional Fisheries Commission (SRFC) in 2013, soon after the adoption of the SDC opinion. This time, the request was presented to the full Tribunal and raised the issue of the jurisdiction of the ITLOS to render advisory opinions. Contrary to the ICJ Statute, the Statute of the ITLOS does not mention an advisory function of the Tribunal, nor does the UNCLOS. On that occasion, some states argued that in the absence of an explicit mention, it was not possible to admit of an implied competence of the Tribunal. The ITLOS, however, considered that the combined reading of Articles 16 and 31 of its Statute, which is annexed to the UNCLOS and forms an integral part thereof,[18] allowed the Tribunal to adopt Rule 138 of its Rules of Procedure, which provides that the Tribunal 'may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'. In that case, the treaty that had created the SRFC did provide the possibility for the SRFC to request advisory opinions from the Tribunal.

In the substance, the ITLOS was asked to identify the duties of flag and coastal states with respect to fishing in the exclusive economic zone. The advisory opinion, while not being as innovative as the 2011 SDC one, made important points, which include clarifying the type of measures that states may be asked to take to comply with a due diligence duty, identifying the duties of flag states in relation to the activities of private parties, and discussing the relationship between states and international

[18] Art 318 UNCLOS. See on the point *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion (1 February 2011) [2011] ITLOS Rep 2011 (2011 Opinion) 10 para 52.

organisations to which they are parties. Notwithstanding the initial opposition of a number of states to the jurisdiction of the Tribunal and the misgivings expressed by some scholars, the 2015 Opinion further consolidated the Tribunal as a reliable organ to address complex webs of interrelated rights and obligations and provide balanced solutions that are ambitious yet feasible for states.

4. *Jurisdiction*

The request that instigated the ongoing advisory proceedings before the ITLOS is similar to that by the SRFC, since it was submitted by an international organisation created for the purpose of asking the opinion itself. One could therefore question whether the ITLOS has jurisdiction to address the request, as has indeed been done by a few states.[19] As mentioned in the previous section, neither the UNCLOS nor the Statute of the Tribunal mention an advisory function of the ITLOS. One could furthermore claim that the adoption of a treaty for the purpose of creating the jurisdiction of the ITLOS would bypass a limitation set by the Convention, and even constitute an abuse of rights.

The latter point can be easily dismissed. The UNCLOS itself provides that the Tribunal has 'jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement'.[20] It is therefore the Convention itself that envisages the possibility for States to further expand the competence of courts mentioned in Part XV UNCLOS beyond what is provided in that Part, or in the rest of the Convention, by simply agreeing to do so.

Turning to the advisory function of the Tribunal, as mentioned above the ITLOS has already stated, in 2015, that its Statute read in combination with its Rules of Procedure allow it to render advisory opinions. This finding has been consolidated in the following years, so much so that in the present case few states have actually contested the jurisdiction of the Tribunal, while most states appearing before the Tribunal have not raised

[19] See for example the submissions of China and Indonesia.
[20] Art 288(2) UNCLOS.

the issue, including some that had opposed the Tribunal's jurisdiction in 2015.

A final point for consideration relates to the type of treaty at the basis of the ITLOS's jurisdiction. Article 288 UNCLOS mentions agreements 'related to the purposes' of the UNCLOS. Can an agreement on climate change be considered as relating to the purposes of the UNCLOS? In light of the role of the oceans in climate change and the threats that climate change directly poses for the oceans, this criterion seems to be satisfied too.

5. *What type of obligations?*

Question b) submitted to the ITLOS ask the Tribunal to identify the duties of states concerning protection and preservation of the marine environment. This seems an almost direct reference to Article 192 UNCLOS, which provides for the general duty of states to protect and preserve the marine environment. This Article has been addressed in a number of cases, in which the Tribunal and other courts judging under Part XV UNCLOS have clarified that it contains a legally binding obligation, and that this obligation is an obligation of due diligence.[21]

As famously conceptualised by the SDC, a due diligence obligation 'is not an obligation to achieve, in each and every case, the result [envisaged by the norm]. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.[22] Applied to climate change, this duty requests states to do the utmost to protect the marine environment from the negative effects of climate

[21] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion of 2 April 2015) [2015] ITLOS Rep 2015 (2015 Opinion) 4 para 120.

[22] 2011 Opinion (n 19) para 110. On due diligence obligations generally A Ollino, *Due Diligence Obligations in International Law* (CUP 2022). On due diligence in the context of the law of the sea I Papanicolopulu, 'Due Diligence in the law of the Sea' in H Krieger et al (eds), *Due Diligence in the International Legal Order* (OUP 2020); D Konig, 'The Elaboration of Due Diligence Obligations as a Mechanism to Ensure Compliance with International Legal Obligations by Private Actors' in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996-2016* (Brill 2018) 83-95; I Caracciolo, 'Due diligence et le droit du mer' in Societé Francaise pour le Droit International, *Le standard de due diligence et la responsabilité internationale* (Pedone 2018) 163-185.

change, including heat waves, acidification, deoxygenation and sea level rise.

Furthermore, judges have identified a certain number of actions that are relevant in assessing compliance with a due diligence obligation: the adoption of laws and regulations;[23] the taking of administrative measures;[24] the exercise of a 'certain level of vigilance in their enforcement and the exercise of administrative control';[25] the enactment of enforcement measures, including 'boarding, inspection, arrest and judicial proceedings';[26] the proper marking of vessels;[27] the creation of monitoring mechanisms;[28] the investigation of any alleged violation and the duty to inform the affected state of the results;[29] the provision for sanctions 'sufficient to deter violations and to deprive offenders of the benefits accruing from their' illegal activities.[30] From a substantial perspective, the SDC underlined the link between due diligence obligations and the precautionary principle/approach,[31] as well as with the duty to conduct an EIA.[32]

Apart from this judicial development, the due diligence obligation is further specified and operationalised by numerous other obligations, which spell out in some detail what states need to do to protect and preserve the marine environment. Thus, all the provisions included in Part XII UNCLOS can be considered as clarifications of the obligation under Article 192. At the same time, they are also self-standing legal obligations, which may be breached in their own rights and may therefore generate the international responsibility of the state. It would be indeed interesting to see if the ITLOS will elaborate on these provisions, identifying the extent to which they include self-standing duties, and how they relate to the respect of the fundamental obligation enshrined in Article 192

[23] 2011 Opinion (n 19) para 119.
[24] 2011 Opinion (n 19) para 119; 2015 Opinion (n 22) para 119
[25] 2011 Opinion (n 19) para 115, citing *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment [2010] ICJ Rep 14 para 197.
[26] 2015 Opinion (n 22) paras 104-105.
[27] ibid para 137.
[28] ibid para 138.
[29] ibid para 139.
[30] ibid para 138.
[31] 2011 Opinion (n 19) para 131.
[32] 2011 Opinion (n 19) paras 145 and 150. See also *South China Sea (Philippines v China)* PCA Case No 2013-19 (Award of 12 July 2016) (SCS Award) para 988.

UNCLOS. Furthermore, this could be an excellent opportunity for the ITLOS to elaborate on the relationship between due diligence obligations that relate to the control of activities carried out by non-State actors, and those activities that are carried out directly by the state, for example through its state vessels or using structures and other sources of GHGs directly operated by the state.

All the obligations recalled under section 2 of this article can be applied to addressing the impacts of climate change on the oceans. It is worth recalling here some of the other duties provided by Part XII that are particularly relevant for climate change. First, the duty to protect fragile ecosystems and the habitats of endangered species requests states to go beyond general measures to address pollution and degradation, and to also adopt concrete measures targeted at these ecosystems and habitats. The impact of climate change on corals, for example, requests states to not only adopt action to prevent the worsening of climate change, but also to adapt restoration and resilience building measures targeted specifically at them. Second, the duty to monitor activities under the jurisdiction and control of states and to conduct environmental assessments[33] is particularly relevant to both identify the sources and trend of GHG emissions and to identify the effects of climate change over the oceans, their species and ecosystems.

Third, the duty to test new technologies, in combination with the duty not to transfer hazards and not to transform one type of pollution into another, may play a special role in addressing climate change. As mentioned at the beginning of this article, the oceans are the main sink for heat and CO2. In the effort to reduce GHGs present in the atmosphere, some suggestions have been made to geoengineer the oceans to absorb more CO2, for example by means of ocean fertilisation. These however are practices that might be harmful for the oceans and life in them and may also present other presently unknown consequences. In evaluating any such proposal the precautionary principle/approach and the duties provided by Articles 195 and 196 UNCLOS must be seriously taken into account. The same applies to any measure which implies human intervention, for example to restore ecosystems or build resilience.

Finally, the duty to cooperate, generally provided for in Article 197 UNCLOS and further recalled in other provisions of the Convention,

[33] This has been considered as a direct duty in the 2011 Opinion (n 19) para 145.

plays a pivotal role in addressing the global issue of climate change. It is worth noting that the duty to cooperate has been considered a fundamental principle by the ITLOS[34] and implies not only the development of legal rules but concerns also monitoring and exchange of information.[35] The duty to cooperate thus extends beyond the requirements of the duty to negotiate. Finally, the duty to cooperate has implicit consequences not only for states themselves, but also for the regional and global organisations which states have created to institutionalise and drive cooperation. These organisations must fully use their powers to accomplish their mandate of normative development and ensure compliance by their members with the obligations provided under relevant instruments. While the duty to cooperate cannot be pushed so far as to oblige a state to become a member of any international organisation, it is certainly a strong pull towards participation within the organs of the institution.

6. *Are GHG emissions a form of pollution?*

All duties discussed in the above section relate to protection of the marine environment *independently* from the existence of pollution. Part XII however, also includes specific obligations for states parties concerning prevention, reduction and control of pollution of the marine environment from any source.

A major duty of states with respect to protection of the marine environment is the one enshrined in Article 194 UNCLOS, obliging states to prevent, reduce and control pollution of the marine environment that is caused by them or by anyone else under their jurisdiction and control. Question (b) submitted to the ITLOS indeed asks the Tribunal to

[34] *The MOX Plant (Ireland v United Kingdom)* Provisional Measures (Order of 3 December 2001) [2001] ITLOS Rep 95 (MOX Order) para 82; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures (Order of 8 October 2003) [2003] ITLOS Rep 10 para 92; 2015 Opinion (n 22) para 140; *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* Provisional Measures (Order of 25 April 2015) [2015] ITLOS Rep para 73. See also SCS Award (n 33) para 985.

[35] MOX Order (n 35) para 89.

indicate what are the duties of states in relation to pollution of the marine environment produced by GHG emissions.

This question presupposes that GHG emissions are a form of pollution of the marine environment,[36] but this statement has not gone uncontested.[37] 'Pollution of the marine environment' is one of the few terms used in the UNCLOS which are defined, and according to its definition it means:

> 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'.[38]

GHGs are substances that have deleterious effects on the marine environment, and are undoubtedly produced by (hu)man(s), but are they introduced by humans into the marine environment? There are two main arguments that have been advanced to prove that GHG emissions are not pollution. In the first place, it has been contended that the 'marine' environment includes only the water column and not the airspace above. Thus, introduction of GHGs into the atmosphere above the waters would not be included in the definition of pollution. This interpretation would be an excessively restrictive reading of the law of the sea rules. Generally speaking, the 'sea' for the law of the sea includes not only the water column, but also the seabed and subsoil underneath, as well as the airspace above. This is evident, for example, from the provisions dealing with freedom of the high seas, which include also overflight,[39] and those dealing with sovereign rights of the coastal state in its exclusive economic zone, which include also production of energy from winds.[40] Even more, this is demonstrated by Article 212 UNCLOS, which deals with pollution from or through the atmosphere, and which will be discussed hereunder.

[36] See for example submissions by Bangladesh, Belize, Canada, Egypt, European Union, Germany, Korea, Latvia, Mauritius, Mozambique, New Zealand, Portugal, Singapore, United Kingdom.

[37] See for example the submission by China.

[38] Art 1 (1)(4) UNCLOS.

[39] Art 87 (1)(b) UNCLOS

[40] Art 56 (1)(a) UNCLOS.

In the second place, it is maintained that most GHG emissions happen in the airspace above land, not the sea. Again, this does not take into account the fact that there are emissions from ships, as well as the fact that, due to the absence of natural boundaries, emissions that originate on land may end up in the airspace above marine waters.

Once it is established that GHG emissions are indeed a kind of pollution of the marine environment, the ensuing duties on the basis of the UNCLOS are rather easy to identify. They include three separate duties: prevention, reduction and control. Furthermore, the UNCLOS specifies a number of sources that need to be considered, most of which apply also to GHG emissions: pollution from vessels,[41] pollution from seabed activities within[42] and beyond[43] national jurisdiction, and pollution from or through the atmosphere.[44]

Two points need to be made in this regard. First, that in the case of vessels states must generally comply with measures agreed at the International Maritime Organization (IMO). The work of the IMO on Annex VI MARPOL is key in this respect, as are the delays that have characterised sometimes IMO's work. The advisory proceedings before ITLOS could be an excellent opportunity to recall that not only states have duties, but also that intergovernmental organisations have the duty to fulfil their mandate – and states have the duty to help the organisation do so and not prejudice the adoption of the necessary rules and regulations.

Second, Article 212 requires states to adopt laws and regulations 'applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry'. The article does not specify that the airspace to which these rules apply includes solely that above the territorial sea, but generally refers to 'airspace under their sovereignty'. This means that states have the obligation to prevent, reduce and control pollution from the atmosphere originating anywhere in their territory, including their land territory. this has a profound impact on states' duties since most of GHG emissions derive from land-based activities.

[41] Arts 211 and 217-220 UNCLOS.
[42] Arts 208 and 214 UNCLOS.
[43] Arts 209 and 215 UNCLOS.
[44] Arts 212 and 222 UNCLOS. Once could argue that also the articles on land-based pollution apply, although GHGs produced on land enter the marine environment through the atmosphere.

7. *A distinction between States?*

One of the main issues of contention among states, when it comes to climate change related obligations, concerns whether all states have the same duties or not. Developing states, in particular, have claimed since the beginning of the climate regime that developed states should bear the greatest burden of the measures that need to be taken, because of their major contribution to GHG emissions both in terms of volume and in terms of time. The UNCLOS does not generally distinguish between states and Article 192 does not mention any differentiated duties when it comes to protection and preservation of the marine environment. However, other provisions refer to duties of states taking into account 'available means' and 'according to their capabilities'.[45]

The SDC has indeed recalled that the precautionary approach may require differences in its application.[46] As a general matter, however, it considered that, unless there is an express mention of differentiated treatment, both developing and developed states should bear the same duties,[47] concluding that

> 'the reference to "capabilities" is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields.'[48]

This conclusion has a particular bearing on disputes on climate change, where some developing states have become major emitters of GHGs.

8. *What about other regimes?*

Another major issue that is contested among states that have participated to the proceedings is the extent to which, if at all, the ITLOS

[45] Notably art 194(1) UNCLOS.
[46] 2011 Opinion (n 19) para 129.
[47] ibid para 158-160.
[48] ibid para 162.

should refer to duties of states deriving from treaties other than the UNCLOS or from customary international law. These treaties fall into two groups. The first includes other treaties concerned with the protection of the marine environment, such as the MARPOL and the regional seas conventions. The second category includes treaties not specifically concerned with the sea. the latter include, first and foremost, the climate treaties (UNFCCC and the Paris Agreement) as well as the Convention on Biological Diversity and human rights treaties.

With respect to the first category, UNCLOS itself often refers to other treaties, especially in Part XII and the ITLOS and judges considering cases under Part XV UNCLOS have often referred to these. There is thus little doubt that these treaties could also be used to identify, clarify, substantiate and reinforce states duties concerning climate change and the oceans.

Turning to treaties that are not specifically concerned with protection of the marine environment, whether the Tribunal should take into account other rules is a long standing question and one that the ITLOS has addressed –somewhat obliquely – in many of its decisions. In general terms, the UNCLOS is an 'open' convention which recalls other treaties – not only law of the sea treaties – in numerous provisions and which explicitly provides that it does 'not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention'.[49] Furthermore, the UNCLOS also provides that a 'court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'.[50] The Tribunal has often used Article 293 to introduce norms from other treaties.[51] Furthermore, the ITLOS has been ready, more than other courts, to refer to rules deriving from regimes other than the law of the sea.

A related point concerns the extent to which the Tribunal could address duties of states concerning activities that do not happen at sea, but rather on land. It seems rather reasonable to expect that the Tribunal will

[49] Art 311(2).

[50] Art 293(1).

[51] 2011 Opinion (n 19) para 57; 2015 Opinion (n 22) para 84; *The M/V "SAIGA" (No 2) (Saint Vincent and the Grenadines v Guinea)* Judgment [1999] ITLOS Rep 10 para 155.

straightforwardly address all duties pending on states concerning activities at sea, such as GHG emissions from vessels and from other activities in areas within and beyond national jurisdiction, as well as all measures necessary to protect and restore fragile ecosystems and the habitats of endangered species. This would already provide important guidance for states, and could help address at least part of the problem and provide solutions for some of the most visible effects of climate change on marine species.

Nonetheless, most GHG emissions do not come from vessels or maritime activities, but from activities on land. At the same time, these land activities produce a huge impact on the seas and oceans that has now been scientifically proven beyond doubt. As a consequence, leaving land activities significantly affecting the oceans out of the opinion would appear artificial and not consistent with the wording of the Convention, in particular considering Articles 212 and 222. It is therefore to be hoped that the Tribunal will seize this occasion and identify duties of states to protect the marine environment that may require action not only at sea, but also, and probably mainly, on land.

9. *Waiting for the decision*

The expectations raised by the current advisory proceedings are high. Following two balanced and, to a further or lesser degree, innovative opinions, this is a new opportunity for the Tribunal to consolidate its role as the main interpreter of the UNCLOS and a reliable organ to which states can turn for clarification of their duties, expecting a forward looking yet reasonable outcome. Furthermore, the past two opinions issued by the SDC and the ITLOS, as well as most of the judgments of the Tribunal, have adopted an evolutionary interpretation of the provisions of the UNCLOS, adapting rules drafted more than 40 years ago to the current problems of the international community. The Tribunal has therefore the opportunity to prove once again its relevance for the interpretation and application of the law of the sea, highlighting the linkages with other fields of international law and showing the way to the other international courts that will address climate change after it.