Impact of the ITLOS Climate Change Advisory Opinion on Civil Liability Regimes for Oil Spills

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Matter Commented on: The Conventions regulating Civil Liability for oil spills were not explicitly mentioned by the ITLOS, but several new duties related to transboundary harms and environmental restoration could have implications for the rights and remedies available to States when remediating this type of marine pollution.

1. Introduction

On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion on the duties of States under the UN Convention on the Law of the Sea (UNCLOS) to respond to the threats of climate change. Specifically, the request by the Commission of Small Island States on Climate Change and International Law (COSIS) asked the Tribunal to elaborate on the specific obligations of State Parties to UNCLOS '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' and, more generally, 'to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.' As such, the focus of the Advisory Opinion is mainly related to the marine pollution caused by the rise of greenhouse gas emissions (GHGs) in the atmosphere caused by three distinct sources: ship emissions, plane emissions, and from land-based sources. This is done by first connecting anthropogenic GHG emissions to the definition of 'pollution of the marine environment' contained in Article 1(1)(4) of UNCLOS, which requires, '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,' including 'harm to living resources and marine life [and] hazards to human health.'

However, the Tribunal's discussion of shipping only focuses on ship emissions and does not directly address or even mention the impact of the approximately two billion metric tonnes of crude oil shipped by sea every year, accounting for over 80% of global crude oil production and for 45% of the total global shipping demands, resulting in an estimated 100+ million metric tonnes of GHG emissions. Are these shipments themselves within the definition of a pollutant in UNCLOS because they are substances introduced to the marine environment which eventually result in GHG emissions once they are processed and used? Or do they only become 'pollution of the marine environment' once the GHGs are emitted or if there is an oil spill? This blog post only mentions but does not discuss the first question except to note that it is not addressed in the Advisory Opinion, and focuses instead on applying the language of the Advisory Opinion to the international civil liability regime for oil spills.

These several conventions include the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC), the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (BUNKER), the International Convention on the Establishment of an International Fund for

Compensation for Oil Pollution Damage, 1971 (FUND), and the International Convention for the Prevention of Pollution from Ships, 1973/78 (MARPOL) and its Annexes. Like MARPOL, the original CLC of 1969 predates UNCLOS, though Article 199 of UNCLOS provides that 'States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment' in cooperation with the 'competent international organizations,' in this case, the International Maritime Organization (IMO).

The IMO brief to the Advisory Opinion proceedings lists the oil spill conventions when 'describing the specific obligations of States insofar as they constitute, or contain, generally accepted international rules and standards developed by IMO as a competent international organization under UNCLOS' in a section entitled 'Obligations under IMO treaties relating to climate change impacts, including ocean warming and sea level rise, and ocean acidification' (para 45). After listing MARPOL, the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Convention), the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (AFS Convention), the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (BMW Convention), and the International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990 (OPRC), the brief turns to the issue of oil pollution (paras 65-88). They declare that '[i]n support of the objectives to prevent pollution incidents in the marine environment, instruments establishing the liability and compensation regime for damage resulting from oil spills . . . have also been developed under the auspices of IMO, operating under the "polluter pays" principle' (para 89). These instruments establish strict polluter pays liability with limitations on liability amount and the nature of environmental damage, along with an insurance requirement. These 'environmental damages' are 'reasonable measures of reinstatement actually undertaken or to be undertaken' and which are based on 'sound science.' (CLC Art 1.6, BUNKER Art 1.9)

The next section of this blog post will examine how those 'reasonable measures' could change in light of the 'sound science' and stricter duties related to the marine environment and climate change resilience found in the Advisory Opinion.

2. Overlaps between UNCLOS and the Civil Liability Conventions

2.1 *The language of the Advisory Opinion relevant to specific oil spill incidents*

Specific incidents that cause pollution to the marine environment (rather than general GHG emissions) are in the Advisory Opinion, but only in limited terms, as the general focus is the overall impact of GHG emissions. For example, in response to the first question of the request, the Tribunal goes into great detail on the regime of Technical Assistance required in Article 202 to help developing states protect and preserve their marine environment, but states that the requirement in 202(b) for assistance to minimize effects of major incidents which may cause serious marine pollution (like oil spills) 'appears to be of lesser relevance' in the larger context of GHG emissions (para 334). The lack of explanation for this phrase is questioned in the separate opinion of Judge Kittichaisaree, while noting the importance of the connection to duties contained in Article 199 (para 34).

Most of the discussion in the Advisory Opinion about specific polluting incidents is related to duties of the State to prevent transboundary harms. When discussing this duty in relation to Article 194(2), the Tribunal notes that UNCLOS 'requires States to take all measures necessary to ensure . . . pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights' (para 245). The discussion of this duty to prevent transboundary harm is introduced in the abstract, and then only specifically elaborated on with respect to anthropogenic GHG emissions, rather than single incidents.

As mentioned above, the advisory opinion begins with a chapter recognizing the scientific research of the IPCC on the impact of anthropogenic GHG emissions on the oceans and then uses that information in the first substantive chapter to define 'pollution of the marine environment' that appears in Article 1(1)(4) of UNCLOS (paras 46-66, 159-179). The 'sound science' of the IPCC used in the first chapter of the Advisory Opinion is also noteworthy for the Tribunal because none of the participants challenged the authoritative value of 35 years of Intergovernmental Panel on Climate Change (IPCC) reports and the increasing urgency of their warnings of 'threat[s] to human well-being and planetary health' (para 51). The IPCC reports are also cited to recognize the importance of coastal blue carbon systems, like mangroves, tidal marshes, and seagrass meadows, as sinks that 'can help reduce the risks and impacts of climate change, with multiple co-benefits' (para 56). Similar to the lesser relevance of transboundary assistance for spills, those impacts are hedged as only a 'very modest addition to, and not a replacement for, the very rapid reduction of GHG emissions' (para 56).

The second question posed by COSIS asked the Tribunal to expound on the more 'general obligation' to 'protect and preserve the marine environment' contained in Article 192, specifically with regard to 'climate change impacts.' The word 'impact' is then specifically 'used in relation to circumstances in which drivers of climate change cause deleterious effects to the marine environment,' which would clearly apply to a discharge of oil from a vessel (para 375). The Tribunal then examines the word 'preserve' and states that it 'may include restoring marine habitats and ecosystems' even though '[t]he term "restoration" is not used in Article 192 of the Convention but flows from the obligation to preserve the marine environment where the process of reversing degraded ecosystems is necessary in order to regain ecological balance.' (para 386) The Tribunal then declares that this obligation is 'open-ended' and 'can be invoked to combat any form of degradation of the marine environment,' and concludes by noting that '[w]here the marine environment may be degraded, this may require restoring marine habitats and ecosystems' (para 400). The importance of these ecosystems is cited from the IPCC WGII 2022 report, which notes that the marine habitats at greatest risk from oil spills are the exact type of '[c]oastal blue carbon ecosystems, such as mangroves, salt marshes and seagrasses, [which] can help reduce the risks and impacts of climate change,' and 'are also important sinks and can contribute to ecosystem-based adaptation' (para 390). The Tribunal considers the obligations of prevention and restoration contained in Article 192 as one of due diligence' and considers 'the standard of the due diligence obligation is stringent (para 399).'

2.2 Civil Liability Conventions guidelines for environmental restoration

The CLC and BUNKER Conventions define 'pollution damage' as 'loss or damage caused outside the ship by contamination resulting from the escape or discharge . . . provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable

measures of reinstatement actually undertaken or to be undertaken' (CLC Art 1.6, BUNKER Art 1.9) These 'reasonable measures' are given flesh by brochures for submitting environmental claims promulgated by the International Oil Pollution Compensation Funds [IOPC], a separate Convention intended to solve certain problems with the original CLC by ensuring that there is always funding available after a spill in cases when the owner can limit their liability below the total damages, which can only be signed by a State that also became a party to the updated CLC. These Environmental Guidelines disclaim damages to the environment itself, loss of use of the resource, and creation of alternative sites, specifically disclaiming 'abstract quantification calculated in accordance with theoretical models' (para 4.1) The guidelines address 'Claims where admissibility is unclear,' allowing unprecedented claims which comply with the following specific criteria, which require linking the measures taken to the damaged component of the environment, 'are based on sound science and established protocols,' and 'would be considered proportionate or not too remote:' (para 4.3)

Specific criteria for reinstatement measures

- The measures should have the aim of re-establishing the biological community in which the organisms characteristic of that community at the time of the incident are present and are functioning normally, that is, the measures should be aimed at enhancing the recovery of the damaged component of the environment.
- The measures should have a realistic prospect of significantly accelerating the natural process of recovery and should be based on sound scientific principles.
- The measures should seek to prevent further damage as a result of the incident.
- The measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources.
- Measures taken at some distance from, but still within the general vicinity of, the damaged area may be acceptable so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment and the services that those components provide.
- The link between the measures taken and the damaged component of the environment is essential.
- The measures should be technically feasible.
- The costs of the measures should be in proportion to the extent and duration of the damage and the benefits likely to be achieved.

None of the specific criteria mention any consideration of climate change, the role of the pollutant in the dangerous rise of anthropogenic GHG emissions, the role of damaged area as a blue-carbon ecosystem or as a climate sink.

3. Conclusion

Though not addressing obligations related to the use of oceans for fossil fuel shipments responsible for pollutive GHG emissions, the language of the Advisory Opinion can impact certain 'unclear' claims for restoration of coastal 'blue carbon' ecosystems after an oil spill. When advising States submitting claims for damage to these ecosystems, the FUND Convention guidelines should encourage State Parties to consider the larger implications of climate change and the habitat's role as a climate sink, and State Parties should likewise include surveying implications on climate change adaptation when preparing their environmental claims. State parties to UNCLOS also have stringent due diligence obligations under Articles 192, 194, and 199 to consider the impacts of climate change when making contingency plans and transboundary harms.

The Advisory Opinion also emphasizes the importance of State Parties to UNCLOS enforcing these obligations against private parties. Even with the role of state owned oil companies, shipment of fossil fuels by sea is mostly a private corporate law function involving charter parties, bills of lading, insurance, and other related contracts necessary for the sale and shipment of goods. This diffusion helps defray costs and spread risks, so higher costs related to environmental liabilities would have to be very high to force a reduction in the use of oceans to transport this dangerous and threatening amount of fossil fuels that will become GHG emissions. Even if these costs were high enough to reduce traffic, there will continue to be both accidental and negligent oil spills into the marine environment, and the liability regime should recognize the relationship to climate change and anthropogenic GHG emissions.

Questions of what is a 'reasonable measure of reinstatement' along with 'sound science' will also have to be interpreted by national courts that hear claims to collect against oil pollution funds. This could potentially result in divergence of interpretation. Despite these problems and their 'lesser relevance,' these Conventions are still successful examples of polluter pays regimes operating for decades, and as concrete instruments through which State Parties to UNCLOS and the IMO can carry out their duties to cooperate in Article 199 along with their stringent due diligent obligations to preserve and restore the marine environment from the adverse effects of marine pollution.

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