To *Lex Specialis*, or not to *Lex Specialis*? The Paris-UNCLOS Nexus in the ITLOS Advisory Opinion on Climate Change

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Matter commented on: The Advisory Opinion of ITLOS on climate change

1 Background and Context

the ITLOS Advisory Opinion on Climate Change and International Law discusses a plethora of climate-related issues, many of which are addressed in this series. Underpinning many of the legal issues addressed in the Opinion is the relationship between the climate change and the law of the sea regimes, which, despite their shared importance in relation to the issue of climate change, operate largely in isolation from one another. Though some mechanisms are provided in the UN Convention on the Law of the Sea (UNCLOS) to govern its relationship to other instruments, their application to climate change is not clear-cut and subject to debate (see, e.g., P. Nickels, 2024).

In addition to their siloed operation, the complicated relationship between these instruments emanates from the profound differences in their respective legal characteristics. On the one hand, UNCLOS is a framework convention with many constitution-like traits; it is a long-standing framework convention that sets forth important substantive obligations and sets up new institutional machinery (J. Barrett and R. Barnes, 2016). The Paris Agreement, on the other hand, is a relatively young instrument that contains very few substantive obligations of result, but rather adopts an informal, bottom-up structure by providing for a common objective, i.e. to hold "global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (ibid, art. 2(1)). Rather than being binding on States individually, this is a collective obligation, or rather, aspiration (A. Zahar, 2019), that is obtained through the submission of nationally determined contributions (NDCs) by individual Parties that they "intend to achieve" (Paris Agreement, art. 4(2)).

It is evident that these instruments are very different legal creatures, and hence traditional rules of international law that govern inter-treaty relationships cannot easily be applied to their interactions. At the core of this issue is the question of whether the Paris Agreement can be considered *lex specialis* and *lex posterior* in relation to UNCLOS. The answer to this question is not clear-cut. While it can be argued that the Paris Agreement is the more specific standard as it targets a single source of pollution within the broader UNCLOS framework that addresses all sources of pollution, considering its breadth and

open-ended nature it can hardly be considered having "a more precisely delimited scope of application" (International Law Commission, 2006, p. 19). The Paris Agreement's ambiguous legal nature adds further complexity to this issue.

This blog post scrutinizes the Tribunal's deliberations with respect to the *lex specialis* question, contextualizing them within the extensive academic and political discourse preceding the Opinion. It does so by firstly providing a concise overview of the arguments raised in academic as well as political spheres in the ensuing section, before embarking on a detailed assessment of ITLOS' arguments in section 3. Finally, section 4 offers some concluding remarks.

2 Academic and Political Accounts

A substantial body of academic literature has examined the interplay between the law of the sea and climate change regimes (e.g., A. Boyle, 2015, B.E. Klerk, 2022; C. Voigt, 2023). The *lex specialis* question, however, has not featured prominently in these debates. Boyle, however, specifically addresses this issue, asserting that the Paris Agreement provides the relevant rules and standards "[f]or protecting and preserving the marine environment from the deleterious effects of greenhouse gas (GHG) emissions and climate change" (A. Boyle, 2015, p. 480), and contends that the Paris Agreement is indeed *lex specialis* with respect to climate change impacts on the ocean. He challenges the notion that "[UNCLOS] regulates climate change impacts on the oceans in splendid isolation from the Paris Agreement", drawing parallels to other conventions, such as the 1973/78 MARPOL Convention and the London Dumping Convention, and asks, "why should the Paris Agreement be different?" (ibid., p. 471). The conclusion he arrives at is that Part XII requires States to implement the Paris Agreement, but does not require them to go beyond it.

Scott, on the other hand, highlights the Paris Agreement's failure to comprehensively address the impacts of climate change on the ocean, pointing to the issue of ocean acidification, which, she argues, is inadequately addressed by both regimes (K.N. Scott, 2021). Considering that the Paris Agreement provides no specific targets for reducing CO_2 emissions, Scott argues that it is "entirely possible that States are able to comply with their obligations under the UNFCCC without addressing ocean acidification" (ibid., p. 122), i.e. by reducing other GHGs such as methane, and hence "even full compliance with the 2015 Paris Agreement is unlikely to prevent or reduce ocean acidification" (ibid., p. 127). She concludes that the UNFCCC regime is no *lex specialis* in respect of CO_2 emissions limits or a pH change target and that it is "[c]onsequently disingenuous to argue that action under the Paris

Agreement, in the absence of any specific consideration of the causes and impacts of ocean acidification, would constitute a due diligence approach a State Party's obligations under Part XII" (ibid.).

The written and oral proceedings preceding the Opinion offer a unique glimpse into the perspectives of States on the question of how the climate change and law of the sea regimes interrelate. The *lex specialis* question was primarily discussed during the oral proceedings, prompted by COSIS' oral submission on the first day of the proceedings, remarking that considering the global climate regime as such is "fundamentally misguided" (ibid., 39). Other States subsequently chimed in on the debate, with the European Union, for instance, offering that the questions posed to the Tribunal "should not lead to a debate on the *lex specialis* principle", because "the different legal regimes are to be applied in conjunction, and, in the European Union's view, there is no conflict between them" (ibid., p. 25).

This line of argumentation, which was first deployed by COSIS' oral submission where it submitted that "[t]here is in fact no identifiable normative conflict between competing regimes" (ibid., p. 26), gained traction during this phase of the proceedings and was echoed by many participants. The African Union, for instance, submitted that "*lex specialis* … come[s] into play when two norms of international law conflict. Here, the two regimes are "compatible", operate harmoniously and there is no conflict to resolve" (oral proceedings 21 September 2023, P.M., p. 4). In a similar vein, New Zealand held in its oral submission that the *lex specialis* debate is 'not helpful' and that the instruments at hand are "complementary and capable of harmonious interpretation" (oral proceedings 15 September 2023, P.M., p. 5).

While the argument that the climate change and law of the sea regimes are complementary and non-conflicting thus gained significant traction during the oral proceedings, the general tenor in the written statements was of an entirely different character. The *lex specialis* question was not addressed by many States in their oral submissions, though those that did address it explicitly answered it affirmatively. Singapore, for instance, submitted that the "UNFCCC regime provides the *lex specialis* in respect of greenhouse gas emissions" (ibid., p. 17), and Mauritius similarly stated that "the UNFCCC/Paris Agreement is the *lex specialis* for preventing dangerous climate change" (ibid., p. 15).

3 The ITLOS Advisory Opinion

ITLOS addressed the question of the relationship between the climate change and law of the sea regimes in its discussion of article 194(1). This provision stipulates that States "shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and

control pollution of the marine environment from any source …". The first question that arises in relation to this provision is whether it is applicable to climate change. In other words: do greenhouse gas emissions constitute 'pollution to the marine environment' under article 1(1)(4) UNCLOS? Aligning with an overwhelming political (i.e., in the written and oral proceedings) and academic (e.g., B.E. Klerk, 2022; A. Boyle, 2015) consensus, ITLOS found that "anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention" (para 179).

Having made this significant determination, which renders the entire regime dedicated to marine pollution applicable to climate change, the Tribunal embarked on a detailed discussion of article 194(1), providing some guidance on how the content of 'necessary measures' may be determined. ITLOS noted that, while the Convention grants States some discretion in designing such measures, "this does not mean that such measures are whatever measures States deem necessary to that end. Rather, necessary measures should be determined objectively" (para 206). Among the relevant factors for objectively determining such measures are 'relevant international rules and standards', which, in the context of climate change, "are found in various climate-related treaties and instruments", i.e. the UNFCCC and the Paris Agreement (para 214).

The Tribunal proceeded to discuss these instruments, and in doing so focused almost exclusively on the temperature goal outlined in article 2(1) and the timeline for emission pathways outlined in Article 4, which it considers to be "particularly relevant" (para 215). This rather narrow analysis has been met with criticism from Voigt, who argues that ITLOS adopted a "pick-and-choose approach", and "fell short of a comprehensive and consistent approach to determining which other treaty norms would be relevant to the interpretation of UNCLOS and how" (C. Voigt, 2024, p. 8). Other norms that the Tribunal could have considered, Voigt points out, are the requirement of NDCs to "regularly progress and to reflect each Party's highest possible ambition", as well as "the obligation for NDCs to be informed by the outcome of the global stocktake … and the obligation to pursue domestic mitigation measures with the aim of implementing the NDC" (ibid., p. 4).

Indeed, ITLOS' analysis of the Paris Agreement does not display an overwhelming degree of depth, and the choice to focus almost exclusively on the temperature goal and the timeline for emission pathways would have benefitted from some elaboration. Nonetheless, the Tribunal arrives at a number of unambiguous conclusions about the Paris Agreement. Upon reiterating that "the temperature goal and the timeline for emission pathways set out in the Paris Agreement inform the content of necessary

measures to be taken under article 194" (para 222), ITLOS notes that the Paris Agreement "does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard" (ibid.).

At this juncture, the Tribunal examines the relationship between the Paris Agreement and UNCLOS, noting a "divergence of views among participants as to the relationship between the obligations under the [UNCLOS] [and] the Paris Agreement" (para 219). Following an overview of various streams of argumentation identified in the oral and written submissions, the Tribunal concludes that the obligation under Article 194 to take 'necessary measures' is not satisfied "simply by complying with the obligations and commitments under the Paris Agreement" (para 223). It further notes that "the Convention and the Paris Agreement are separate agreements, with separate sets of obligations" (ibid.). ITLOS goes on to conclude that "while the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter" (ibid.), before addressing the *lex specialis* question in more detail:

> The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention. Furthermore, as stated above, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention (para 224).

At first glance, ITLOS' approach appears to align with participants favoring a harmonious interpretation of the Paris Agreement and UNCLOS. The Tribunal's assertion that *lex specialis* has 'no place in the interpretation of the Convention' implies that it views the rules as complementary rather than conflicting. However, this argument does not require the outright rejection of the notion that the Paris Agreement is *lex specialis*; it could have noted that no conflict between the instruments arises, rendering the *lex specialis* question, as COSIS argued in its oral submission, "fundamentally misguided."

Nonetheless, the Tribunal chose to explicitly reject the *lex specialis* question, thereby strongly contradicting the written and oral proceedings that preceded the Opinion, as discussed previously. Its choice to do so must be appreciated in the context of ITLOS' broader treatment of the climate change regime. That is, ITLOS appears to take a rather critical view of the Paris Agreement. Phrases indicating that the Agreement should not "frustrate the very goal of the Convention" (para 224) and that mere

compliance with the Paris Agreement does not satisfy the obligation under Article 194(1) imply such underlying considerations (para 223). These arguments suggest that ITLOS does not consider the Paris Agreement to be 'enough' and, seemingly for that reason, chose not to recognize it as *lex specialis*.

Two primary issues arise with this line of argumentation. First, there is the aforementioned lack of depth in the Tribunal's analysis of the Paris Agreement, which, as noted, is a treaty of an entirely different nature from UNCLOS and arguably any existing treaty. While subject to criticism (see, e.g., S.N. Neo, 2017; O.R. Young, 2016), it is also praised for its innovative approach to increasing ambition over time (see, e.g., W. Obergassel et al, 2015). Viewing the Paris Agreement through a traditional, formal-legalistic lens, focusing on legally binding obligations and enforcement mechanisms, may indeed yield a dim perspective. ITLOS might have approached the Agreement in this manner, failing to appreciate its informal, bottom-up nature that finds other ways to subject States to scrutiny and drive ambition. Secondly, and more profoundly, for analyzing whether a legal instrument is *lex specialis*, the stringency of the instrument is irrelevant. The evaluation hinges on whether a matter is governed by a general standard and a more specific rule, and whether this results in a normative conflict (International Law Commission, 2006, paras 46 *et seq*).

It seems ITLOS viewed the *lex specialis* issue as an impediment to interpreting UNCLOS as imposing more stringent obligations than those of the Paris Agreement. Indeed, ITLOS concluded its discussion of Article 194(1) by imposing a 'stringent' due diligence obligation on States and reinforcing the 1.5-degree temperature goal over 2 degrees, thereby, in a sense, going 'beyond' Paris. However, rejecting the *lex specialis* doctrine was unnecessary to reach these conclusions. Indeed, as Boyle aptly notes: "Given the open-ended and evolutionary commitments of parties to the Paris Agreement it seems unnecessary to suggest that 'going beyond' the Paris Agreement might be required: the terms of the Agreement are surely wide enough to sustain whatever level of due diligence is necessary to deliver the objective set out in Article 2" (A. Boyle, 2015, p. 472).

4 Concluding Remarks

The ITLOS Advisory Opinion on Climate Change shed light on myriad complex and topical issues. In the initial wave of responses, the Tribunal has received praise for boldly "advance[ing] the international law of climate" (C. Payne, 2024), and for seeking harmony by "advancing a more holistic vision of climate-relevant international law" (J. Peel, 2024). However, a truly harmonious interpretation did not require ITLOS to reject the *lex specialis* argument; it could have adhered to the general tenor of the oral declarations and deemed it inapplicable. Nonetheless, ITLOS felt compelled to take an additional step,

seizing the opportunity to deliver an impactful Opinion, as illustrated by the epilogue to Judge Kittichaisaree's declaration.

While in principle commendable, it may be questioned whether ITLOS might have been overzealous in its attempts to strengthen States' climate change obligations. Climate change, by its very nature, presents challenges that transcend the scope of international law; it is primarily a political, financial, and technological issue (E. Fisher et al, 2017; A. Giddens, 2011). The Paris Agreement exemplifies this reality, for it is a treaty that primarily functions to catalyze the political, economic, and technological transformations necessary to address climate change. Its strength lies not in the legally binding obligations it imposes but in its role as a political forum of an unprecedented magnitude, where States submit and discuss their plans to mitigate and adapt to climate change (i.e., NDCs) which are then subjected to public, scientific and political scrutiny as well as various mechanisms that seek to ensure increasing ambition.

Ultimately, the Paris Agreement and the UNFCCC COP are the arena where climate change will have to be addressed. However, ITLOS did little to reinforce these mechanisms and may even risk undermining them. The Opinion clearly prioritizes UNCLOS over the Paris Agreement, and although it strongly endorses some of the Agreement's objectives, particularly the 1.5°C temperature goal, it conveys a generally critical view of the Agreement. As such, ITLOS is treading on thin ice. Its articulation of far-reaching obligations to mitigate greenhouse gas emissions is unlikely to lead to States adjusting their climate policies and risks undermining the Paris Agreement, which, despite its imperfections, remains our best strategy for addressing climate change.

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