Some Reflections on External Rules in ITLOS' Advisory Opinion on Climate Change

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

1. Introduction

Commentators, for example, Elmahoud and Voigt, suggesting that the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) in *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change (COSIS) and International Law* (Advisory Opinion or AO) should have engaged more profoundly with human rights law or the climate change regime prompted my curiosity about how the Tribunal engaged with external rules. ITLOS' assertion, quoting the Advisory Opinion of the International Court of Justice (ICJ) in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Namibia/South West Africa), "that treaties do not operate in isolation but are 'interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'" (para. 135 AO, quoting the ICJ AO in Namibia/South West Africa, para. 53) further triggered my interest in the extent to which the Tribunal engaged in systemic integration.

This essay focusses on how ITLOS engaged with treaty instruments external to the United Nations Convention on the Law of the Sea (LOSC or the Convention). It first maps how ITLOS identified and then engaged with such external instruments. Thereafter, the essay provides an assessment of how the Tribunal engaged with treaty instruments external to the LOSC. The essay concludes that the Advisory Opinion provides insight into how the LOSC, as a living instrument (para. 130 & 134 AO), interacts with external rules that pertain to the protection of the environment. It also finds that ITLOS' engagement with external rules in treaty instruments could have been more profound. I suggest that this result might have emerged because ITLOS' main concern, probably prompted by COSIS submission, seems to have been with assessing whether states when implementing the climate change regime, the Paris Agreement in particular, can meet the due diligence obligations that rest on them by virtue of, in particular, article 194 and article 192 of the LOSC.

2. Identifying external rules

By way of introduction, the Tribunal provides, amongst other things, a summary of "[i]nternational instruments on climate change" (paras. 67-82 AO). The summary identifies the United Nations Framework Convention on Climate Change (UNFCCC) as "[a]t the core" of the agreements that address climate change (para. 67 AO, also see paras. 214 and 222 AO where the UNFCCC and the Paris Agreement are identified "as primary treaties/legal instruments addressing climate change"). The

summary discusses the UNFCCC, the Kyoto Protocol and the Paris Agreement (paras. 68-77). In the summary ITLOS also identifies "as related to climate change" instruments adopted by the International Maritime Organization IMO), and the International Civil Aviation Organization (ICAO), as well as the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) (paras. 78-82 AO).

Before answering the two questions asked of it, ITLOS, in general terms, reflects on external rules to the LOSC when it considers "the interpretation of the Convention and the relationship between the Convention and other rules of international law" (para. 128 AO). ITLOS identifies articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) as "part of the applicable law in this case" (para. 128 AO) and article 31 of the VCLT as "[t]he general rule of treaty interpretation" (para. 129 AO). Thereafter, it points to article 31(3)(c) of the VCLT (para. 135 AO). Article 31(3)(c) of the VCLT, which provides that "any relevant rules of international law applicable in the relations between the parties" "shall be taken into account, together with the context", is the provision that is associated with systemic integration (International Law Commission, Section 2, Conclusions of the Work of the Study Group, paras. 17-23). It is also in this context that ITLOS refers to the ICJ's Advisory Opinion in Namibia/South West Africa quoted above (para. 135 AO).

ITLOS also points to two mechanisms by way of which Part XII of the LOSC relates to external rules. It refers to the rules of reference contained in Sections 5 and 6 of Part XII of the LOSC (paras. 131 & 134 AO) and to article 237 of the LOSC, on "obligations under other conventions on the protection and preservation of the marine environment" (paras. 132-134 AO). In the context of Sections 5 and 6 of Part XII of the LOSC, rules of reference point to international instruments that states adopt to implement their obligations to cooperate to protect the marine environment from specific sources of marine pollution (Nguyen). These international instruments, in different ways, relate to the obligations of states to adopt national legislation and enforce rules aimed at preventing marine pollution. These obligations arise from articles 207-222 of the LOSC (paras. 259-262 AO). Article 237 of the LOSC in essence provides that the provisions of Part XII of the LOSC "are without prejudice to" obligations that rest on states by virtue of conventions on the protection and preservation of the marine environment adopted prior to or after the adoption of the LOSC and that such obligations "should be carried out in a manner consistent with the general principles and objectives of this Convention" (paras. 132-133 AO, Nickels). While ITLOS discusses how various treaty instruments relate to the rules of reference on land-based sources of pollution, pollution from or through the atmosphere and pollution from vessel (paras. 265-291 AO), it does not classify any agreement as relevant under article 237. Instead, it found that the Paris Agreement is not a *lex specialis* to the LOSC (para. 224 AO, Klerk) and characterized the Paris Agreement and the LOSC as "separate agreements, with separate sets of obligations" with the Paris Agreement complementing and not superseding the LOSC (para. 223 AO).

ITLOS identifies the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to International Convention for the Prevention of Pollution from Ships (MARPOL), Annex 16 (Volumes III and IV) to the Convention of Civil Aviation (Chicago Convention), and the Montreal Protocol, including the

Kigali Amendment as agreements in which "in the present case, relevant external rules may be found, in particular" (para. 137 AO). Except for the UNFCCC, Kyoto Protocol and the Paris Agreement, which concern both mitigation and adaptation, these agreements focus on the mitigation of greenhouse gas (GHG) emissions and thus relate to the provisions of LOSC that address the prevention of marine pollution, including article 194(1) and (2) of the LOSC.

Instruments that are relevant for the interpretation and application of article 192 and article 194(5) of the LOSC are identified later on in the Advisory Opinion, when the Tribunal considers the second question before it. The Tribunal then identifies as relevant agreements, beside the UNFCCC and the Paris Agreement, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement), the Convention on Biological Diversity (CBD), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (paras. 388 & 404 AO).

Finally, ITLOS in considering area-based management tools, including marine protected areas (MPAs), refers to the practice of the parties to the Convention for the Protection of the Marine Environment of the North-East Atlantic as an example of how MPAs in areas beyond national jurisdiction (ABNJ) have been realized by way of a regional treaty (para. 439 AO, Hey). In this context, ITLOS points out that more rigorous measures than those required by Part XII of the LOSC may be adopted but that "such measures must be consistent with the Convention and other rules of international law" (para. 440 AO). ITLOS also points to the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement) as the "global framework under the Convention to better address the conservation and sustainable use of marine biological diversity" in ABNJ "and provides for the use of area-based management tools, including MPAs" (para. 440 AO).

3. Engaging with external rules

Besides identifying the relevant treaty instruments under some of the rules of reference in Sections 5 and 6 of Part XII of the LOSC, ITLOS engages with external rules in other treaty instruments in three main ways. It derives definitions from other treaty instruments, engages with the principles included in article 3 of the UNFCCC, and assesses the compatibility of the Paris Agreement with provisions of the LOSC.

3.1. Definitions

ITLOS relies on external rules as well as IPCC reports for defining relevant terms and thus for interpreting the LOSC. In considering whether anthropogenic GHG emissions are covered by the definition of marine pollution in article 1(1)(4) of the LOSC, ITLOS, for example, in clarifying the term "greenhouse gases" relies on the definition in article 1(5) of the UNFCCC as well as definitions provided by the IPCC (para. 164 *juncto* paras. 54 & 68 AO). In addition, ITLOS in clarifying the term

'ecosystem' in article 194(5) of the LOSC relies on the definition of the term in article 2 of the CBD and on definitions provided by the IPCC (para. 169 AO) and in clarifying the term 'habitat', in the same article, also relies on the definition of the term in article 2 of the CBD (para. 404 AO). In clarifying the term 'marine environment' ITLOS relies on the definition of this term in the binding exploration regulations adopted by the International Seabed Authority (para. 170 AO). ITLOS classifies these regulations "as representing the practice of the States Parties to the Convention and of the Authority" (para. 170 AO), which may be understood as a reference to article 31(3)(b) of the VCLT. In clarifying the term 'marine protected area' ITLOS refers to the definition of 'protected area' in article 2 of the CBD (para. 439 AO).

3.2. Principles in the climate change regime

In the summary of "international instruments on climate change", ITLOS notes that "the Parties to the UNFCCC are guided by the provisions of Article 3" (para. 69 AO). It summarizes this guidance as referring to, "*intern alia*, common but differentiated responsibilities and respective capabilities [CBDR-RC], specific needs and special circumstances of developing country Parties, precautionary measures, sustainable development and cooperation" (para. 69 AO). These principles, except for the obligation to cooperate and the obligation to take into account the specific needs and special circumstances of developing states, have become part of international (environmental) law since the adoption of the LOSC. ITLOS, of course, develops the obligation to cooperate throughout the Advisory Opinion. Furthermore, the Tribunal considers the principle of CBDR-RC in conjunction with the specific needs and special circumstances of developing states, and the precautionary approach.

ITLOS does not critically assess the CBDR-RC principle (Enyew and Ahmed). Instead, it integrates the principle as such into its analysis. The Tribunal, for example, finds that article 194(1) while not referring to the CBDR-RC principle, "contains some elements common to this principle". The Tribunal, presumably, is referring to the clause "the best practical means at their disposal and in accordance with their capabilities" in article 194(1) of the LOSC (para. 229 AO). The Tribunal concludes that "the scope of the measures under this provision, in particular those measures to reduce anthropogenic GHG emissions causing marine pollution, may differ between developed States and developing States" (para. 229 AO). It also concludes, that even if developed states "should 'continue taking the lead'", "[a]ll States must make mitigation efforts" (para. 229 AO). In addition, on technical assistance in relation to the prevention of marine pollution, article 202 and article 203 of the LOSC, the Tribunal finds that assistance mechanisms in these provisions "coexist" with the mechanisms provided in the UNFCCC and the Paris Agreement (para. 329 AO). It concludes that "articles 202 and 203 of the Convention set out specific obligations to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions" (para. 339 AO).

The Seabed Dispute Chamber (SDC), in its Advisory Opinion in *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the*

Seabed Disputes Chamber) (SDC AO), had already, in 2011, characterized the precautionary approach as "an integral part of the general obligation of due diligence" (para. 131 SDC AO, also see para. 242 AO) and as part of an "initiated … trend towards making this approach part of customary international law" (para. 135 SDC AO, also see para. 213 AO). I suggest that this trend has solidified, with the Tribunal submitting that the precautionary approach is part of customary international law. ITLOS, for example, concludes that "States must apply the precautionary approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions" (para. 242 AO). It also finds "that the precautionary approach may restrict the margin of discretion on the part of the State concerned" in determining whether an environmental impact assessment is to be conducted, in accordance with article 206 of the LOSC (para. 361 AO). Furthermore, ITLOS finds that when implementing article 63 and article 119 of the LOSC, on the conservation of the living resources of, respectively, the exclusive economic zone and of the high seas, "entails the application of the precautionary approach and an ecosystem approach" (para. 418 AO). In the context of fisheries conservation and management, ITLOS also points to the "enhanced framework for the conservation and management of straddling and highly migratory fish stocks" that the Fish Stock Agreement provides, a framework that includes the precautionary approach (para. 425 AO).

3.3. Assessing the compatibility of external rules with the LOSC

As illustrated above, ITLOS identifies a number of agreements that contain relevant external rules and that address the mitigation of GHG emissions. Yet, in considering the due diligence obligations resting on states pursuant to article 194 and article 192 of the LOSC ITLOS assesses only one agreement as to its compatibility with the LOSC: the Paris Agreement.

In assessing the Paris Agreement in terms of the due diligence obligation that ensues from article 194(1) of the LOSC, ITLOS positively references the 1.5° C temperature goal provided in article 2(1) of the Paris Agreement (paras. 216 & 222 AO) and the timelines for emission pathways set out in article 4(1) of the Paris Agreement (paras. 200 & 222 AO). However, ITLOS negatively assesses the manner in which the reduction of GHG emissions is to be obtained pursuant to article 3 of the Paris Agreement. In this context, ITLOS points out 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" (para. 222 AO). This finding then leads ITLOS to conclude that it "does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied by simply complying with the obligations and commitments under the Paris Agreement" (para. 223 AO). A conclusion that would also apply to the obligation under article 194(2) of the LOSC, given that ITLOS finds that "[t]he standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution" (para. 258 AO).

The adequacy of the other instruments that ITLOS identified as relevant in relation to the obligation that ensues from article 194(1) – Annex VI to MARPOL, Annex 16 of the Chicago Convention, and the Montreal Protocol including the Kigali Amendment – are not assessed by ITLOS. Instead, they

are, together with the UNFCCC and the Paris Agreement, considered in terms of how they relate to the rules of reference in Sections 5 and 6 of Part XII of the LOSC. In this context, the Tribunal notes that its findings regarding article 194 of the LOSC "are equally applicable with respect to" the article on land-based sources of marine pollution (art. 207 LOSC), on vessel source marine pollution (art. 211 LOSC), and on pollution from or through the atmosphere (art. 212 LOSC) (para. 265 AO). ITLOS also notes that under articles 207 and 212 the referenced instruments, "include those contained in the climate change treaties such as the UNFCCC and the Paris Agreement", are instruments which states need to take into account when developing national laws and regulations (para. 270 & 276 AO). Even if, as ITLOS emphasizes, "States must comply with internationally agreed rules and standards which are binding on them" (para. 271 AO). Yet, I suggest that ITLOS might have drawn a more explicit conclusion with respect to the obligations under article 207(1) and (2) and article 212(1) and (2) of the LOSC. I suggest that ITLOS might have stressed that these obligations remain intact, regardless of the possibly deficient content of the international treaty instrument that is referenced. Meaning that what states have agreed in the Paris Agreement does not absolve them from the obligations under article 207(1) and (2) and article 212(1) and (2) of the LOSC in conjunction with article 194(1) of the LOSC (paras. 269-271 AO). Be this as it may, ITLOS in the part of the Advisory Opinion on rules of reference does not assess any of the instruments in terms of their compatibility with obligations ensuing from the LOSC. This way of proceeding is perhaps best illustrated by the manner in which the Tribunal refers to Annex VI to MARPOL when considering the obligations of flag states under article 211(2) of the LOSC (paras. 278-280 AO). The Tribunal notes as follows:

> "In the context of marine pollution from GHG emissions from vessels, the Tribunal notes in this regard that the IMO adopted amendments to Annex VI to MARPOL in 2011 and 2021 with a view to reducing GHG emissions from ships" (para. 280 AO).

In other words, the Tribunal does not assess the compatibility of Annex VI to MARPOL with the obligations ensuing from the LOSC, article 194(1) of the LOSC in particular.

Where the Tribunal addresses article 192 and article 194(5) of the LOSC a similar approach as described above surfaces. ITLOS identifies, besides the UNFCCC and the Paris Agreement, the Fish Stocks Agreement, and the CBD as relevant for the implementation of the obligation that ensues from article 192 of the LOSC (para. 388 AO), and it refers to CITES in the context of its consideration of article 194(5) of the LOSC (para. 404 AO). Yet, in considering these instruments, ITLOS only assesses the Paris Agreement in terms of its compatibility with the LOSC. It finds that the adaptation strategies addressed in article 7(5) and (6) of the Paris Agreement "are compatible with the obligations of the Convention" (para. 394 AO). Whereas the CBD and the Fish Stocks Agreement are characterized as instruments that "may also provide relevant guidance" (para. 388 AO) and articles 5 through 7 of the Fish Stocks Agreement are singled out as being particularly relevant to fisheries management in the context of climate change (paras. 425-428 AO). The same approach was adopted by ITLOS with respect to CITES in relation to article 194(5) of the LOSC. ITLOS finds that "the classification of species in the appendices to CITES provides guidance in interpreting the term 'depleted, threatened

or endangered species' in article 194, paragraph 5," of the LOSC (para. 404 AO). While the term 'guidance' of course implies a positive assessment, these agreements are not explicitly assessed as to their compatibility with the obligations that ensue from the relevant provisions of the LOSC.

4. An assessment

Several issues stand out when considering how ITLOS engaged with external rules. First, ITLOS glosses over the term "hazards to human health" in the definition of marine pollution in article 1(1)(4) of the LOSC. Second, and related, ITLOS does not include treaty instruments that the LOSC might be regarded as implementing in its considerations. Third, the reason why ITLOS found the Paris Agreement not to satisfy the due diligence obligation that ensues from article 194(1) of the LOSC.

4.1. Hazards to human health and agreements that the LOSC implements

In determining that anthropogenic GHG emissions come under the definition of marine pollution in article 1(1)(4) of the LOSC (para. 159 AO), ITLOS rather meticulously analyses the elements of that definition based on three criteria that must be met for something to constitute pollution. Namely, "1) there must be a substance or energy; 2) this substance or energy must be introduced by humans, directly or indirectly, into the marine environment; and 3) such introduction must result in or be likely to result in deleterious effects" (para. 161 AO). While the Tribunal acknowledges that the deleterious effects "are not limited to the marine environment" because the definition mentions, among other things, "effects on human health" (para. 174 AO). It leaves it at that and does not make the link to the right to health or to human rights law more broadly, including the right to a clean, healthy, and sustainable environment. ITLOS, in the Advisory Opinion, does not engage with international human rights law. Instead, it "notes that climate change represents an existential threat and raises human rights concerns" (para. 66).

What if ITLOS had engaged with human rights law when considering the definition of marine pollution and thereafter? In that case, ITLOS would have engaged with a body of law that does not implement the LOSC, but with a body of law that is implemented by, among other provisions, Part XII of the LOSC. It would have had to acknowledge that, in particular, article 194(1) of the LOSC, given its focus on the prevention of pollution of the marine environment and the definition of pollution of the marine environment in the LOSC, also serves to implement human rights law. It might also have had to delve into the question of how Part XII and other provisions of the LOSC relate to anthropocentric and ecocentric concerns. A place the Tribunal, or at least a majority of the members of the Tribunal, probably did not wish to go (see the Declarations of Judge Infante Caffi, Judge Kittichaisaree, and Judge Pawlak, which refer to human rights law). Yet, I suggest, the Tribunal, without trespassing its mandate, which is "the interpretation or application of this Convention … [and] an international agreement related to the purposes of this Convention" (art. 288(1) & (2) LOSC), could have, for example, reminded states of their obligations under human rights law when implementing their due diligence obligation under, in particular, article 194(1) of the LOSC. Such an approach might have done justice to the terms "entire legal system prevailing at the time of the

interpretation" in the quoted passage of the ICJ's Advisory Opinion in Namibia/South West Africa (para. 135 AO).

4.2. The Paris Agreement and the due diligence standard ensuing from article 194(1)

As mentioned above, the Tribunal found that it "does not consider that the obligation under article194, paragraph 1, of the Convention, would be satisfied by simply complying with the obligations and commitments under the Paris Agreement" (para. 223 AO). According to the Tribunal this is related to the nature of the nationally determined contributions (NDCs), which do "not require the Parties [to the Paris Agreement] to reduce GHG emissions to any specific level according to a mandatory timeline but [leave] each Party to determine its own national contributions in this regard" (para. 222 AO). While I am well aware of the danger of *a contrario* arguments and note that the Tribunal is very careful in how it characterizes the other treaty instruments that it identified as relevant for implementing the obligation that ensues from article 194(1) of the LOSC (see above where the Tribunal refers to Annex VI to MARPOL in para. 280 of the AO), I am concerned about the implication this finding may have. Might it imply that if specific levels and mandatory timelines are agreed by states in an agreement, such as Annex VI to MARPOL, the presumption is that *prima facia* the due diligence obligation under article 194(1) of the LOSC would be met? While ITLOS leaves this question unanswered, this, I suggest, would be a most unfortunate development, considering, for example, the critique that has been levied at the IMO in regulating GHG emission reductions from vessels (Ringbom).

It is also regrettable that ITLOS, beyond its disapproval of the nature of the NDCs, did not explicitly comment on the turn to procedure in the Paris Agreement (Voigt). This turn to procedure is not only evident in the Paris Agreement, but also in other multilateral environmental agreements (Brunnée). An assessment of this trend might have provided negotiators with insight into how international law pertaining to the protection of the environment should be developed in future, also when implementing the "continuing" duty to cooperate under article 197 of the LOSC (para. 311 AO).

5. Conclusions

The reflections presented in this essay suggest that ITLOS missed a few opportunities in which it could have more profoundly engaged in systemic integration. These opportunities include specifying the type of agreements, or parts thereof, that fit the parameters of article 237 of the LOSC, engaging with human rights law, even if lightly as suggest above, and examining the turn to procedure in the Paris Agreement. In addition, the Tribunal should have explained why it only assessed the compatibility of the Paris Agreement with the obligations that ensue from the LOSC. While this approach may well have been prompted by the COSIS submission, we are now left in the dark as to why the Tribunal chose this approach especially when considering the obligation of due diligence that ensues from article 194(1) of the LOSC.

Or is it perhaps too much to ask of a specialized global tribunal, such as ITLOS, to engage in such a systematic exercise, given the unsystematic manner in which international law has been developed? After all, not all parties to the LOSC are necessarily parties to the agreements identified by ITLOS as containing relevant external rules. Moreover, many of those agreements specify how they should be implemented in non-binding instruments adopted by their conferences of the parties. Whether these non-binding instruments provide elements of customary international law or provide evidence of subsequent practice in the application of these treaties remains unresolved by the Advisory Opinion, even if the Tribunal on two occasions refers to this type of instrument, namely decisions of the conference of the parties to the climate change regime that affirm the 1.5 C° temperature goal in article 2(1) of the Paris Agreement (paras. 77 & 216 AO).

What the Advisory Opinion does offer is insight into how the LOSC is related to external rules by way of some of the rules of reference contained in Sections 5 and 6 of Part XII of the LOSC and how the LOSC can be related to other treaty instruments that seek to protect the environment in terms of the definitions and guidance that these instruments provide. In this respect, the Advisory Opinion shows that treaty instruments related to the protection of the environment do not stand on their own. I suggest that the Advisory Opinion might also be regarded as another step in ensuring that the LOSC remains a living instrument.

Yet, if international law is to be conceptualized as a system, which I suggest it should be, what the ICJ normatively prescribed in its Advisory Opinion in Namibia/South West Africa, namely that "an international instrument *has to be* interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (italics added) needs to be engaged with further. Achieving this aim is a tall order, given how international law has been developed. It is also one of the challenges that the ICJ faces in the climate change advisory opinion asked of it.

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