Finding Light in Dark Places

Specific Obligations for Climate Change and Ocean Acidification Mitigation

Cymie Payne

04.06.2024 doi: 10.59704/651d916278036d80

Can the new advisory opinion interpreting the United Nations Convention on the Law of the Sea (UNCLOS) move us beyond the lethargy of unmet climate change policy needs? The International Tribunal for the Law of the Sea (the Tribunal, ITLOS) established the gravity of this question by stating that "climate change represents an existential threat and raises human rights concerns" (para. 66). The advisory opinion identified a number of specific State climate change obligations under UNCLOS in response to the request of the Commission of Small Island States (COSIS).

The Tribunal acted both boldly and conservatively by interpreting UNCLOS as an independent source of international legally binding obligations to address climate change and ocean acidification. When States become parties to UNCLOS, they agree to protect and preserve the marine environment, and they also make the more specific commitment to prevent, reduce, and control pollution of the marine environment. By accepting the COSIS request, ITLOS boldly advanced the international law of climate change to take full account of its harmful impacts on the marine environment.

The Earth's surface is about 70 percent ocean; the ocean absorbs 95 percent of our excess heat and over 25 percent of our excess carbon dioxide, contributes half of Earth's oxygen production, and provides other services that sustain life as we know it. Yet to date State obligations negotiated through the international climate change regime and implemented in national laws have been almost exclusively oriented to land, and some have argued that only the climate change treaties—in particular, the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement—regulate international obligations to control greenhouse gas (GHG) emissions. This advisory opinion finds that UNCLOS regulates all sources of GHG emissions into the atmosphere as pollution of the marine environment; consequently, States Parties have specific obligations under UNCLOS to address their GHG emissions.

When ITLOS asserted the relevance of UNCLOS as an independent source of climate change-related obligations, including land-based emission sources, it put a spotlight on commitments that are, in some ways, more concrete than those found in the UNFCCC or the Paris Agreement. It characterized the "due diligence" standard for these obligations as a demanding, objective, science-based standard, not "whatever measures States deem necessary" (para 206). The discussion of due diligence in the opinion and in the declarations of Judges Jesus and Kittichaisaree are an important contribution to international jurisprudence, particularly relevant to environmental problems.

At the same time, the Tribunal's interpretation was also conservative in the sense that it was a straightforward reading of the UNCLOS text. Having analyzed UNCLOS article 1, paragraph 1(4) to determine that the definition of "pollution of the marine environment" was applicable to anthropogenic GHG emissions into the atmosphere, the Tribunal's task was to interpret UNCLOS "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (para. 29, citing the Vienna Convention on the Law of Treaties, article 31). It did so, without implying any artificial constraint in deference to the climate change regime. This opinion has also been viewed as "conservative" by some in that it did not further explore the relevance of international human rights law and it provided only limited discussion of State responsibility and liability.

General and Specific Obligations

ITLOS determined that UNCLOS, article 194, paragraph 1, which requires States to take all "necessary" measures to "prevent, reduce and control pollution of the marine environment" and which covers "any source" of pollution whether from land-based sources, seabed activities, dumping, vessels, and the atmosphere, applies to anthropogenic GHG emissions.

The Tribunal then moved to a discussion of what the obligation to take "all necessary measures" includes, identifying reduction of anthropogenic GHG emissions into the atmosphere as central, based on its reading of article 194, paragraph 3 (para. 205). It found that States must take into account best available science, especially the Intergovernmental Panel on Climate Change (IPCC) reports and relevant international rules and standards, such as those found in climate change treaties, MARPOL, and the Chicago Convention (paras 70-82, 441). The Tribunal emphasized in this respect, "the global temperature goal of limiting temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal" provided in the Paris Agreement, linking this legal obligation to the IPCC statement that "[l]imiting warming to 1.5°C implies reaching net zero CO2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO2 forcers, particularly methane" (paras 63, 441).

Further analyzing UNCLOS, IPCC reports and obligations in other treaties, the Tribunal lays out many specific measures that States can and should implement (paras 70-82). In doing so, States should "endeavour to harmonize their policies" to address this problem where every State's action affects every other State (para 441).

ITLOS further found that, while global and regional cooperation on climate change are necessary, it is not enough to simply "participat[e] in the global efforts to address the problems of climate change. States are required to take all necessary measures, including individual actions as appropriate" (paras 202, 294-321). It stated that "articles 213 and 222 of the Convention should be interpreted as imposing an obligation to adopt laws and regulations and to take measures necessary to implement, among others, rules and standards set out in climate change treaties and other relevant instruments" (para. 286). States with capacity must provide technical assistance to others (paras 322-339).

Under UNCLOS and customary international law, all States have duties to undertake environmental assessment, to monitor their activities, and to report the results. The ITLOS advisory opinion noted that this supports States in complying with their obligations under articles 192 and 194 of UNCLOS, and "is an essential part of a comprehensive environmental management system" (para. 353). It says that the duty applies to land-based activities as well as those at sea (para. 360). ITLOS also provided more specificity about the contents of environmental assessments than has been the case in the past, addressing points of particular relevance for climate change and ocean acidification, such as analysis of cumulative impacts and socio-economic impacts (paras 340-367). It notes that the Agreement on Biodiversity Beyond National Jurisdiction contains detailed provisions on environmental impact assessment procedures, including monitoring (para. 366).

The Tribunal quoted the IPCC 2018 and 2019 reports' recommendations to mitigate GHGs, which included protecting and enhancing coastal blue carbon ecosystems, "energy-demand reductions, decarbonization of electricity and other fuels, electrification of energy end use, deep reductions in agricultural emissions, and some form of carbon dioxide removal" (paras 56, 63). For States that endeavor to implement the ITLOS advisory opinion this can be guidance to concrete actions, although ITLOS does not say that UNCLOS requires them to do any of those things: that would have strayed beyond the Tribunal's conservative interpretive approach.

Standard for Performance of Specific Obligations

The advisory opinion concluded that the performance standard for taking all measures necessary to mitigate GHG emissions is due diligence, following its prior decisions in the *Area Advisory Opinion*and the *IUU*

Fishing Advisory Opinion (paras 233, 234). The Tribunal observed that some participants identified certain obligations as requiring "States to adopt all measures necessary to ensure that certain events will not occur", unlike the due diligence obligations analyzed in the *Area Advisory Opinion* (para. 255).

Some submissions described due diligence as merely requiring that a State take measures toward a particular outcome; others rejected a sharp distinction between obligations of conduct and obligations of result in this context. Judge Jesus, in his Declaration, found that while article 194, paragraph 2 "is an obligation that requires measures of due diligence, this obligation also imposes the achievement of results," based on its description of the result to be obtained; however he would not apply paragraph 2 to anthropogenic GHGs (Jesus, paras 12, 16).

The Tribunal stated that article 194, paragraph 2, and other obligations "are formulated in such a way as to prescribe not only the required conduct of States *but also the intended objective or result of such conduct*". (para. 238, emphasis added) It concluded, nonetheless, that articles 192 and 194 impose obligations of conduct (paras 441(c), (d)). However, it said that due diligence is variable and subject to the following factors that make it a demanding standard:

- "Necessary measures should be determined objectively;" they are not merely whatever States prefer (paras 206, 257).
- Necessary measures are to be based on best available science and the IPCC in particular; but scientific certainty is not a relevant factor. Uncertainty should be addressed by the precautionary approach (para. 213).
- For article 194, paragraph 1, the "standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions" (para. 441).
- Where there is a risk of transboundary pollution affecting the environment of other States, the standard under article 194, paragraph 2, "can be even more stringent" and "highly demanding" (paras 256, 257, 441(d)). It is interesting that the Tribunal distinguished the due diligence standard for transboundary pollution under article 194(2) as possibly more stringent than the general rule under article 194(1), since all GHG pollution is, by nature, transboundary.
- Article 192 requires "measures as far-reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment. The standard of due diligence under article 192 is … stringent given the high risks of serious and irreversible harm to the marine environment" (para. 399).

Other factors provide flexibility for the State to implement its obligations:

- States are to carry out article 194, paragraph 1 obligations using "the best practicable means at their disposal" (paras 225-226, quoting article 194). ITLOS explained that "the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic and financial capabilities" while stating that this justifies neither postponement nor exemption from taking all necessary measures (paras 225, 441).
- ITLOS noted that article 193 acknowledges the sovereign right of States to exploit their natural resources pursuant to their environmental policies, a right balanced with "their duty to protect and preserve the marine environment" (paras 187, 380). Judge Kulyk suggested that this "offers States flexibility in determining how to balance resource exploitation with environmental protection" and that "States are expected to adapt their measures to evolving technological, environmental and socio-economic developments" (Kulyk Declaration).

Implementation of Specific Obligations

The Tribunal also addresses *how* states are to prevent, reduce and control GHGs and the steps that they must take to protect and preserve the marine environment, interpreting articles 195 and 196 of UNCLOS. Histori-

cally, some approaches to managing pollution had the effect of causing pollution elsewhere—for example, incinerating trash to reduce landfills caused air pollution. Article 195 absolutely prohibits this kind of practice. It states:

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

The Tribunal gives the example of marine geoengineering, which "would be contrary to article 195 if it has the consequence of transforming one type of pollution into another" (para. 231). The Tribunal also flags article 196, which extends the duty to prevent, reduce and control pollution of the marine environment to technologies and introduction of alien or new species that "may cause significant and harmful changes thereto" (para. 231). In showing how these obligations apply to preventing, reducing and controlling GHG pollution, the Tribunal draws our attention to fundamental principles of environmental management.

Responsibility and Liability for Breach of Specific Obligations

The failure of a State Party to take effective steps to give effect to the best available scientific evidence in respect of climate change will expose a State Party to the risk of responsibility and liability under UNCLOS (para 223). The consequences for a State's breach of its international obligations can include the requirement to cease the wrongful action and liability for reparations, including compensation, restitution, and satisfaction, under the customary international law doctrine of state responsibility.

Under the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, the COSIS mandate refers to "responsibility for injuries arising from internationally wrongful acts in respect of the breach of … obligations [relating to the protection and preservation of the marine environment]." The Tribunal concluded that, if a State fails to honor the obligations related to climate change that it identified in this advisory opinion, the State would be responsible and might be liable for the consequences (paras 286). However, it decided that issues of responsibility and liability were beyond the scope of the COSIS request for an advisory opinion, observing that COSIS did not mention those issues in its request (para. 145-148).

Conclusion

Judge Kittachaisaree quoted these passages from Dante, "It is always darkest just before the dawn. … Even in the darkest places, we can find light if we only search for it." Humans reside on land, and the marine environment seems remote—the view that "there's nothing out there" is not uncommon.

ITLOS has shown UNCLOS to be a living treaty that can provide a beacon to guide States as they face the complex and demanding task of combating climate change. While not as well known as the UNFCCC and the Paris Agreement, UNCLOS is an important convention that was negotiated over many years, and which has strong and globally representative participation with 168 State parties that include major economies and developing States, maritime and landlocked States, major GHG emitters (including China, India, the EU, and Russia, but not the United States) and States most threatened by GHG emissions. This brief review of legally binding obligations identified in the advisory opinion has shown the boldness of the Tribunal in asserting that the importance and reach of States' obligations under UNCLOS extends to taking all measures necessary to prevent, reduce and control all GHG emissions from any source, that these are stringent and objectively determined obligations, though they may vary according to a State's capabilities and available resources. ITLOS's conservative interpretation of international law, using traditional canons of construction, makes this a robust contribution to climate change jurisprudence.

ABOUT THE AUTHOR

Cymie Payne
Cymie Payne is an Associate Professor in the Department of Human Ecology at Rutgers University and the School of Law.

SUGGESTED CITATION

Payne, Cymie: Finding Light in Dark Places: Specific Obligations for Climate Change and Ocean Acidification Mitigation, Verfassungsblog, 04.06.2024, doi: 10.59704/651d916278036d80.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240605-005033-0.