

# Climate Change before ITLOS and the ICJ

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# Introduction

- Discuss two pending requests for advisory opinions on the topic of climate change
- Outline:
  - Factual background: Why climate change at International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ)?
  - Island States and international law, the bigger picture
  - Procedural legal background: How did the requests reach ITLOS and the ICJ?
  - Substantive legal background: What questions are being asked of the courts?
  - Some closing remarks
- Note that there is a third request for an advisory opinion, submitted by Chile and Columbia, pending before the [Intern-American Court of Human rights](#). It will not be considered during this lecture.

# The situation of Island States

- Contribution to greenhouse gas emissions has been minimal
- Yet, enduring
  - Sea level rise
  - Ocean acidification
- Result: Islands or parts thereof are disappearing
- Island States will lose some or all of their territory
  - If all of its territory, an Island State would lose one the three/four requirements for statehood, i.e. a defined territory. The other two/three requirements being a permanent population and a government and the capacity to enter into relations with the other states, with the last criterion being contested. See 1933 [Montevideo Convention on the Rights and Duties of States](#)



# Island States and international law

## Stabilizing baselines and maritime zones

Changing how we interpret the 1982 United Nations Convention on the Law of the Sea (LOSC)

- Understanding was that baselines and the outer limits of maritime zones would change as sea level changed
- Emerged understanding is that if baselines and the outer limits of maritime zones have been set in accordance with LOSC and registered with the UN Secretary-General baselines and the outer boundaries of maritime zones can be stabilized

Not the subject matter of the requests for advisory opinions

## Requests for Advisory Opinions

*Low waterline/  
baseline*

# Jurisdiction at Sea

*Outer limit of  
maritime zones*

----- 200 nautical miles (nm) -----

-- 12 nm --

----- EEZ \*\* -----

Territorial  
Sea

- 12 nm -  
Contiguous  
zone

High Sea

Land  
territory

Freedom of  
the High Sea

Continental shelf  
200 nm and given  
certain conditions up  
to a max. of 350 nm

The Area  
Common  
Heritage of  
Mankind

Territory, incl.  
air space  
**sovereignty**

**Jurisdiction or sovereign rights**  
excluding air space

# Stabilizing baselines and maritime zones, developments

**Declarations adopted by Pacific Island states, among which the 2014 [Palau Declaration](#) on 'The Ocean: Life and Future', suggesting that their baselines and maritime zones should be stabilised**

**International Law Associations [Resolution 5/2018](#)**

- “that, on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline.”

**International Law Commission, 2019 report of ILC [study group](#)**

- “Consequently, nothing prevents Member States from depositing notifications, in accordance with the Convention [LOSC], regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, to stop updating these notifications in order to preserve their entitlements;”

**2021 [Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise](#) adopted by Pacific Island states**

- the LOSC “imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations”

**United Nations General Assembly as reported on by ILC Study Group** (see ILC Study Group Report, [UN Doc. A/CN.4/761](#), 13 February 2023)

- “legal stability (and security, certainty and predictability) is viewed among Member States as having a very concrete meaning, and has been linked to the preservation of maritime zones through the fixing of baselines (and outer limits of maritime zones measured from those baselines): in other words, States affected by sea-level rise are not required to update their notifications of coordinates and charts, resulting in their baselines being fixed even if the physical coast moves landward because of sea-level rise. No States – not even those with national legislation providing for ambulatory baselines – have expressed positions contesting the option of fixed baselines;”

# Pacific Island States and international law

## Stabilizing baselines and maritime zones

## Requests for advisory opinions

Using international law to attain what was not attained in the climate change negotiation, in particular

- Sufficient mitigation of greenhouse gas emissions to prevent significant sea level rise and ocean acidification
- Sufficient financial resources to realize adaptation to climate change

What obligations international law imposes on states in this context is the subject matter of the two advisory opinions

- For ITLOS, based on the LOSC
- For the ICJ, based on the UN Charter, human rights law, international environmental law, the climate change regime, LOSC

# How the requests for advisory opinions reached the benches?

## ITLOS

Submitted by Commission of Small Island States on Climate Change and International Law ([COSIS](#)) on 12 December 2022

- COSIS was established for this purpose in 2021

Making use of art. 21 of ITLOS' Statute and art. 138 of the Rules of Procedure of the Tribunal

- Some controversy as to whether ITLOS, as a full court, has the competence to deliver advisory opinions
  - First used in [Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission \(SRFC\)](#), ITLOS, 2 April 2015)
    - In which ITLOS decided it had the competence to deliver advisory opinions as a full bench
    - Note that the LOSC only explicitly attributes the competence to give advisory opinions to ITLOS' Seabed Dispute Chamber, see art. 191 LOSC

## ICJ

At the initiative of Vanuatu, request submitted by the UN General Assembly based on art. 96(1) UN Charter and pursuant to art. 65 of the ICJ Statute, on 12 April 2023 (See letter [UN Secretary General to the ICJ](#), attached is UNGA Res. 77/276 (containing the request))



# So here we are in Hamburg and in The Hague

ITLOS is  
expected to  
deliver  
advisory  
opinion late  
spring/early  
summer  
2024



ICJ hearings not  
scheduled yet,  
written comments  
on submissions  
now due 24 June  
2024



# ITLOS

- Questions asked of ITLOS (all documents related to the request are available at [Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law \(Request for Advisory Opinion submitted to the Tribunal\)](#))

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:

- 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?

Question a) points to art. 194 of the LOSC; question b) points to art. 192 of the LOSC, both provisions are of the type which the ICJ referred to as evolving provisions, in [Gabčíkovo-Nagymaros](#) (1997), see para. 112.

# Essence of what ITLOS is asked to find

That states have not acted with due diligence as required by the LOSC to protect the marine environment and prevent pollution of the marine environment as required by articles 192 and 194 of the LOSC.

- Important in this respect is also art 194(2) which provides that “States shall **take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment**, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”
  - Possibly, giving rise to the question of state responsibility, even if the questions put to ITLOS are not framed in that manner, as opposed to those put to the ICJ

In other words, COSIS is arguing that what states have agreed within the framework of the climate change regime is insufficient to meet the standard that the LOSC sets.

- Meaning that ITLOS will somehow have to relate to the climate change regime

# Questions asked of the ICJ (introduction)

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,”



# Questions asked of the ICJ (continued, specific questions)

- (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
- (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
  - i. States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
    - State responsibility in terms of duties owed to a group of states
  - ii. Peoples and individuals of the present and future generations affected by the adverse effects of climate change?
    - State responsibility in terms of duties owed to the international community as a whole

# Essence of what the ICJ is asked to find

- That international law imposes responsibilities on states to protect the climate system and other parts of the environment in the interest of other states and the members of present and future generations

And

- If those obligations have not been met, that international law (the law on state responsibility) gives rise to obligations to 'compensate' other states, in particular states that are vulnerable to climate change, for significant harm suffered
- If those obligations have not been met, that international law also gives rise to obligations to 'compensate' for significant harm suffered by peoples and individuals of present and future generations

The ICJ will have to consider the inter-relationship between different bodies of international law (such as human rights law, the climate regime, the LOSC, international environmental law, and general international law, including the law on state responsibility)

# Closing remarks: ITLOS' and ICJ's advisory opinions and the potential for the development of international law

The requests for advisory opinions present the benches with the opportunity to pronounce themselves on issues that involve inequalities between states

They can do so

- By way of developing the law State responsibility, especially those parts on duties owed to a group of states or the international community
- By way of the harmonization (as opposed to fragmentation) of international law
  - Addressing the relationship between the climate change regime and law of the sea (both)
  - The threshold for acting with due diligence (e.g. under arts. 192 and 194 LOSC) in view of the existence of a treaty instrument (climate change regime) (both)
  - The relationship between a variety of areas of international law, including human rights law, climate change law, law of the sea, environmental law and general international law (ICJ)
- With a role for
  - General principles of international law, e.g. as contained in article 1(2) and (3) of the UN Charter
  - References to especially vulnerable states and to human rights (vulnerable groups) in the Preamble and body of the Paris Agreement (for vulnerable groups in the body of the Paris Agreement see e.g. art. 7 on adaptation)
  - Human rights law