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Client Alert Commentary

Latham & Watkins Environmental, Social & Governance and Complex Commercial Litigation Practices

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International Tribunal on the Law of the Sea Issues Landmark Advisory Opinion on Climate Change

The Tribunal confirmed that States party to UNCLOS must take measures to prevent marine pollution caused by climate change, on top of their obligations under the Paris Agreement.

On 9 April 2024, the International Tribunal on the Law of the Sea (ITLOS, or the Tribunal) issued a long-awaited advisory opinion on climate change and international law, concluding that States party to the United Nations Convention on the Law of the Sea (UNCLOS) are subject to specific obligations to prevent, reduce, and control greenhouse gas (GHG) emissions and their adverse effect on the marine environment.

While this advisory opinion is not binding and did not assess any specific State's liability, it clarifies the scope of the obligations of States party to UNCLOS with respect to climate change. States are required to take "all necessary measures" to reduce, prevent, and control marine pollution caused by climate change, and conduct environmental impact assessments (EIAs) to monitor public and private activity. Those that fail to do so face the risk of future UNCLOS proceedings.

The Tribunal's opinion may also have wider implications for companies facing climate change-related actions. While the Tribunal's opinion addresses only the potential liability of States, it will likely be referred to by claimants in the increasing number of actions brought against companies. In practice, we have observed claimants relying on key factual and legal findings from these "framework" cases as part of their case strategies against companies.

This opinion is also an important reminder that, when it comes to addressing climate change through international law, the United Nations Framework Convention on Climate Change (UNFCCC) regime and the Paris Agreement are not the be-all and end-all. The Tribunal made clear that UNCLOS obligations would not be satisfied "simply by complying with the obligations and commitments made under the Paris Agreement". This advisory opinion follows the European Court of Human Rights' recent judgment on climate change, in which the court concluded that Switzerland had breached Article 8 of the European Convention on Human Rights by failing to implement effective measures to combat climate change. It also precedes the awaited opinions from the Inter-American Court of Human Rights and the International Court of Justice, all of which will likely have a major impact on the understanding of the legal obligations of States and companies alike.

This Client Alert provides (1) a short background to the request to ITLOS for an advisory opinion, (2) an overview of the key findings in the advisory opinion, and (3) an explanation of the implications of ITLOS' findings.

The Latham ESG and Complex Commercial Litigation teams have considerable experience in defending claims in this area and assisting clients in developing and implementing their ESG strategies, including assistance with EIAs and related regulations. If you have any questions or would like to discuss the issues raised here, please do not hesitate to contact the authors of this Alert or your usual Latham lawyer.

Request for Advisory Opinion

The request for the ITLOS advisory opinion was made by the Commission of Small Island States on Climate Change and International Law (COSIS). This organisation was formed in 2021 by nine island nations, including Antigua and Barbuda and the Bahamas, with a mandate of promoting the implementation and development of rules and principles of international law concerning climate change.

On 12 December 2022, COSIS submitted two specific questions to ITLOS:

"What are the specific obligations of State Parties to 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?"

COSIS made clear in its request to ITLOS that it had two primary objectives: (i) to establish that the adverse effects on oceans that result, or are likely to result, from GHG emissions amount to "marine pollution" for the purposes of UNCLOS; and (ii) to confirm that States party to UNCLOS are under specific legal obligations to address those impacts of climate change.

In response, more than 50 States, intergovernmental and non-governmental organisations, and others made written and oral submissions, sharing diverse views on how these two questions should be answered.

Key Findings

ITLOS made a number of important factual and legal findings, several of which may also be relevant to other climate change litigation cases brought against both States and companies.

Adverse effects of GHG emissions amount to "marine pollution" under UNCLOS

To answer COSIS' questions, the Tribunal had to first determine whether the accumulation of GHG emissions amounted to "pollution of the marine environment". This was a necessary first step in ITLOS' analysis, as certain State obligations under UNCLOS are only triggered if anthropogenic GHG emissions fell within the definition of "marine pollution".

The answer was a definitive yes. ITLOS determined that GHG emissions amounted to "marine pollution" under Article 1(1)(4) of UNCLOS, given they are a "substance or energy" which is "introduced by humans,

directly or indirectly, into the marine environment" and caused multiple "deleterious effects" that were "observed and explained by the science and widely acknowledged by States".

In reaching this conclusion, ITLOS relied heavily on the works of the Intergovernmental Panel on Climate Change (IPCC), which were considered to be "authoritative assessments" of climate change science and "reflect the scientific consensus".

States are under an obligation to prevent, reduce, and control pollution of the marine environment

Given ITLOS' finding that GHG contributing to climate change amounted to "marine pollution", the obligation of States to prevent, reduce, and control that pollution under Article 194(1) of UNCLOS was therefore triggered. Article 194(1) provides that States party to UNCLOS must take "all necessary measures" to prevent, reduce, and control existing marine pollution caused by GHG emissions and "eventually preventing such pollution from occurring at all". This is significant as it makes clear that States are under an obligation to mitigate, control, and eventually eliminate all GHG emissions that may impact, directly or indirectly, the marine environment, whatever the source.

However, the obligation to prevent, reduce, and control marine pollution under Article 194(1) is subject to a "margin of discretion", in that States are only required to take such measures that are considered "necessary". What is considered "necessary" is ultimately a fact-intensive analysis that takes into account objective relevant factors, including the available means and capabilities of States.

As part of this analysis, ITLOS considered the 'principle of common but differentiated responsibilities", recognised in the UNFCC and the Paris Agreement. As noted by one of the leading authorities on international environmental law, "[t]he principle of common but differentiated responsibility has developed from the application of equity in general international law, and the recognition that the special needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law." When applied, the principle results in differing obligations for states depending on their special needs and circumstances, future economic development, and historical contributions to climate change. While ITLOS expressly confirmed in the opinion that this principle did not apply in the UNCLOS context, it noted that UNCLOS contains similar elements and allows for the scope of measures that each State must take to vary depending on their level of development.

The Tribunal clarified that a State would satisfy its Article 194(1) obligation if it were to act with "due diligence" in taking the necessary measures. In the Tribunal's view, this obligation of due diligence requires a State "to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question" and to "to exercise adequate vigilance to make such a system function effectively". Importantly, ITLOS confirmed that if the activities to be regulated are "carried out by private persons or entities", "it would not be reasonable to hold a State, which has acted with due diligence, responsible simply because such pollution has occurred." So long as a State has set up a national system to regulate emissions and done "whatever it can in accordance with its capabilities and available resources", it would not be in breach of this obligation.

States are subject to a separate obligation to prevent, reduce, and control transboundary pollution

The Tribunal confirmed that the separate obligation under Article 194(2) of UNCLOS to prevent transboundary pollution was also triggered. The Tribunal described transboundary pollution as the GHG emissions originating from activities in one State's jurisdiction or under that State's control, which causes damage in another.

While the Tribunal accepted that "it would be difficult" to determine the causal link between the anthropogenic GHG emissions from activities under the control of one State and the damage caused elsewhere, it concluded that States were nevertheless still required to take all measures necessary to ensure that those activities do not cause damage to the environment. In the Tribunal's view, this obligation of due diligence under Article 194(2) was an "even more stringent" one, but little more was said about the scope or content of this obligation.

States are required to undertake EIAs

UNCLOS has a number of other specific procedural obligations that States must comply with, mainly related to monitoring and assessing identified risks or effects of marine pollution. The Tribunal observed that many of these procedural obligations were relevant to determining whether the other substantive obligations (such as the Article 194 obligation referred to above) had been satisfied.

The Tribunal referred in particular to the requirement to conduct EIAs under Article 206 of UNCLOS. The Tribunal confirmed that an EIA must be produced if there are "reasonable grounds for believing" that certain activities in the State's jurisdiction "may cause substantial pollution of or significant and harmful changes to the marine environment". The content of the EIAs should depend on the nature and magnitude of any planned activities and their likely impact on the marine environment, but States will be afforded some discretion depending on their particular means and capabilities. Other procedural, related obligations include a duty of surveillance under Article 204 and to publish reports of those surveillance results under Article 205.

UNCLOS imposes separate obligations to Paris Agreement

The Tribunal also addressed the question of whether the obligations of States under UNCLOS mirrored the Paris Agreement or required States to undertake additional measures than what the Paris Agreement contemplated.

The Tribunal concluded that it did not consider a State's obligation under Article 194 of UNCLOS to be satisfied "simply by complying with the obligations and commitments under the Paris Agreement". ITLOS noted 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". Article 194, on the other hand, imposed upon States a "legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions". Failure to do so would result in "international responsibility" for that State.

ITLOS considered that, while the term "climate change" does not appear in UNCLOS, "relevant external rules" relating to climate change (such as the UNFCCC and the Paris Agreement) were in place. In the view of ITLOS, these "external rules" were "important to clarify, and to inform the meaning of, the provisions of [UNCLOS]" and UNCLOS rules should be interpreted in a compatible manner, but should not be interpreted in such a way to "frustrate" UNCLOS' goals.

Implications for States and Companies

Clarification on the scope of States' international obligations with respect to climate change is welcome. There are 168 States party to UNCLOS, and this decision will likely impact the measures they take with respect to climate change and marine pollution going forward, and guide the approaches taken to EIA regulations. As mentioned above, this advisory opinion will also be considered by the Inter-American

Court of Human Rights and the International Court of Justice, as they prepare to issue their opinions on climate change within the next two years.

The Tribunal's opinion may also have wider implications for the potential legal obligations of private actors at the domestic level. While the opinion addresses only the scope of states' international obligations, claimants will undoubtedly rely on it in the increasing number of actions brought against companies. We often see in practice claimants relying on what are often referred to as "framework" cases, typically brought against States, taking key evidentiary and legal findings from those cases and incorporating them into their case strategies against companies.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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