CHAPTER 4

Jurisdictional Ingenuity in Pursuit of Promoting States' Obligations in the Context of the Climate Emergency

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Abstract

Time is running out to avoid the most devastating consequences of climate change. States are falling short of the stated goal of the Paris Agreement to hold the increase in global temperature to 'well below' 2ºC. For some States, climate change poses an existential threat. In the face of limited jurisdictional pathways to pursue direct accountability against the States most responsible for climate change, States are pursuing creative solutions to seek progress before international courts and tribunals. The requests for advisory opinions submitted to the International Court of Justice, the International Tribunal on the Law of the Sea, and the Inter-American Court of Human Rights are illustrative of what I term 'jurisdictional ingenuity;' meaning the pursuit of alternative jurisdictional avenues when direct pathways to dispute resolution under the relevant legal framework are weak or unavailable. Jurisdictional ingenuity is also the creation of jurisdictional pathways. The effect of jurisdictional ingenuity may facilitate future pathways for dispute resolution the domestic, regional, or international level. In the context of the climate emergency, jurisdictional ingenuity is a survival mechanism that may contribute to the future security of all.

Keywords

advisory opinions – climate change – dispute resolution – international law – jurisdiction – small island states.

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1 Introduction

There can be no doubt that the reality of climate change is no longer a dire warning about the future. It is here. Climate change is more than the gradual warming of the earth's atmosphere. It will usher in a complete reshaping of our natural world. The climate crisis poses risks for all of humanity. States are already experiencing devastating losses caused by increased frequency and severity of disasters, such as cyclones, catastrophic flooding, and wildfires. For a discrete number of States at risk of losing the entirety of their territory due to sea level rise, the threat is existential.[1] Tragically, those States that are most at risk for experiencing the adverse impacts of climate change tend to be the least responsible for its cause.[2]

The Paris Agreement was seen as a breakthrough in the global community's efforts to fight climate change. Despite the initial optimism surrounding the agreement, States are falling far short of meeting the stated goal to hold the increase in global temperature to 'well below' 2°C and pursue efforts to limit the increase to 1.5°C. The Paris Agreement offers limited pathways to pursue accountability for the failure of States to meet their existing pledges under the agreement or for failing to make pledges sufficient to meet the aims of the agreement.[3] States have thus far been reluctant to consent to compulsory dispute resolution before the ICJ to resolve disputes over the interpretation or application of the UNFCCC and the Paris Agreement, and other dispute resolution mechanisms envisioned in these treaties have yet to be operationalized.

In the face of these obstacles and with time running out to avoid the most devastating consequences of climate change, States are pursuing creative solutions in an effort to move the needle forward on climate change before it is too late. Nowhere is this clearer than in the requests for advisory opinions from the ICJ, ITLOS, and the IACtHR, and a potential future request to the AfCHPR.[4]

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1 Melissa Stewart, 'Cascading Consequences of Sinking States' (2023) 59 *Stanford JIL* 131.

2 Margaretha Wewerinke-Singh, 'The Rising Tide of Rights: Addressing Climate Loss and Damage Through Rights-Based Litigation' (2023) 12 *Transnt'l Env't L* 537, 538.

3 Progress has been made on the establishment of the Paris Agreement Implementation and Compliance Committee (a mechanism envisioned in Article 15 of the Paris Agreement). However, this mechanism is designed only to 'encourage compliance' in a way that is 'transparent, non-adversarial and non-punitive.' This type of 'managerial model' of compliance is distinct from an 'enforcement model' of compliance. See Abram Chayes & Antonio Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1996); Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California LR* 1823, 1830; Tim Stephens, *International Courts and Environmental Protection* (CUP 2009) 104–105.

4 Benoit Mayer & Harro van Asselt, 'The Rise of International Climate Litigation' (2023) 32 *RECIEL* 175, 176.

While advisory opinions have addressed issues of common concern,[5] never before have the questions been so urgent and ambitious in their vision for potential impact. Nor has there ever been this number of simultaneous requests focused on a common cause that were submitted or contemplated in such a wide range of jurisdictions.

These efforts are illustrative of what I term 'jurisdictional ingenuity', meaning the pursuit of alternative jurisdictional avenues when direct pathways to dispute resolution under the relevant legal framework are weak or unavailable under international law. Jurisdictional ingenuity is also the creation of jurisdictional pathways. In the case of the climate change advisory opinion requests, this can be observed in at least three ways. First, through the creation of a new international organization for the purpose of conferring jurisdiction on an existing tribunal.[6] Second, by utilizing diplomatic tools to achieve an advisory opinion request that was previously out of reach. Third, by framing the legal questions in the requests in such a way that the forthcoming advisory opinions have the potential to create further avenues of dispute resolution.

Deploying jurisdictional ingenuity through multiple requests for advisory opinions on the obligations of States in the context of climate change has many potential benefits as well as risks. The expected opinions to be issued in relatively short succession may lead to cross-regime interaction that may result in a more comprehensive approach to addressing the climate crisis than if action had been pursued through the climate regime alone.[7] However, there is also a risk that decisions will produce fragmented or contradictory outcomes that cause confusion, or worse yet, hinder progress towards solving the climate crisis.[8]

Jurisdictional ingenuity in the context of the climate emergency is a survival mechanism. For States that face an existential threat from climate change, jurisdictional ingenuity is just one strategy among many to confront the crisis. Deployed by small States, jurisdictional ingenuity is one way in which they

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5 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

6 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (adopted 31 October 2021, entered into force 31 October 2021) 3447 UNTS (*COSIS Agreement*).

7 Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 *RECIEL* 237.

8 Daniel Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions' (2023) 32 *RECIEL* 185; Benoit Mayer, 'International Advisory Proceedings on Climate Change' (2023) 44 *Michigan JIL* 41; Melissa Stewart, 'Climate Change Advisory Opinion Requests: Risk and Reward' (*Lawfare,* 24 March 2023) <www.lawfaremedia.org/article/climate-change-advisory-opinion-requests-risk-and-reward> accessed 14 January 2024; Maria Antonia Tigre & Armando Rocha, 'Competing Perspectives and Dialogue in Climate Change Advisory Opinions', 117 *AJIL Unbound* 287, 288–289. See also, Susan Ann Samuel & Jorge Alejandro Carrillo Bañuelos, Chapter 4 in this book.

counteract the 'asymmetr[ies] of power' among the community of states.[9] In the end, it may contribute to the future security of all of humanity.

2 Jurisdictional Pathways under the Climate Change Regime

The UNFCCC was adopted in May 1992 and came into force in March 1994. Together with the 1997 Kyoto Protocol and the 2015 Paris Agreement, it constitutes the legal framework governing climate change under international law ('climate change regime' or 'climate change framework').[10] This chapter focuses on the jurisdictional provisions of the UNFCCC and the Paris Agreement as the relevant legal frameworks for the resolution of disputes between States regarding their obligations in the context of climate change.[11] As this chapter is focused on jurisdictional pathways for the resolution of disputes between States, it distinguishes dispute resolution procedures from compliance mechanisms and enforcement as while they are interrelated, they remain distinct.

The UNFCCC initially envisioned both non-adversarial procedures as well as traditional State-to-State dispute resolution procedures. Article 13 of the UNFCCC provides for the potential 'establishment of a multilateral consultative process' that would be 'available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.'[12] During negotiations for the UNFCCC, this cooperative procedure was thought to be more appropriate for addressing the collective challenges of climate change.[13] According to Daniel Bodansky, the COP could have designed the multilateral consultative process to allow for individuals, international organizations, or NGOs to have standing to participate in the process.[14] A Multilateral Consultative Committee was considered at COP4 and COP5, but was never implemented

9 See Douglas Guilfoyle, 'Small States, Legal Argument, and International Disputes' (*CIL Dialogues,* 7 July 2023) <https://cil.nus.edu.sg/blogs/small-states-legal-argument-and-international-disputes/> accessed 14 January 2024; see also Douglas Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea,' (2023) 1 *British YIL* 1.

10 Daniel Bodansky, 'The History of the Global Climate Change Regime', in Luterbacher & Sprinz (eds), *International Relations and Global Climate Change* (MIT Press 2001) 32–35.

11 Voigt (n 7) 238.

12 UNFCCC, art 13.

13 Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale JIL* 451, 547.

14 ibid, 548.

due to a failure of the parties to reach an agreement on its precise composition.[15] Although the consultative process might be revived in the future, the possibility seems unlikely due to its extended period of 'dorman[cy].'[16]

Article 14 of the UNFCCC outlines the provisions for the settlement of disputes between State Parties on its interpretation or application. It was initially drafted to complement the multilateral consultative process outlined in Article 13, which, as explained above, has yet to be implemented. Under Article 14, States must first seek to settle disputes through negotiation or another peaceful means of dispute settlement. Should negotiation fail to resolve a dispute within twelve months, States can request the establishment of a conciliation commission and submit their dispute to conciliation. Alternatively, should both parties have recognized one of the compulsory dispute mechanisms outlined in Article 14, namely the submission of a dispute to the ICJ or arbitration, States can submit their disputes using the compulsory procedures. Article 14 was drafted as a compromise to accommodate the disparate views of State parties, some of which preferred non-mandatory and non-binding procedures, others of which preferred mandatory and binding procedures.[17]

Under Article 24 of the Paris Agreement, the dispute resolution provisions of Article 14 of the UNFCCC apply *mutatis mutandis* to the Paris Agreement. While a panel of experts is currently developing a conciliation annex that was considered in advance of COP28,[18] the COP has yet to adopt the required additional procedures on conciliation or compulsory arbitration envisioned by Article 14 of the UNFCCC.[19] The Solomon Islands and Tuvalu have consented to compulsory arbitration pursuant to Article 14 and only one State, the Netherlands, has consented to compulsory arbitration *and* the compulsory jurisdiction of

15 Xueman Wang & Glenn Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol' (2002) 11 *RECIEL* 181, 186; Clara Reichenbach, 'The Missing Dispute Resolution Mechanisms in International Climate Change Agreements' (2022) 3 *Global Energy Law & Sustainability* 129, 134.

16 Roda Verheyen & Cathrin Zengerling, 'International Dispute Settlement', in Carlarne, Gray and Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (OUP 2016) 419.

17 Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (OUP 2017) 115.

18 'ICCA Launches Panel of Experts to Develop a Paris Agreement Conciliation Annex' (*ICCA*, 10 February 2023) <www.arbitration-icca.org/icca-launches-panel-experts-develop-paris-agreement-conciliation-annex.> accessed 14 January 2024.

19 Catherine Amirfar & Merryl Lawry White, 'The Paris Agreement's Conciliation Annex: If Not Now, Then When?' (*ASIL Insights*, 15 September 2021) <www.asil.org/insights/volume/25/issue/17> accessed 14 January 2024.

the International Court of Justice.[20] The Netherlands is also the only State to renew its declaration under Article 24 of the Paris Agreement.[21] No State has yet invoked the dispute settlement procedures outlined in Article 14.[22]

Given the lack of State consent to compulsory arbitration or the compulsory jurisdiction of the ICJ, conciliation is the default method of dispute resolution for the vast majority of States should negotiation fail. A conciliation commission may be created at the request of one of the parties to a dispute pursuant to the basic procedures established under Article 14(6). However, in the absence of a conciliation annex, it is unclear what procedures would apply beyond the number of members to be appointed to a conciliation commission and by whom.[23] The absence of clear procedures may act as a 'disincentive' to the resolution of a dispute through conciliation as the parties would have to first negotiate the applicable procedures.[24] Furthermore, any decision by the conciliation commission would not be legally binding as it only has the authority to issue a 'recommendatory award' for parties to 'consider in good faith.'[25]

Should that fail, the secondary mechanisms for the resolution of the dispute are not currently available as the mechanism for compulsory arbitration has not been established and only one State has agreed to the compulsory jurisdiction of the ICJ. As the negative impacts of climate change accelerate, States experience devastating effects that result in the loss of life and enormous economic losses. The current structure and implementation of the UNFCCC and Paris Agreement leave impacted States without clear pathways for the resolution of disputes on the interpretation and application of the conventions most applicable to confronting the challenge of climate change.

States have pushed for alternatives to conciliation or inter-State dispute resolution mechanisms to provide some measure of redress for losses suffered due to the adverse impacts of climate change or to secure greater compliance

20 UNFCCC, Declarations by Parties <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties> accessed 14 January 2024.

21 Amirfar & White (n 19).

22 Bodansky, Brunnée & Rajamani (n 17) 115; Reichenbach (n 15) 129; Maria Antonia Tigre & Margaretha Wewerinke-Singh, 'Beyond the North-South Divide: Litigation's Role in Resolving Climate Change Loss and Damage Claims' (2023) 32 *RECIEL* 439, 442.

23 The Paris Agreement Draft Conciliation Annex was presented to 50 state representatives in November 2023. 'The ICCA Panel of Experts Engages with States on the Paris Agreement Draft Conciliation Annex' (*ICCA*, 29 November 2023) <www.arbitration-icca.org/icca-panel-experts-engages-states-paris-agreement-draft-conciliation-annex> accessed 14 January 2024.

24 Reichenbach (n 15) 143.

25 UNFCCC, art 14(6).

with State pledges for the nationally determined contributions.[26] Small island developing States have advocated for such measures for over three decades.[27] This includes the Alliance of Small Island States' proposal for an International Insurance Pool.[28] While insurance is envisioned as a potential area of cooperation under Article 8(4)(f) of the Paris Agreement and Article 4(8) of the UNFCCC, parties have yet to bring such a mechanism to fruition. There was much optimism following the agreement to establish a Loss and Damage Fund at COP27.[29] However, there is skepticism that it will meet the anticipated need of $300 billion per year by 2030.[30] Even with the agreement to establish a loss and damage fund, there remains strong pushback from developed States that they accept any liability for the adverse impacts of climate change or have a legal obligation to finance the fund.[31]

Faced with this reality that a direct pathway to dispute resolution under the climate framework is weak or unavailable, States have exercised jurisdictional

26 Arthur Wyns, 'COP27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change' (2022) 7 *The Lancet* 21 <www.thelancet.com/journals/lanplh/article/PIIS2542-5196(22)00331-X/fulltext> accessed 14 January 2024; Maxine Burkett, 'Reading Between the Red Lines: Loss and Damage and the Paris Outcome' (2016) 6 *Climate Law* 118.

27 M.J. Mace & Roda Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 *RECIEL* 197, 198.

28 Vanuatu, Draft Annex Relating to Article 23 (Insurance) for Inclusion in the Revised Single Text on Elements Relating to Mechanisms (A/AC.237/WG.II.Misc.13) Submitted by the Co-Chairmen of Working Group II, Negotiation of a Framework Convention on Climate Change (17 December 1991) A/AC.237/WG.II/CRP.8 <www.aosis.org/an-insurance-mechanism-for-the-consequences-of-sea-level-rise/> accessed 14 January 2024.

29 Wyns (n 26).

30 'What you Need to Know about the COP27 Loss and Damage Fund' (*UN Environment Program*, 29 November 2022) <www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund> accessed 14 January 2024. Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4 (UNFCCC, 13 December 2023) <https://unfccc.int/documents/636558> accessed 14 December 2023. Nina Lakhani, '$700m Pledged to Loss and Damage Fund at COP28 Covers Less than 0.2% Needed' *The Guardian* (Dubai, 6 December 2023) <www.theguardian.com/environment/2023/dec/06/700m-pledged-to-loss-and-damage-fund-cop28-covers-less-than-02-percent-needed> accessed 14 December 2023.

31 The United States deputy special envoy for climate at the State Department, Sue Biniaz, was recently quoted as saying she was 'violently opposed' to the idea that the USA and other high emitting or developed countries have 'a legal obligation to pay into the fund.' Valerie Volcovici, 'US Seeks Focused, Efficient Fund for Climate Disasters' (*Reuters*, 23 August 2023) <https://www.reuters.com/sustainability/sustainable-finance-reporting/us-seeks-focused-efficient-fund-climate-disasters-2023–08–23/> accessed 14 January 2024.

ingenuity to seek clarity on the obligations of States under international law through alternative jurisdictional avenues. The ICJ provides one potential avenue as a court of general jurisdiction, but as will be explained below, pursuing a case on climate change before the ICJ is politically risky and, at the present moment, may be of limited utility.

The contentious jurisdiction of the ICJ is based on State consent.[32] Disputes come to the court through special agreement in which parties specifically refer matters to the Court, through treaties and conventions that provide for the jurisdiction of the ICJ, or through the compulsory jurisdiction of the court if both States have recognized the same obligation.[33] Under the compulsory jurisdiction of the court, a State could submit a dispute related to '(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.'[34]

With respect to climate change, it is unlikely that a large emitter State would agree to a special agreement to resolve a dispute regarding the adverse impacts of climate change.[35] The most relevant treaties that provide for the jurisdiction of the ICJ in their dispute resolution clauses are the UNFCCC and the Paris Agreement, although there are potentially others that could be used.[36] As outlined above, only the Netherlands has consented to the compulsory jurisdiction of the ICJ pursuant to either the UNFCCC or the Paris Agreement.

Currently, only 74 States have deposited declarations under the optional clause of Article 36(2) of the Statute of the ICJ recognizing its general compulsory jurisdiction.[37] Among those, most have included what Aloysius Llamzon describes as 'evisceratory caveats.'[38] While it is possible that a State

32 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (*ICJ Statute*) arts 36 & 37; Jonathan Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice' (1987) 81 *AJIL* 855.

33 ICJ Statute, art 36.

34 ICJ Statute, art 36.

35 Andrew L. Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice', in Burns & Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (CUP 2009) 340.

36 For example, writing in 2009, Andrew Strauss argued that Friendship, Commerce, and Navigation (FCN) or similar treaties could potentially provide a path for the ICJ to exercise jurisdiction over a climate change related dispute. ibid 345.

37 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' (*ICJ*) <www.icj-cij.org/declarations> accessed 14 January 2024.

38 Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18 *EJIL* 815, 817.

that recognizes the compulsory jurisdiction of the ICJ could bring a dispute concerning climate change against any State that also accepts this obligation, there are obstacles to pursuing that strategy. With the exception of the Marshall Islands, very few small island States have deposited a declaration with the ICJ recognizing its compulsory jurisdiction. That obstacle is easily surmountable for small island States as any State may deposit a declaration with the UN Secretary-General at any time. However, only one of the three largest emitter States recognizes the ICJ's compulsory jurisdiction: India. Other large emitter States that accept the ICJ's compulsory jurisdiction include Australia, Canada, Germany, Japan, Mexico, Poland, and the United Kingdom.[39] So, any State would be limited in the available respondent States should it decide to institute proceedings before the ICJ pursuant to Article 36(2).

In 2002, Tuvalu briefly considered suing the United States and Australia for their failure to join the Kyoto Protocol.[40] While Tuvalu stated at the time that it would pursue a case before the ICJ, it is unclear how it would have obtained jurisdiction for such a dispute.[41] It could have accepted the compulsory jurisdiction of the ICJ and pursued a case against Australia, but the United States withdrew its consent for such jurisdiction in 1985.[42]

A contentious case would present enormous challenges and significant political risks for any State pursuing this strategy.[43] A State could bring a case alleging another State failed in its obligation to prevent the adverse impacts of climate change or contributed to climate change. However, as described by Philippe Sands, the obligations under the UNFCCC are 'crushingly vague,' making it 'impossible to argue that any particular provision gives rise to a cause of action.'[44] Written on the eve of the negotiations of the Paris Agreement, Sands'

39 Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 *Arizona State LJ* 689, 711.

40 Richard C. Paddock, 'A Nation on Edge of Extinction' (*The Washington Post*, 24 November 2002) <www.washingtonpost.com/archive/politics/2002/11/24/a-nation-on-edge-of-extinction/3b32c521-3664-46fa-8625-516e7fb05765/> accessed 12 June 2023.

41 Rebecca Elizabeth Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14 *Pacific Rim L & Pol'y J* 103.

42 United States, Notification of Termination of No 3 Declaration Recognizing as Compulsory the Jurisdiction of the ICJ (received 7 October 1985, effective 7 April 1986) 1408 UNTS 270 Annex A <https://treaties.un.org/doc/Publication/UNTS/Volume%201408/v1408.pdf#page=286> accessed 14 January 2024.

43 Bodansky (n 39) 708.

44 Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 *JEL* 19, 28. See also, Tim Stephens, 'See You in Court? A Rising Tide of International Climate Litigation' (*The Interpreter* 30 October 2019) <https://www

assessment would likely apply to that agreement as well given the intention of States to avoid liability under that treaty.

It is not clear under international law that historic GHG emissions or current failures to adopt more ambitious nationally determined contributions would constitute a breach of an international obligation. Much of the historic emissions occurred prior to the signing of the Paris Agreement or the UNFCCC. Actions that occurred prior to these agreements coming into force could not constitute noncompliance with obligations under the respective agreements, and States that are not currently parties do not have obligations pursuant to the agreements absent an argument that any obligations are reflective of customary international law. Compelling arguments have been made that other principles of international environmental law, such as the 'no harm rule,' are applicable in the context of climate change.[45] Further arguments have been made that failure to reduce emissions following the ratification of the UNFCCC *could* amount to an internationally wrongful act under Articles 2 and 4.2 of the UNFCCC,[46] although this perspective is 'without consensus.'[47] Even if a State could demonstrate these actions constituted a breach of an international obligation, there would be issues in determining attribution and causation related to any specific harm given the global contributions to the underlying causes of climate change.

Concerns about attribution and causation aside, an authoritative interpretation of the obligations of States with respect to climate change under international law could help to clarify what action or inaction by States constitutes a breach of an international obligation. This could reduce the uncertainty to some extent as to the utility of a potential contentious case interpreting obligations under the UNFCCC, the Paris Agreement, or more broadly under international law before the ICJ. As the next section explains, advisory opinions seeking such an answer could potentially provide this essential interpretation in an area where, to date, there has yet to be a State-to-State dispute.[48]

.lowyinstitute.org/the-interpreter/see-you-court-rising-tide-international-climate-litigation> accessed 22 March 2024.

45 See eg Benoit Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics' (2016) 19 *APJEL* 79.

46 Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic JIL* 1, 7.

47 ibid, 7. See also Stephens (n 3) 68–69. Although the decision in the ITLOS Advisory Opinion lends credence to this perspective, as explained below.

48 Annalisa Savaresi, 'Inter-State Climate Change Litigation: 'Neither a Chimera nor a Panacea', in Alogna, Bakker & Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 366; Dapo Akande, Naomi Hart & Mubarak Waseem, 'Climate Change and

3 Jurisdictional Ingenuity through Requests for Advisory Opinions

The pursuit of advisory opinions in multiple jurisdictions is an example of what I am terming jurisdictional ingenuity, as it corresponds to a pursuit of alternative jurisdictional avenues when direct pathways to dispute resolution under the relevant legal framework are weak or unavailable.

Jurisdictional ingenuity as a strategy is distinct from forum shopping in that it focuses on jurisdiction creation or lowering the barriers to accessing potential jurisdictional pathways as compared to selecting between existing and competing jurisdictions.[49] Although as employed in the context of the climate change advisory opinion requests, it raises some similar concerns, such as potentially inconsistent opinions from different courts and tribunals and risk of fragmentation.[50]

Jurisdictional ingenuity is also distinct from what Laurence Helfer has termed 'regime shifting,' which attempts to 'mov[e] treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another.'[51] Parties engaged in jurisdictional ingenuity as described are not attempting to shift the regime from one international venue to another. Rather, they are seeking out jurisdictional pathways to influence the *existing* regime, in this case, the climate framework. This is not to say that there is no risk that jurisdictional ingenuity could contribute to regime shifting. However, on its own, jurisdictional ingenuity does not constitute a regime shift.

Framing this strategy as 'ingenuity' is a purposefully positive framing. The States that are pursuing this strategy have provided leadership on combating climate change for decades.[52] While the positive framing is reflective of jurisdictional ingenuity in the context of climate change, an examination of other examples of this jurisdictional strategy would be a valuable comparison,

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Proceedings before the ICJ and ITLOS' (*Essex Court Chambers,* 20 October 2022) <essex-court.com/publication/climate-change-in-law-current-perspectives-week-9/> accessed 14 January 2024.

49 Forum shopping has been observed in international environmental law. Typically, this occurs when there is a 'range of fora' in which a State might bring a dispute. Stephens (n 3) 275–279. That type of range of fora for State-to-State dispute resolution is currently lacking in the context of climate change.

50 Joost Pauwelyn & Luiz Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 42 *Cornell ILJ* 77, 83.

51 Laurence R. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale JIL* 1, 14.

52 Margaretha Wewerinke-Singh, 'Litigating Human Rights Violations Related to the Adverse Effects of Climate Change in the Pacific Islands', in Lin & Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP 2020) 109.

although it is outside of the scope of this chapter. For the purposes of this chapter, general questions about the value of state-to-state dispute resolution are deferred for another day.[53]

The following will explore three illustrative avenues of jurisdictional ingenuity in the context of climate change. First, the creation of an international organization to confer jurisdiction on an existing tribunal. Second, the utilization of diplomatic tools to achieve an advisory opinion request on climate change that was previously out of reach. Third, the framing of the legal questions in the requests to create future avenues of dispute resolution.

3.1 *The Creation of an International Organization for the Purpose of Conferring Jurisdiction on an Existing Tribunal*

A remarkable illustration of jurisdictional ingenuity in the context of climate change is the creation of an international organization for the purpose, at least in part, of requesting an advisory opinion of ITLOS. The Commission of Small Island States on Climate Change and International Law ('COSIS') was established through an agreement executed by Antigua and Barbuda and Tuvalu on October 31, 2021.[54] According to the agreement, the mandate of COSIS is

> to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.[55]

The agreement is comprised of only four articles. The activities of COSIS outlined in the agreement are to assist other Small Island States in the promotion and progressive development of international law on climate change, appoint experts and advisors, and, most importantly, the agreement authorizes COSIS to request advisory opinions from ITLOS 'on any legal question within the scope of the [UNCLOS].'[56]

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53 See eg Vaughan Lowe, 'The Function of Litigation in International Society' (2021) 61 *ICLQ* 209; Benedict Kingsbury, 'Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *NYU Journal of Int'l Law & Policy* 679.

54 COSIS Agreement (n 10).

55 ibid, art 1.

56 ibid, art 2.

The advisory jurisdiction of the full tribunal of ITLOS has not been without controversy.[57] UNCLOS does not explicitly confer advisory jurisdiction on the full tribunal of ITLOS, only on the Seabed Disputes Chamber.[58] The origins of the Tribunal's advisory jurisdiction can be found in Article 21 of the Statute of the Tribunal, and Article 138 of the Rules of the Tribunal. Article 21 of the Statute establishes that '[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement with confers jurisdiction on the tribunal.'[59] Article 138 of the Rules provides that the 'Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides from the submitted to the Tribunal of a request for such an opinion.'[60]

In the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (*SRFC*), 23 States submitted written statements that objected to ITLOS exercising its advisory jurisdiction in that case on the grounds that UNCLOS does not contain an explicit reference to the advisory jurisdiction of ITLOS. Despite these concerns, ITLOS determined that it has advisory jurisdiction pursuant to Article 288 of UNCLOS, Article 21 of the Statute of the Tribunal, and Article 138 of the Rules of Procedure.

While ITLOS did exercise its advisory jurisdiction, the separate declaration of Judge Cot highlighted some of the weaknesses in the Tribunal's approach, calling the reasoning 'convoluted' and 'unpersuasive,' and its interpretation 'misguided.'[61] He highlighted the need to elaborate a clear jurisdictional framework for when ITLOS will exercise its advisory jurisdiction and warned of the 'dangers of abuse and manipulation' by States 'seek[ing] to gain an advantage over third States' through the execution of a bilateral or multilateral agreement.[62]

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57 Rozemarijn J. Roland Holst, 'Taking the Current When it Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' (2023) 32 *RECIEL* 217, 217–218.

58 UNCLOS, art 191.

59 Statute of the International Tribunal for the Law of the Sea (Annex VI to UNCLOS) (*ITLOS Statute*) art 21.

60 International Tribunal for the Law of the Sea Rules of the Tribunal (adopted 28 October 1997) ITLOS/8 (*ITLOS Rules*) art 138.

61 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*) (Advisory Opinion, 2 April 2015) ITLOS Case No 15, Declaration of Judge Cot, §§2–3, 13 (*SRFC Opinion*).

62 ibid, §9.

Where others might see a danger of 'abuse and manipulation'[63] or a 'shortcut,'[64] the governments of Antigua and Barbuda and Tuvalu saw an opportunity. What they could not achieve as State Parties to the UNCLOS, they accomplished with the stroke of a pen. The COSIS Agreement was executed on the eve of COP26 in 2021 and the request for an advisory opinion was submitted a little over a year later on December 12, 2022.[65] The COSIS Agreement does little more than authorize the organization to request an advisory opinion from ITLOS.[66] The substance of the request was for an advisory opinion on the obligation of States under UNCLOS to, inter alia, 'prevent, reduce, and control pollution of the marine environment' resulting from climate change and 'protect and preserve the marine environment in relation to climate change impacts.'[67]

Whether the full tribunal of ITLOS had advisory jurisdiction was a live issue in the case.[68] While many States and international organizations submitted written statements that ITLOS had jurisdiction to render an advisory opinion,[69]

63 ibid. See also Richard Barnes, 'An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect? (2022) 53 *Ocean Development & IL* 180, 193 & 202.

64 Alina Miron, 'COSIS Request for an Advisory Opinion: A Poisoned Apple for the ITLOS?' (2023) 38 *Int'l J Marine & Coastal L* 249.

65 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Institution of Proceedings, 12 December 2022) (Pending) <www.itlos.org/en/main/cases/list-of-cases/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/> accessed 9 February 2024.

66 Although COSIS has already engaged in activities beyond the ITLOS request. It also submitted written statements in the advisory opinion requests submitted to the International Court of Justice and the Inter-American Court. Statement of Gaston Alfronso Browne, Prime Minister of Antigua and Barbuda, on behalf of COSIS in the ITLOS Advisory Opinion Oral Proceedings. Verbatim Record 11 Sept 2023, 10 AM pg 5.

67 *Request for an Advisory Opinion submitted by the COSIS* (n 65).

68 Compare Armando Rocha, 'The Advisory Jurisdiction of the ITLOS in the Request Submitted by the Commission of Small Island States' (*Climate Law,* 12 April 2023) <https://blogs.law.columbia.edu/climatechange/2023/04/12/the-advisory-jurisdiction-of-the-itlos-in-the-request-submitted-by-the-commission-of-small-island-states/> accessed 8 February 2024 with Donald R. Rothwell, 'Climate Change, Small Island States, and the Law of the Sea: The ITLOS Advisory Opinion Request' (*ASIL Insights*, 12 May 2023) <https://www.asil.org/insights/volume/27/issue/5> accessed 10 March 2024.

69 *Request for an Advisory Opinion submitted by the COSIS* (n 65); ibid, Written Statement of New Zealand; ibid, Written Statement of Germany; ibid, Written Statement of Mauritius.

several States objected[70] or submitted substantive statements without prejudice to their position on the advisory jurisdiction of the full tribunal.[71] Even if they did not object, many States expressed the view that it was important for the Tribunal to elaborate on the basis of its jurisdiction and under what circumstances the conditions of jurisdiction will be met.[72]

In its Advisory Opinion of May 21, 2024, ITLOS found that it had jurisdiction to issue an Advisory Opinion in the case pursuant to Article 21 of the Statute and the COSIS Agreement.[73] It relied on the *SRFC Advisory Opinion* to outline that its jurisdiction includes 'all "matters" … specifically provided for in any other agreement which confers jurisdiction on the Tribunal,' and that the COSIS Agreement meets that requirement.[74] In addition to statements provided by States during the written and oral proceedings in support of the exercise of jurisdiction, the Tribunal noted that States recently concluded 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). The convention specifically allows the BBNJ COP to request an advisory opinion from ITLOS.[75] Given that the agreement was adopted by consensus, it provides strong evidence that State parties to UNCLOS consider that they may confer advisory jurisdiction on ITLOS through a separate agreement.[76]

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70 *Request for an Advisory Opinion submitted by the COSIS* (n 65), Written Statement of the Federative Republic of Brazil, para 9; Written State of the People's Republic of China, §25.

71 For example, Australia submitted a statement 'without prejudice to Australia's position on the advisory jurisdiction of the Tribunal' that cited to their written statement in the *SRFC* case. *Request for an Advisory Opinion submitted by the COSIS* (n 69), Written Statement of Australia. The written statement in the *SRFC* case argued that the Tribunal may not have advisory jurisdiction at all given it cannot be found in UNCLOS, and if it does, it should be limited to the interpretation and application of the "other agreement" that confers advisory jurisdiction on the Tribunal, and not UNCLOS. *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (n 65), Written Statement of Australia.

72 See eg *Request for an Advisory Opinion submitted by the COSIS* (n 65), Written Statement of Poland; ibid, Written Statement of Norway; ibid, Written Statement of Italy; ibid, Written Statement of Germany.

73 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Case No 31, §§88–89, 109 (*COSIS Opinion*).

74 ibid, §§85–88.

75 Art 47(7).

76 See *COSIS Opinion* (n 73) §92. However, Mossop has described the provision in the BBJN as 'circumscribed.' Joanna Mossop, 'Dispute Settlement Provisions in the Agreement for Biodiversity Beyond National Jurisdiction' (2024) 1 *Portuguese J of Int'l L* 98, 110.

ITLOS did not directly address the concerns about the exercise of its advisory jurisdiction expressed by Judge Cot in the *SRFC Advisory Opinion*, a point that was noted in the Declarations of Judges Kulyk and Kittichaisaree. Judge Kulyk wrote that ITLOS could have further elaborated on the grounds for its exercise of advisory jurisdiction.[77] Judge Kittichaisaree wrote separately to dismiss the concerns that this was an agreement executed for the 'sole purpose' of requesting an advisory opinion or that COSIS was not a truly international organization.[78]

What may now see obvious was not necessarily evident at the time the COSIS Agreement was executed. While it was certainly possible that ITLOS would exercise its advisory jurisdiction in this case, it was not guaranteed when the request for an advisory opinion was submitted, much less when the COSIS agreement was concluded. The Creation of the Commission is a powerful example of jurisdictional ingenuity as the creation of jurisdictional pathways as well as the leadership of small-island states.

3.2 *The Utilization of Diplomatic Tools to Open a Jurisdiction Pathway*

Jurisdictional ingenuity in the context of climate change has involved utilizing diplomatic tools to achieve an advisory opinion request on climate change that was previously out of reach. The idea that states might utilize international adjudication to address issues related to climate change is not new.[79] Neither is the idea of seeking an advisory opinion from the ICJ. Yet, to date, there has not been a state-to-state dispute related to climate change. Until the March 2023 General Assembly Resolution, efforts to request an advisory opinion on climate change from the ICJ had failed to come to fruition.

In 2011, Palau, together with the Marshall Islands, announced that it would call on the UN General Assembly 'to seek, on an urgent basis … an advisory opinion from the [ICJ] on the responsibilities of States under international law to ensure that activities emitting [GHG] that are carried out under their jurisdiction or control do not damage other States.'[80] Although Palau had built a coalition of small island and other interested states,[81] it was reportedly pressured by the United States to drop the initiative.[82] It never came to the floor of

77 ibid, Declaration of Judge Kulyk.

78 ibid, Declaration of Judge Kittichaisaree, §§4–10.

79 Bodansky (n 39) 689.

80 Address by Johnson Toribiong, President of the Republic of Palau, UN GAOR 66th Session, 16th Plenary Meeting at 26, 27, UN Doc A/66/PV.16 (22 September 2011).

81 Mayer (n 8) 63.

82 Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 *Univ Haw LR* 633, 635.

the UN General Assembly. This was apparently not the first time a small island state considered proposing an advisory opinion request. An 'undisclosed small island State' was considering such an endeavor as early as 1997.[83]

The current ICJ advisory opinion request illustrates the potential when multilateral diplomacy fueled by grassroots advocacy comes to fruition.[84] In 2019, a group of law students from eight Pacific Island countries founded the Pacific Islands Students Fighting Climate Change (PISFCC).[85] PISFCC started a campaign to persuade states to seek an Advisory Opinion from the ICJ on the issue of climate change and human rights, a call first answered by Vanuatu.

Vanuatu worked over the course of several years with a 'Core Group' of States to gain diplomatic support for a UN General Assembly Resolution on a 'Request for an advisory opinion of the [ICJ] on the obligations of States in respect of climate change.'[86] It sought input from a wide range of stakeholders in framing the legal question to be included in the draft resolution. While the content of the question has not been without its detractors,[87] the efforts to reach some sort of consensus appear to have paid off. The resolution was adopted on March 29, 2023, with 132 co-sponsors. It was the first request for an advisory opinion from the UN General Assembly to be adopted by consensus.[88] According to Vanuatu, this sends 'a strong and unambiguous signal that

83 Bodansky (n 8) 185, note 18.

84 The request for an advisory opinion on the legality of the threat or use of nuclear weapons was fueled by a similar, if not larger, effort by civil society. The World Court Project, a non-governmental organization that lobbied the World Health Organization and General Assembly for the advisory opinion requests, was supported by 700 organizations around the world. John Burroughs, *The Legality of the Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (Lit Verlag 1998) 9.

85 '"Beginning of a New Era": Pacific Islanders Hail UN Vote on Climate Justice' *The Guardian* (29 March 2023) <www.theguardian.com/world/2023/mar/30/un-vote-on-climate-justice-pacific-island-change-crisis-united-nations-vanuatu> accessed 9 February 2024.

86 *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change*, UNGA Res 77/276 (29 March 2023) UN Doc A/RES/77/276.

87 Philippa Webb, 'EJIL : The Podcast! Episode 18 – "Be Careful What You Ask For"' (28 February 2023) <https://www.ejiltalk.org/ejilthe-podcast-episode-18-be-careful-what-you-ask-for/> accessed 17 March 2024, 15:35–15:36. (Philippe Sands, on the danger of drafting the question too broadly, 'I'm afraid the drafts that are circulating and that which has gone to ITLOS are so open ended, that the room for mischief [by the Court] is very significant.')

88 Although no State called for a vote, Member States still voiced concerns during the debate. The representative of the United States expressed that addressing shared goals related to climate change was best achieved through diplomatic means rather than a judicial process. 'General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change' (*United*

nations are united in their commitment to abide by existing climate obligations under international law.'[89]

Through the use of diplomatic tools for this advisory opinion request, the ICJ may contribute to the normative development of international law on climate change on a faster timetable than would be possible had they waited for a future State-to-State dispute to arrive through the underutilized dispute settlement mechanism of the UNFCCC or the compulsory jurisdiction of the ICJ. Of course, while the ITLOS decision was generally received positively, it remains to be seen if the ICJ opinion will help or hinder the ability of States to address the threat of climate change.

3.3 *Framing the Legal Questions to Create Future Avenues of Dispute Resolution*

The legal questions in the requests for advisory opinions also represent jurisdictional ingenuity. In this way, jurisdictional ingenuity can be synergistic and may contribute to the systemic integration of climate change law.[90] In this context, the legal questions are framed in such a way that they will open the doors to future avenues of dispute resolution across regimes. Or, in the words of Margaretha Wererinke-Singh, the opinions have the potential to 'mak[e] international law more actionable through climate litigation.'[91]

The ITLOS advisory opinion provides evidence of jurisdictional ingenuity as a way to connect disparate areas of law as well as create future pathways for dispute resolution. UNCLOS was negotiated well before climate change was recognized by the General Assembly as a "common concern" in 1988.[92] It was

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Nations, 29 March 2023) <https://press.un.org/en/2023/ga12497.doc.htm> accessed 9 February 2024.

89 'ICJ Resolution' (*Vanuatu ICJ Initiative*) <www.vanuatuicj.com/resolution> accessed 9 February 2024.

90 See eg Damilola S. Olawuyi, 'Harmonizing International Trade and Climate Change Institutions: Legal and Theoretical Basis for Systemic Integration' (2014) 7 *L & Dev Rev* 107, 118; Spyridon Aktypis, Emmanuel Decaux, and Bronwen Leroy, 'Systemic integration between climate change and human rights at the United Nations?' in Quirico & Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Taylor & Francis 2015) 232; Ottavio Quirico, 'Systemic Integration Between Climate Change and Human Rights in International Law?' (2017) 35 *Neth Q Hum Rts* 31, 44. See also Samuel & Carrillo Bañuelos (n 8).

91 Statement by Margarethe Wewerinke-Singh, Doughty Street Chambers, 'Advisory Opinions on climate change before the ICJ, IACtHR and ITLOS' (17 November 2023) 35:50 – 44:20 <https://youtu.be/oz3ddbraOB0?si=5nf-XKkM_wWmj_KW> accessed 9 February 2024.

92 UNGA Res 43/53 (6 December 1988) UN Doc A/43/755 ('Protection of Global Climate for Present and Future Generations of Mankind').

adopted in 1982, a full decade before the UNFCCC was open for signature.[93] UNCLOS does not mention climate change or the emission of GHG. However, the 'constitution for the ocean' has been described as a 'living treaty'[94] subject to 'evolutive interpretation.'[95]

The question posed to ITLOS was phrased in such a way to bridge the gap between UNCLOS and the climate change regime. It asked the tribunal for an advisory opinion on the obligation of State parties to UNCLOS to (a) 'prevent, reduce and control pollution of the marine environment' from the effects of climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by greenhouse gas emissions into the atmosphere, and (b) 'to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.' In short, one of the main issues the question posed to the Tribunal was to address the open question of whether the emission of GHG constitutes 'pollution of the marine environment' within the meaning of UNCLOS and what specific obligations flow from that potential threshold determination.

In terms of the applicable law, neither the COSIS Agreement nor the request for the advisory opinion mentions either the UNFCCC or the Paris Agreement. The request for the advisory opinion was submitted pursuant to UNCLOS and involves the interpretation and application of UNCLOS. However, the interpretation of the legal questions seemed to necessitate reference to the UNFCCC and the Paris Agreement. Indeed, many States in their written submissions expressed that the UNFCCC and the Paris Agreement were the 'primary instruments' to guide the interpretation of the obligations of States in relation to climate change.[96] Other States suggested that ITLOS was permitted to refer to the UNFCCC and related agreements pursuant to Part XII of UNCLOS,[97] but clarified that it was limited to determining the obligations under UNCLOS and not under related treaties.[98]

93 See also Millicent McCreath, 'The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes', Lin & Kysar (n 56) 122.

94 Jill Barret & Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016).

95 Lianne P. Baars, 'The Salience of Salt Water: An ITLOS Advisory Opinion at the Ocean-Climate Nexus' (2023) 38 *Int'l J Marine & Coastal L* 1, 2.

96 See, eg *Request for an Advisory Opinion submitted by the COSIS* (n 65), Written Statement of Norway; ibid, Written Statement of the European Union.

97 See eg *Request for an Advisory Opinion submitted by the COSIS* (n 65), Written Statement of the Republic of Korea, §16.

98 See eg *Request for an Advisory Opinion submitted by the COSIS* (n 65), Written Statement of Canada, §61.

In its opinion, the Tribunal confirmed that UNCLOS is considered a 'living instrument' with flexible rules of interpretation that can be read with reference to the text of the instrument itself in addition to other 'external rules' of international law.[99] Specifically, it found that the global climate change regime, including the UNFCCC and the Paris Agreement, were particularly relevant external rules in responding to the request, but that they were not *lex specialis*.[100] To fully bridge the gaps between the two regimes, the Tribunal determined that GHG emissions constitute "pollution of the marine environment" within the meaning of Article 1, paragraph 1, subparagraph 4 of UNCLOS.[101] This is significant as the Tribunal found that State parties to UNCLOS have specific obligations to 'prevent, reduce and control pollution of the marine environment' under Article 194 of the treaty.[102]

Prior to the current advisory opinion effort or even the creation of COSIS, Alan Boyle, among others,[103] argued that UNCLOS provided a viable pathway for the settlement of disputes on the obligations of States to protect and preserve the marine environment from the effects of climate change.[104] A State could bring a case against another state party to UNCLOS alleging its lack of compliance with the pollution control obligations of UNCLOS. As Boyle pointed out, there are challenges in pursuing this effort. One is the enormous financial resources required to pursue arbitration. The other was the indeterminacy of the meaning of pollution under UNCLOS.[105] While some argued that it was clear that climate change and the emission of GHG constitute pollution within the meaning of UNCLOS,[106] that issue had yet to be determined until ITLOS issued its advisory opinion.

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99 *COSIS Opinion* (n 73), §§130–131.

100 ibid, §§137 & 224.

101 ibid, §179.

102 The Tribunal elaborated on these obligations, finding that States have 'specific obligations to take all necessary measures to prevent, reduce and control marine pollution from [GHG] emissions.' Ibid, para 243. See also, Melissa Stewart, 'What to Watch for Following Historic Climate Opinion from "The Oceans Court"' (4 June 2024) *Just Security* <https://www.justsecurity.org/96365/oceans-court-climate-opinion/> accessed August 7, 2024.

103 See eg McCreath (n 93) 122; William C. G. Burns, 'Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention' (2006) 2 *McGill Int'l J. Sustainable Development L & Pol* 27.

104 Alan Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 *Int'l J Marine & Coastal L* 458.

105 Alan Boyle & Navraj Singh Ghaleigh, 'Climate Change and International Law Beyond the UNFCCC', in Carlarne, Gray, Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (OUP 2016) 46.

106 McCreath (n 93) 123, who argues that 'it is now generally accepted that several of the causes and effects of climate change can be considered pollution of the marine environment.'

While the advisory opinion is not binding on State Parties to UNCLOS, it does have 'legal effect.'[107] The conclusion that GHG emissions constitute 'pollution' within the meaning of UNCLOS provides the substantive link between the climate regime and the law of the sea. This lowers at least one barrier to entry and easing the burden for States that may wish to pursue a contentious case pursuant to UNCLOS.

The determination that GHG emissions constitutes 'pollution' potentially opens other avenues for State-to-State dispute resolution related to climate change outside of the dispute settlement regime of UNCLOS. As explained by Steve Lorteau, this type of 'state-as-polluter' litigation is in some ways a well-worn path under international law.[108] ITLOS elaborated on the due diligence obligations of States in context of climate change, finding that the standard 'is stringent, given the high risks of serious and irreversible harm to the marine environment' from GHG emissions.[109] The Tribunal also found that states have specific obligations to ensure that GHG emissions within their jurisdiction and control do not cause transboundary harm. In this context, the obligation is 'even more stringent … because of the nature of transboundary pollution,' in that pollution from one state that spreads beyond its jurisdiction has the potential to 'cause damage to other States and their environment.'[110] The opinion also noted that a State may incur international responsibility if it 'fails to comply' with the obligation to 'take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, *including measures to reduce such emissions*.'[111] Thus, the opinion may make it easier in the future for a State to establish that another State failed to comply with its obligation of due diligence to prevent transboundary harm from GHG emissions.

If the ICJ opinion builds on the ITLOS opinion, it could open the door to future state to state dispute resolution even wider. The legal question in the request for an advisory opinion from the ICJ is much broader than the request submitted to ITLOS. As a court of general jurisdiction, the ICJ has the opportunity to interpret the question with reference to any body of international law.

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107 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*) (*Preliminary Objections*) (Judgment, 28 January 2021) ITLOS Case No 28, §§202–205.

108 Steve Lorteau, 'The Potential of International "State-as-Polluter" Litigation' (2023) 32 *RECIEL* 259.

109 *COSIS Opinion* (n 73) §243.

110 ibid, §258.

111 ibid, §286 (emphasis added)

The chapeau paragraph of the legal question was intentionally capacious in its inclusion of sources and general principles of international law.[112]

According to counsel for Vanuatu, the legal question in the request for an advisory opinion from the ICJ is framed in such a way as to offer the court an opportunity to provide an avenue for States to pursue compensation for climate harms, including those caused by past actions.[113] Under paragraph (b), the question asks, '[w]hat are the legal consequences under these obligations for States where they, by their acts and omissions, *have caused* significant harm' to the climate and the environment?[114] Julian Aguon, counsel to Vanuatu, recently described that part of the legal question as being 'the home for reparations.'[115] While it does not seem likely that the ICJ will find that historic emissions prior to the UNFCCC constitute an internationally wrongful act[116] or that historic emitters have an obligation to make reparations for damage caused by climate change, it does seem to be the hope of many behind the effort that an advisory opinion will open a pathway for such potential future action.[117] These do not appear to be isolated hopes. Counsel for Vanuatu wrote elsewhere that '[a]n advisory opinion from the ICJ on the issue of compensation could set the stage for further international litigation …'[118]

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112 The chapeau paragraph listed 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 See, 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.' UNGA Res 77/276 (n 86).

113 Statement by Margaretha Werewinke-Sing, saying the legal question will give the ICJ the opportunity to have 'due regard for past, present, and future.' Doughty Street Chambers, 'Advisory Opinions on climate change before the ICJ, IACtHR and ITLOS' (17 November 2023) 35:50 – 44:20 <https://youtu.be/oz3ddbraOB0?si=5nf-XKkM_wWmj_KW> accessed 9 February 2024.

114 UNGA Res 77/276 (n 86) (emphasis added).

115 UH Better Tomorrow Speaker Series, 'Julian Aguon: An Indigenous Pursuit of Climate Justice' (31 October 2023) 1:00:00 – 1:14:30 <www.youtube.com/watch?v=mabawiuyvD4> accessed 9 February 2024.

116 Under Article 13 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.' See 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', adopted by the International Law Commission at its 53rd session, UN Doc A/RES/56/10 (2001).

117 See also, Benoit Mayer, 'Climate Change Reparations and the Law and Practice of State Responsibility' (2017) 7 *Asian JIL* 185; Voigt (n 46) 1.

118 Margaretha Wewerinke-Singh, Julian Aguon & Julie Hunter, 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions', Alogna, Bakker & Gauci (n 48).

With respect to the ICJ, it is possible that an advisory opinion could clarify how existing bodies of law and general principles of international law relate to the climate regime, such as the concept of due diligence or the relationship between the 'no harm' rule and the obligations of States with respect to climate change. Even the non-binding interpretation in an advisory opinion could help lower the barrier for States contemplating pursuing interstate dispute resolution as a result of less uncertainty in the legal landscape.

Jurisdictional ingenuity in the context of climate change may be synergistic in another way. It may allow for further climate litigation to move forward at the regional or domestic level in jurisdictions that incorporate international law.[119] Several landmark decisions on climate change have come from regional[120] and domestic courts[121] and progressive articulation of the obligations of States in respect of climate change could lead to future litigation to push States to adopt more ambitious climate targets.

4 Potential Risks of Jurisdictional Ingenuity in the Context of Climate Change

As explained above, jurisdictional ingenuity can open up legal pathways through alternative jurisdictional avenues when direct pathways to dispute resolution are weak or unavailable. Jurisdictional ingenuity can also be synergistic by approaching litigation strategy in such a way as to create future pathways for dispute resolution. Jurisdictional ingenuity is not without risks, however. Generally speaking, jurisdictional ingenuity can lead to fragmentation in the law. With respect to climate change, it has the potential to clarify obligations in a less progressive way than hoped for by its advocates and could potentially undermine future progress within the climate regime.

Jurisdictional ingenuity has the potential to lead to fragmentation in the law.[122] This is particularly true where, as here, the strategy is pursued through

119 Bodansky (n 8) 185.

120 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App No 53600/20) ECtHR [GC] 9 April 2024.

121 District Court of the Hague (DC), *Urgenda Foundation v The State of the Netherlands*, Case No. C/09/456689 / HA ZA 13–1396, 24 June 2015.

122 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, adopted at its 58th session, UN Doc A/CN.4/L.682 (2006); Martti Koskenniemi & Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden JIL* 553; Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergency of a New International Judiciary' (2009) 20 *European JIL* 73, 87.

simultaneous advisory opinion requests in multiple jurisdictions with overlapping subject matter jurisdiction.[123] For example, the legal questions submitted to the ICJ touch on States obligations under international human rights law and the law of the sea, the subject matter jurisdiction of the IACtHR and the ITLOS, respectively. There is a risk that these tribunals will interpret the obligations of States under these overlapping bodies of a law in a way that is inconsistent, creating a more muddied legal landscape rather than clarifying the law.[124] Conflicting opinions might lead to States choosing the least common denominator through which to demonstrate their compliance with international law.

The concern about fragmentation is not unique to jurisdictional ingenuity,[125] nor is it a new concern in the field of environmental law. As explained by Tim Stephens, 'jurisdictional competition' between various multilateral and bilateral agreements related to international environmental law has led to forum shopping, simultaneous proceedings, and successive proceedings in international environmental law.[126]

While proponents of the advisory opinion requests are hopeful that it will lead to much needed positive action on climate change, it is not at all clear that the opinions will result in such an outcome.[127] An opinion at the ICJ that merely confirms that States have a duty of due diligence or an obligation to cooperate under customary international law is unlikely to change the status quo.[128] It would further entrench the notion that international environmental obligations are framed in terms of 'conduct and not of result.'[129] Even a seemingly progressive opinion announcing that States have an obligation under international law to compensate States for loss and damage caused by climate

123 See Stephens (n 3) 272–273; Tigre & Rocha (n 8) 287–288.

124 The timelines of the expected opinions appear to lessen this concern somewhat as the opinions may be issued sequentially with sufficient time for the subsequent opinion to consider the previous decision.

125 ILC, 'Fragmentation of International Law' (n 122); Koskenniemi & Leino (n 122).

126 Stephens (n 3) 272–286.

127 British Institute of International and Comparative Law, 'Promoting Climate Justice through International Law: Climate Litigation & Climate Advisory Opinions' 6 <https://www.biicl.org/documents/163_event_report_climate_advisories_litigation_15_march.pdf> accessed 10 March 2024.

128 Law Report, 'Vanuatu's Push for International Court Action on Climate Change' 12 July 2022 <https://www.abc.net.au/listen/programs/lawreport/vanuatu-climate-court/13965770> accessed 22 February 2024.

129 Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 *Nordic JIL* 73, 77. This is reflective of Tim Stevens concern with the ITLOS opinion, that it is lacking in clarity as to 'precisely what the obligation *is* under Article 194.' ANZSIL-OIELIG ITLOS AO Webinar (28 May 2024) 41:15–41:25 <https://tinyurl.com/3pxckanr> accessed 17 March 2025.

change might not result in more ambitious climate action.[130] As Daniel Bodansky has explained, it could 'threaten to blow up the negotiations' under the climate regime if States are seen to have circumvented the multilateral process under the UNFCCC.[131] There is also the possibility that the ICJ could divert from the ITLOS advisory opinion and announce that States do not have obligations beyond which they have agreed to under the UNFCCC and the Paris Agreement, a result that could stifle progress for years if not decades to come.

5 Conclusion

Jurisdictional ingenuity in the context of the climate emergency has the potential to transform the legal landscape. For States that are at risk of losing the entirety of their territory due to sea level rise, it is an attempt to avoid the most severe consequences of climate change before it is too late.[132] Although there are risks of fragmentation in the law and there is no guarantee of a positive result, there is potential for substantive outcomes that will lead to future progress on addressing the dire threat of climate change.

130 Bodansky (n 8) 185. Law Report, 'Vanuatu's Push for International Court Action on Climate Change' 12 July 2022 <https://www.abc.net.au/listen/programs/lawreport/vanuatu-climate-court/13965770> accessed 22 February 2024 (Douglas Guilfoyle describing such an outcome as 'radical.')

131 Bodansky (n 8) 185. See also 'Special Online Briefing with Secretary John Kerry, Special Presidential Envoy for Climate, and Monica Medina, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs' (US Department of State 3 March 2023) <https://www.state.gov/special-online-briefing-with-secretary-john-kerry-special-presidential-envoy-for-climate-and-monica-medina-assistant-secretary-of-state-for-oceans-and-international-environmental-and-scientific-aff/> with Secretary Kerry describing Vanuatu's Advisory Opinion effort as 'sort of just jumping ahead and going to court.'

132 Stewart (n 8).