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SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS

COMPETING PERSPECTIVES AND DIALOGUE IN CLIMATE CHANGE ADVISORY OPINIONS

Maria Antonia Tigre and Armando Rocha***

The limited use of dispute settlement mechanisms under the UN Framework Convention on Climate Change and the Paris Agreement explains the recent upsurge in requests for advisory opinions on issues specific to climate change to international courts, namely the International Court of Justice (ICJ), the International Tribunal of the Law of the Sea (ITLOS), and the Inter-American Court of Human Rights. However, it is still unclear how these courts will answer the questions posed, and in particular whether they will coordinate or compete with each other. As the requesting states and bodies are well aware of this uncertainty, requesting an advisory opinion from three courts simultaneously was an ingenious (not ingenuous) strategy to clarify states' obligations to mitigate or adapt to climate change through the international judiciary. This essay assesses how the parallel jurisdiction of courts in these cases presents an opportunity to enhance states' obligations concerning climate change through requesting concurrent views on the same rules and obligations. It considers the potential for contradictory views between courts on the same obligations. Finally, the essay analyzes the extent to which these courts may compete or cooperate in their approach to the resolution of these issues.

Parallel Jurisdiction as an Opportunity to Enhance States' Obligations

The dramatic increase in climate litigation over the past decade is a manifestation of climate action democratization in response to the inadequate response from governments and corporations to the climate crisis. Advisory opinions, specifically, contribute to clarifying and developing the understanding of existing rules and obligations. In this regard, the international law on climate change provides fertile ground for judicial development: the Paris Agreement is formally binding, but states' obligations under the Agreement are sparse and open-textured. However, this does not mean that the rules and obligations have no force, since courts can step in and contribute to fleshing out their implications.

International courts have the authority to clarify and develop legal rules and states' obligations, but utilizing three different advisory jurisdictions simultaneously can lead to competition. The outcome will depend on the decisions made by judges and can either be beneficial or harmful to the requesting states or bodies.

Competition between the ICJ, the ITLOS, and the Inter-American Court of Human Rights is the product of their parallel jurisdiction, which allows states to choose the forum of their preference but also allows all fora to be selected at the same time. Since there is no vertical integration among these courts, they should seek some

* *Sabin Center for Climate Change Law, Columbia Law School, New York, NY, United States.*

** *Universidade Católica Portuguesa, School of Law, Lisbon, Portugal.*

coordination, as explained below, or risk contradicting each other.[1] This is the case with regard to the trio of advisory opinions: the ITLOS has the competence to interpret and enforce law of the sea treaties, but that competence is shared with the ICJ.[2] Since Part XII of the UNCLOS lies at the intersection of the law of the sea and environmental law, the ITLOS will interpret the UNCLOS in light of the Framework Convention on Climate Change and the Paris Agreement and general principles of international environmental law. It may also have to consider human rights and considerations of humanity.

The ICJ has concurrent jurisdiction concerning the UNCLOS. However, the request for an advisory opinion is based upon its general competence to interpret any legal question of international law, and thus refers to states' obligations under general international law, the Framework Convention on Climate Change, the Paris Agreement, the UNCLOS, general environmental law, and general human rights law, i.e., the same body of rules the ITLOS will assess.

In its turn, the Inter-American Court of Human Rights has the exclusive competence to interpret the American Convention on Human Rights.[3] However, since the wording of human rights law is open-ended and relies on its application to concrete cases, the ICJ and the Inter-American Court of Human Rights may offer competing views on climate change and human rights. Moreover, the Inter-American Court of Human Rights must rely on the Framework Convention on Climate Change and the Paris Agreement as an interpretative benchmark, which entails providing its own views on the obligations under these treaties.

Potential for Contradiction Between International Courts

The parallel jurisdiction of international courts is a design choice, but it can be a design flaw if courts cannot coordinate for harmonious development of international law, provide compatible views on the same set of rules, or apply rules in the same manner to the same factual background. For instance, courts' reputation can be jeopardized if the ICJ, the ITLOS, and the Inter-American Court of Human Rights have irreconcilable views on states' due diligence standards under general environmental law or the scope of states' obligations under the Paris Agreement or the UNCLOS.

The most apparent source of contradiction might come from different understandings of the same concepts, principles, or doctrines. For instance, the ICJ's and the ITLOS's case law on states' due diligence obligations in environmental law is compatible, but the due diligence doctrine is not applied equally by all courts or in all international law domains. Since courts need to secure internal coherence with prior rulings, the due diligence standards outlined by the ICJ and the ITLOS will likely not match the more developed criteria outlined by the Inter-American Court of Human Rights. This does not mean they are conflicting standards, but due diligence standards can be more developed under human rights law than under the Framework Convention on Climate Change, the Paris Agreement, or the UNCLOS, implying that the level of protection provided thereunder is also broader.

More concerning, however, is how courts will elaborate on states' obligations under specific treaty provisions. For instance, in comparison with other international bodies, regional human rights courts are bolder in defining states' obligations under their treaties, because cultural integration among states parties is greater. In contrast, the ICJ and the ITLOS adopt a more cautious stance, relying heavily on state consent. Therefore, it would be predictable for the American Convention on Human Rights to have more rigorous requirements for addressing climate change compared to the Framework Convention on Climate Change, the Paris Agreement, or the UNCLOS, which may have less demanding obligations for mitigating and adapting to climate change. Furthermore, the

[1] Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, *in* The Oxford Handbook of International Adjudication 143 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2015).

[2] UN Convention on the Law of the Sea, Art. 287(1), Dec. 10, 1982.

[3] American Convention on Human Rights, Art. 64, Nov. 22, 1969.

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ICJ and the ITLOS face the additional challenge of having to interpret the UNCLOS to clarify states' obligations to reduce greenhouse gas emissions and adapt to climate change while simultaneously aligning with the same states' obligations under the Framework Convention on Climate Change and the Paris Agreement. Similarly, it would be surprising if one court directly identifies states' obligations under the UNCLOS while the other does not, or if there are discrepancies in the scope and extent of states' obligations to mitigate and adapt under the Framework Convention on Climate Change, the Paris Agreement, or the UNCLOS. Judicial development of the existing law relies on coherence, meaning that different readings of the same rules and obligations undermines courts' contribution to developing states' obligations in relation to climate change.

Potential for Cooperation Between International Courts

The question at hand is how the ICJ, the ITLOS, and the Inter-American Court of Human Rights can effectively manage the potential for conflicting views. In domestic legal systems, vertical integration harmonizes views between courts. International law is also equipped with valuable tools to secure harmonization. First, the *electio fori* rule allows states to confer exclusive jurisdiction to a specific court concerning a particular treaty. For example, the American Convention on Human Rights assigns the exclusive competence for its interpretation to the Inter-American Court of Human Rights.[4] However, this exclusive competence does not prevent other courts interpreting other instruments to issue differing views on human rights obligations. In most cases, however, states only choose a court to settle their dispute *ex post facto*. Second and third, the *lis pendens* and *res judicata* rules allow courts to declare a case inadmissible if it has already been submitted to or decided by another court. Both rules enable courts to avoid challenging or being challenged by another court's ruling. Nonetheless, *electio fori*, *lis pendens*, and *res judicata* only apply to disputes and are unhelpful in advisory opinions.

Fourth, judicial comity requires courts to exercise restraint and rule narrowly based on the exact question posed and the treaty being interpreted; and encourages courts to align their views with prior pronouncements from other courts. Nonetheless, judicial comity is of limited use in the case of the advisory opinions. Fifth, cross-regime interpretation helps harmonize views—but the broad and open nature of the questions asked can actually enhance contradictions between courts, especially if some have specialized jurisdiction. Finally, relying on prior judicial decisions is a helpful tool to harmonize views but irrelevant in the trio of opinions on climate change, since no international court has yet pronounced on this topic.

Judicial ethics prohibit judges from different courts from discussing and aligning their views. However, judges are not restricted from seeking external sources of information and inspiration. Data suggests that international courts often refer to other courts' decisions to inform their perspectives and avoid conflicts with their rulings.[5] Dialogue between the courts may thus need to be indirect, informal, and perhaps unacknowledged, but the ICJ, the ITLOS, and the Inter-American Court of Human Rights can resort to each other's prior decisions on related topics (e.g., due diligence or precaution) and read states' and non-state actors' observations before other courts to analyze the commonalities among them. Moreover, referring to decisions from other bodies, such as domestic courts or the European Court of Human Rights on pending (contentious) climate cases can help identify common patterns and pathways. And in the end, simultaneous requests do not mean that the opinions will also be rendered simultaneously: as one court renders its opinion, others can adjust and incorporate the views expressed in prior opinion(s) by another court.

These forms of cooperation may be limited, but they nonetheless provide helpful tools for institutional collaboration. In the past, the ICJ and the ITLOS have already dialogued on topics such as states' due diligence

[4] *Id.* Art. 33(b).

[5] Dupuy & Viñuales, *supra* note 1, at 149.

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obligations in environmental law, which is likely to be key in the advisory opinions on climate change. Due diligence was first mentioned by the ICJ in the *Pulp Mills* case[6] and later developed consistently by the ICJ[7] and the ITLOS[8]—including its derivative obligations, such as the duties to conduct an environmental impact assessment, or to exercise a certain level of vigilance and to monitor private operators. This consistency confirms that courts are concerned with providing a coherent understanding of states' international obligations. Thus, even though the ICJ, the ITLOS, and the Inter-American Court of Human Rights may have no prior indications of each other's views on states' obligations concerning climate change, they are aware of the risks in case they fail to provide a consistent reading of concepts, principles, and doctrines of environmental law that are relevant for the trio of advisory opinions.

Potential for Competition Between International Courts

Although the three courts should seek to align their views on key concepts, principles, and doctrines, other factors may lead to competing views. First, courts are bound by the request submitted to them, which means that even if they can rephrase the question, courts still need to answer what is specifically asked of them. Different questions, therefore, can lead to different answers, and it should not be surprising if a question on states' obligations under a human rights treaty leads to a different answer than a question on states' obligations under the UNCLOS. More importantly, questions are never neutral: the wording and narrative adopted are the result of a complex process, as Wewerinke-Singh, Viñuales, and Aguon explain in this issue,[9] and signal to the court what the requesting state or body expects to be answered. Questions imply what courts should be looking at and suggest a possible answer and line of reasoning for the court. The UN General Assembly's request to the ICJ was straightforward since it required a majority approval among states, but the requests made to the ITLOS and the Inter-American Court of Human Rights were more specific, indicating the line of answer expected from the requesting states and body.

Second, given the lack of mandatory jurisdiction and enforcement mechanisms, international courts need to secure their authority and reputation through other means. To that end, when reading a rule or a principle, rather than looking to other courts' jurisprudence, it is more important to secure an understanding of that rule or principle which is compatible with a court's prior case law. Providing an institutionally coherent and predictable view on a specific question of law enhances courts' authority. Furthermore, courts' reputation relies on the satisfaction of their clientele. This means, for instance, that, in human rights law, states expect detailed rulings and opinions. This explains the in-depthness of the request submitted by Chile and Colombia to the Inter-American Court of Human Rights. In this sense, institutional coherence refers not only to how a certain rule or principle is interpreted in light of prior rulings of the same body, but also to how far the opinion goes in detailing states' obligations.

Third, judges have their own interpretative biases and "horizons,"[10] which are particularly relevant in the context of specialized courts such as the ITLOS or the Inter-American Court of Human Rights. Treaty interpretation

[6] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 14, para. 197 et seq. (Apr. 20).

[7] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 ICJ Rep. 665, paras. 104, 105, 153, 168, 228 (Dec. 16).

[8] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 2011 ITLOS Rep. 10, paras. 111, 115, 135, 147, 149 (Feb. 1); Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2015 ITLOS Rep. 4, paras. 128, 131 (Apr. 2).

[9] Margaretha Wewerinke-Singh, Jorge Viñuales & Julian Aguon, *The Role of Advocates in the Conception of Advisory Opinion Requests*, 117 AJIL Unbound 277 (2023).

[10] Ulrich Fastenrath, *A Political Theory of Law: Escaping the Aporia of the Debate on the Validity of Legal Argument in Public International Law*, *in* From Bilateralism to Community Interest: Essays in Honour of Bruno Simma 65 (Ulrich Fastenrath et al. ed., 2011).

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is never entirely objective and is affected by the interpreter's prior understandings, cultural imprints, worldviews, and conceptions of what constitutes a fair and reasonable world order.[11] As such, finding an objective meaning of a treaty provision is illusory. This task is even harder if, on the one hand, the questions are asked of courts with different subject matter jurisdictions and, on the other hand, the questions require the interpretation of open-textured rules.

Fourth, judges are human beings. Judges may seek to align their perspectives with those of other courts concerning the same set of rules. However, it is improbable that they will deviate too far from their individual posture toward the interpretation of the law. If judges strongly believe in a particular interpretation of a rule that is incompatible with another court's interpretation, it is unlikely that they will adopt a view that contradicts their own. On the other hand, judges are conscious of their legacy. They do not want to be known for damaging a court's reputation by adopting an overly ambitious opinion. At the same time, they do not want to be remembered for missing the opportunity to make a decisive contribution. Instead, they strive to be recognized as authoritative contributors to the development of international law. This may lead them to want to be the first to render an opinion or to adopt the most progressive stance on climate change law.

Finally, authority can be a zero-sum game. If one court provides a more authoritative and/or progressive reading of a rule or principle of climate change law, it is likely that other opinions will be less cited by other courts, or at least not cited on an equal footing. Furthermore, being the first to render an opinion could provide authoritativeness to a court. It is expected that the ITLOS advisory opinion will be published in the beginning of 2024, with the one from the Inter-American Court of Human Rights next, around the second half of 2024, and the ICJ last, in the beginning of 2025. This can be a double-edged sword, since it suggests that courts can be tempted to render their opinion first and to be as ambitious as possible, although an excessively ambitious opinion may fail to be authoritative and be ignored by states—and thus fail to contribute to the clarification and development of climate change law, or to provide a focal point for future state action or negotiations.

Conclusion

The use of the parallel advisory jurisdiction of the ICJ, the ITLOS, and the Inter-American Court of Human Rights poses an additional conundrum for these courts: apart from the challenge of fleshing out open-textured treaty provisions on states' obligations to mitigate and adapt to climate change, these courts must bear in mind that their contribution to the clarification and development of climate change law depends on rendering decisions that are coherent—although there are only limited tools to achieve such coherence between courts. Nonetheless, other factors may encourage courts to compete, such as the need to preserve an intra-institutional coherent jurisprudence, or their ambition to be perceived as more progressive, who made a decisive contribution to the judicial clarification and development of climate change law, or who rendered its opinion first.

[11] *Id.* at 65.

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