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The role of *amicus curiae* in the ITLOS Advisory Opinion on Climate Change and International Law

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Image by Rafael Prado

This Reflection aims to call attention to the role of the International Tribunal for the Law of the Sea (ITLOS) in the new order of global ocean governance, as well as to the importance of civil society participation in judicial practice. *Amicus curiae* are a key element to achieving the crucial principle established by the Rio Declaration on Environment and Development (1992) that environmental issues are best handled with the participation of all concerned citizens at the relevant level, and with effective access to judicial and administrative proceedings. The analysis of the Request for an Advisory Opinion submitted by the Commission of Small Island States (COSIS) on Climate Change and International Law on 12 December 2022 (Case No. 31) illustrates that ITLOS is a fundamental mechanism for the development of global ocean governance.

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In the past, international judicial institutions did not play a leading role in global governance, and they were not perceived as mechanisms to ensure the participation of the international society. The ITLOS was established by the UN Convention on the Law of the Sea (UNCLOS) and has specialized and universal jurisdiction. ITLOS can deal with disputes of any kind concerning the sea, as well as activity carried out at sea, and it is an ideal forum to discuss the judicial implications of climate change on the oceans. We believe that faced with the contemporary challenges of climate change and ocean governance, this new judicial activism of ITLOS is necessary, and that its performance and authoritative action are grounded in its body of jurisprudence. The rapid evolution and increase of concerns about the health of the oceans in the international scenario and the assumption of their essential role in supporting life on earth has been observed over the last two decades. In 2005, the Intergovernmental Panel on Climate Change (IPCC) noted the increasing rise of temperatures in oceans due to climate change.

After its 2005 Report, the IPCC highlighted in 2019 that climate change is causing persistent and in some cases irreversible changes to the physical and chemical state of the oceans. Increased atmospheric greenhouse gas emissions (GHGs) resulting from anthropogenic emissions contribute to ocean acidification, increased ocean temperatures, deoxygenation, and sea level rise, with serious implications for marine biodiversity. For example, many fish stocks are already suffering from the impacts of climate change, along with the communities that rely on them for sustenance and livelihoods. Oceans store heat trapped in the atmosphere, mask and slow the warming of the earth's surface, store excess carbon dioxide, and are a key component of global biogeochemical cycles. Relying on the IPCC scientific findings, the 2019 Report of the Conference of the Parties (COP) of the UN Framework to Combat Climate Change (UNFCCC) has also noted the oceans are part of the global climate system and there is a need to protect oceans and coastal ecosystems.

Moreover, in 2021, the UN Decade of Ocean Science for Sustainable Development (2021-2030) ('the Ocean Decade') started attempting to reverse the decline of the state of the ocean system and catalyze solutions for sustainable ocean governance. Following these developments, the IPCC Report of 2022 noted the high-level vulnerability of people living in small island development States (SIDS) to the impacts of climate change, which are threatening the very survival of these States. The projected and current impacts of climate change on oceans are having significant consequences on marine and terrestrial ecosystems, as well as on the livelihoods of the local communities. Despite their

limited contribution to the anthropogenic GHGs causing and exacerbating climate change, SIDS are disproportionately burdened by these impacts.

At COP 26 in 2021, given the evident sea level rise caused by climate change and the real possibility that SIDS could lose their physical territories, , the civil societies of these countries decided to take action. Antigua and Barbuda and Tuvalu signed the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (COSIS Agreement). The Agreement establishes that the Commission is authorized to request advisory opinions from the ITLOS on any legal question within the scope of the UNCLOS. At its third meeting in 2022, the COSIS adopted a adopted a decision requesting that ITLOS: 1) define obligations in terms of the prevention, reduction and control of the negative effects that *result or are likely to result* from climate change, including through ocean warming and sea level rise and ocean acidification, and 2) specify the measures States should take to protect and preserve the marine environment from the impacts of climate change, including ocean warming and sea level rise, and ocean acidification (Advisory Opinion No.31).

Thus, this Reflection focuses on the role of *amicus curiae*, through the lens of Principle 10 of the Rio Declaration, in the proceedings related to the request for Advisory Opinion No.31. Since its establishment in 1982, the Seabed Disputes Chamber and the ITLOS have adopted two advisory opinions in 2011 and 2015, respectively. Neither the UNCLOS Convention nor the ITLOS Rules contain specific provisions on the submission of *amicus curiae*. However, some rules may be relevant to the issue, in particular Articles 84 and 133 of the ITLOS Rules, which focus on the participation of intergovernmental organizations. While these provisions do not deal with the participation of non-State actors, we argue that these Articles could serve as a vehicle to reform the current ITLOS rules and serve as an inspiration to include specific rules on the submission of *amici* briefs. A reform of the ITLOS rules of procedure would allow for the democratization of a purely inter-State procedure, especially when issues of interest to all humankind, such as climate change, are discussed. Like a contentious procedure, the advisory function of international courts and tribunals can be used to protect common interests[2] and can benefit several actors, including State and non-State actors.

[2] Laurence Boisson de Chazournes, "Advisory Opinions and the Furtherance of the Common Interest of Mankind", in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement – Trends and Prospect*s, New York, Transnational Publishers, 2002. p. 105–118.

The ITLOS Advisory Opinions and the submission of *amicus curiae* briefs

Since its origin as a specialized branch of international law in the 1970's, international environmental law (IEL) has significantly evolved. International judicial institutions have played an important role in the development of international environmental law and its principles as part of the general principles of international law. *Amicus curiae* are also evidence of the growing interest in IEL. *Amicus curiae* represent the materialization of Principle 10 of the Rio Declaration on public participation and access to environmental justice. In intervening as *amicus curiae*, organizations aim to represent international civil society and underline the role of judicial institutions in addressing issues of global concern.

The participation of *amicus curiae* in proceedings related to international environmental law allows for the conversion of a subjective judicial process into an objective one that represents the interests of the entire civil society. Admitting *amici curiae* ensures the participation of the most diverse people and entities, expanding and democratizing the debate around the issues at stake. But the interest of a growing number of actors in international legal proceedings and the possibility of intervening in these procedures is a challenging question to tackle. International courts and tribunals could potentially receive an important number of *amici* briefs that may not be strictly linked to the factual and legal issues related to the case. The possibility of being flooded by requests for participation from non-State actors could go against the need to safeguard an efficient legal procedure. However, we argue that outlining clear rules for the participation of *amici* in the ITLOS procedure, like potentially in the case of the International Court of Justice (ICJ), could limit these risks and be a necessary instrument for the democratization of these tribunals' procedures. Like the ICJ, ITLOS is increasingly addressing issues of public interest that are not strictly limited to States but that extend to all humankind.

We believe that opening international legal proceedings to *amici* briefs would provide more benefits than disadvantages, and may assist tribunals with the substantive or procedural aspects of questions they are asked. We argue that where non-State actors do not have the right to be parties in an international proceeding, the submission of *amici briefs* should be viewed as an essential means of public participation. Indeed, through the submission of *amici* briefs, non-State actors who are not parties to a contentious or an advisory procedure may express their concerns, points of view, scientific information, or legal analysis. Thus, *amici* briefs may often represent the public interest and become a vehicle for public participation in an international proceeding.

As already mentioned, the ITLOS and the Seabed Chamber have adopted advisory opinions on this matter. An aspect common to the two proceedings relates to the submission of *amici curiae* briefs by non-State actors. While in the first Advisory Opinion rendered by the Seabed Chamber in 2011, this body decided not to grant permission to the Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature (WWF) to participate in the advisory proceedings as *amici curiae*, in 2015 the Tribunal sitting for the first time in *banc* to decide to grant WWF the possibility of submitting its *amicus curiae* brief in the first and second round of the written proceedings of the Advisory Opinion No.21. In his Declaration, Judge Cot positively commented this opening of the ITLOS to non-State actors and he noted that "the broad participation in these first advisory proceedings before the International Tribunal for the Law of the Sea sitting en banc" and indicated that "[t]he number of participants and the quality of the written and oral submissions from the representatives of the Sub-Regional Fisheries Commission, the States Parties, the European Union and international *and non-governmental organizations* have been remarkable. The advisory proceedings have been a success in this respect."

ITLOS has taken a similar approach in the ongoing proceedings related to Case No.31 and granted the submission of *amici curiae* briefs in the written proceedings. In the context of the current proceedings, individuals, academic institutions, and non-governmental organizations submitted *amici* briefs. *Amici* briefs were submitted, for example, by the Center of International Environmental Law (CIEL), Greenpeace, WWF, Oxfam International as well as the UN Special Rapporteurs on Human Rights and Climate Change, Toxics and Human Rights and Human Rights and the Environment. While these *amici* briefs are publicly available on the website of ITLOS, they are considered "not part of the case file".

This practice was already used by ITLOS in 2015 Case No. 21 when WWF submitted *amici* briefs in the two rounds of the written proceedings, and they were published on the website of the Tribunal. In its Advisory Opinion, the ITLOS explained that: "At the request of the President, the Registrar, by letter dated 4 December 2013, informed the WWF that its statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements, and placed on the website of the Tribunal in a separate section of documents relating to the case".

A similar statement was made by ITLOS in paragraph 23 of Case No.21 regarding the participation of WWF in the second round of written proceedings. The WWF also asked to participate in the oral proceedings. However, by letter dated 24 June 2014, the Registrar informed the WWF that the President had decided that, in light of articles 133 and 138 of the Rules, it would not be possible to grant the organization participant status in the proceedings.

Compared to the previous Case No.21, in which only one brief was submitted by the WWF, the ITLOS received 14 *amici* briefs in the ongoing advisory procedure on climate change and international law. This marks an increase in public interest and participation in international judicial proceedings under the UNCLOS, which is mainly perceived as an inter-State regime. This also confirms the growing attention to the advisory function of international courts and tribunals, and the evident materialization of Principle 10 of the Rio Declaration in international law practice related to international environmental law.

The role of non-State actors, such as specialized international environmental NGOs, can also be seen in two other ongoing advisory legal proceedings, notably the Request for Advisory Opinion on the Obligations of States in respect of Climate Change, transmitted to the International Court of Justice (ICJ) under General Assembly resolution 77/276 of 29 March 2023, and the Request for an Advisory Opinion on Climate Emergency and Human Rights, submitted by Chile and Colombia before the Inter-American Court of Human Rights on 9 January 2023. In the first case before the ICJ, the mobilisation of young people played an essential role in the process of the adoption of the UN General Assembly resolution, which was adopted without a vote. This shows the consensus by States on the need to clarify legal obligations related to climate change. It also illustrates how the international civil society may influence inter-State decision-making bodies, such as the UN General Assembly.

Under a traditional conservative interpretation of the subjects of international law, there would be no place for civil society to participate in the proceedings before ITLOS and ICJ. Nevertheless, international environmental law and its principles have evolved and forced a change to ensure the participation of civil society from least developing countries, developing countries, and SIDS. This is needed in such sensitive issues as climate change and international law. Case No. 31 concerns sea level rise, which can have an impact on the loss of national territory by SIDS. This implies that ITLOS judges would need to think about the existence of SIDS as nations, people, and States which can have its territory deeply affected, and even extinguished, by the sea level rise due to climate change.

In this perspective, civil society organized in associations and NGOs may bring a useful new interpretation of the role of *amicus curiae,* bringing social and cultural perspectives.

ITLOS adaptation to the challenges of global ocean governance

Since its origin at the third United Nations Conference on the Law of the Sea and the adoption of UNCLOS, ITLOS has developed an important practice that answers to the mandate given by the Convention. In the advisory opinions Case No. 21 and Case No. 31, the Tribunal applied its Rules of Procedure on the basis of the ITLOS Rules that provide for the participation of intergovernmental organizations. While these provisions do not deal with non-State actors, they could be used for updating the current procedure. The adaptation of the current ITLOS Rules of Procedure will be a mechanism for facing the challenges related to climate change and global ocean governance.

The three advisory opinions in Cases No. 17, No. 21, and No. 31, have given the ITLOS an important role in global ocean governance. It is worth mentioning that the situation concerning the Tribunal's advisory jurisdiction is rather complex, as the only explicit provision on advisory opinions found in the UNCLOS is related to the Seabed Dispute Chamber, which is an integral part of the Tribunal and is established under section 4 of Annex VI of UNCLOS containing the Statute of the Tribunal. However, it is possible to overcome this obstacle by invoking Article 21 of the Statute of the Tribunal related to its jurisdiction. This Article comprises all disputes and all applications submitted to it, following UNCLOS *and all matters* specifically provided for in any other agreement that offers jurisdiction on the Tribunal, including those dealing with climate change and directly affecting the oceans. Another possible foundation is Article 133 of the ITLOS Rules, which specifically focuses on the advisory procedure and indicates the procedure to follow for the provision of information by an intergovernmental organization.

The manifestation of Principle 10 of the Rio Declaration includes the participation of non-State actors in international proceedings. These actors may help to address the global challenges of climate change and the oceans. ITLOS could decide not to embark on a formal reform process of its Rules and decide to accept *amici* at its discretion. This choice would follow the practice of the Appellate Body of WTO, which has not reformed its working procedures about amici briefs.[3] Another approach

[3] In particular, in the case, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom*, the Appellate Body of WTO stated that "neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs" and that "as long as we act consistently with the provisions of the DSU and the covered agreements, [the

would be to follow the practice of human rights bodies or investment arbitration procedures. In international fora such as human rights bodies or the International Criminal Court, non-State actors have significant rights of participation. For example, the Rules of Procedure of the Inter-American Court of Human Rights confer a significant space to non-State actors by giving them the possibility to submit a brief, as well as to present an argument in the oral hearing. The 2009 Rules of Procedure provide that a person or institution may submit to the Court "reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject matter of the proceeding by means of a document or an argument presented at a hearing" (art.2.3).

A more restricted approach is taken by the 2023 Rules of Procedures of the European Court of Human Rights, which has three pending contentious cases dealing with climate change.[4] The Rules affirm that the President of the Chamber may invite any person concerned who is not the applicant to submit written comments or, "in exceptional cases", to take part in a hearing (art. 44.3 of the revised Rules 2023).

A legitimate question is if the existing ITLOS Rules of Procedure drafted in 1997 still reflect the current international practice or would need to be revised. In international investment law proceedings, for example, Article 67 of the 2022 International Center for the Settlement of International Disputes (ICSID) Arbitration Rules and Article 77 of the 2022 ICSID Additional Facility Arbitration Rules provide clear criteria for whether to accept the submissions by a non-disputing third party. In considering whether an *amicus curia* can participate in the written and oral proceedings, a tribunal should consider the extent of public interest in the case, as well as the applicant's expertise. Additional elements to consider are whether the *amicus curiae* brief provides a new perspective on the case that the other parties do not bring or if, on the contrary, it may support the arguments made by States and intergovernmental organizations adding a public interest perspective.

The current practice on the requests of advisory opinions shows that this function, which is carried out by international courts and tribunals, is increasingly perceived as a tool for the protection of public

Appellate body] has the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal". Two years later, in 2002, the WTO Appellate body affirmed that: "acceptance of any amicus curiae brief is a matter of discretion, which we must exercise on a case-by-case basis". United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom, 10 May 2000, WT/DS138/AB/R, par. 39. European Communities – Trade Description of Sardines, 26 September 2002, WT/DS231/AB/R, para.167.

[4] *Duarte Agostinho and others v. Portugal and others*, *Vereiin KlimaSenirorinnem Schweiz and Other v. Switzerland* and *Carême v. France*.

interests, including the protection of humankind. Consequently, international tribunals and courts need to develop mechanisms to ensure the participation of the public, thus favouring participatory justice. The fact that ITLOS' current rules of procedure have limited the possibility of participation in oral proceedings only to States and intergovernmental organizations could be perceived as a reduction of the space for public participation.

Several advantages could work in favour of an adaptation of the ITLOS Rules of Procedure and having clear norms on the participation of non-State actors. First, participation in the ITLOS procedures by individuals, NGOs, and other institutions would be consistent with the general trend in international law recognizing greater rights and duties to non-state entities. Second, the participation of entities other than States and intergovernmental organizations can potentially bring benefits and show public support for the arguments that these actors make before ITLOS.

The growth of fields regulated by international law, including scientific matters, requires that international Courts and Tribunals rely on the knowledge of NGOs, individuals, and academic institutions that have technical and specialized expertise. Even if it can be challenging to engage with an increased number of international actors such as NGOs, individuals, and academic institutions participating in a legal proceeding, it has been in the field of international environmental law that non-State actors have shown their value. Non-State actors are important agents in assisting international organizations and States in their task of protecting the environment at the global, regional, subregional, and local levels. Whether *motu proprio* or assisting States and intergovernmental organizations, non-State actors have, in some fields, supported the development and the implementation of international law in protecting oceans.

Conclusion

Arguably, an adaptation of the ITLOS procedure to allow for the formal participation of non-State actors in the written and oral proceedings could bolster some of the arguments already made by States and intergovernmental organizations. The participation of these actors would make an important contribution to the global governance of oceans. ITLOS must also be prepared for the future of dispute settlement and possible requests for advisory opinions from the recent agreement under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Treaty), which by its article 68(1) is going to "enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession".

In some cases, non-States actors may help to support the arguments of States. In Case No.31, one of the common arguments made by States, intergovernmental organizations, and non-State actors was, for example, that UNCLOS should not be interpreted in isolation by other international agreements such as the UNFCCC and the Paris Agreement. Another argument that was raised by several NGOs and individuals together with States and intergovernmental organizations was that greenhouse gases fall within the scope of "pollution" under Article 1.1(4) of UNCLOS and increase concentrations of GHGs in the atmosphere, and subsequently in the marine environment, resulting in ocean acidification and warmer seas.

Moreover, another joint argument made by States and non-State actors was related to human rights. Notably, the joint submission by three UN Special Rapporteurs emphasizing the adverse impact of climate change on marine biodiversity is relevant to the right to life, the right to food, and the cultural rights of minorities and Indigenous peoples. In particular, the UN Special Rapporteurs made the argument that these human rights translate into the obligation for States to rapidly reduce GHG emissions in keeping with their obligations under both international human rights law and environmental law. *Amicus curiae* briefs by non-State actors demonstrated a clear tendency for an evolutive interpretation of the UNCLOS Convention, a position which will be eventually adopted by ITLOS.

An adaptation of the ITLOS Rules stating clear criteria for the participation of *amici curiae* would reflect the practice of other international Tribunals and Courts, especially in the fields of human rights law, criminal law, and investment law. Such a reform would also promote the democratization of ITLOS's advisory function. Regulated participation of non-state actors before the ITLOS could also support the implementation of the advisory opinion, even if were not binding per se. An adaptation could also create a bridge between international judicial bodies and the international civil society, especially in matters such as climate change and global ocean governance, which are of interest to all humankind and should not be treated purely as an inter-State concern.

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