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# Treasure Trove UNCLOS – New Argumentative Ground for Climate Change Litigation?

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# Table of Contents

List of Abbreviations ..... 3

1 Introduction ..... 1

1.1 Background ..... 1

1.2 Research Question and Scope ..... 6

1.3 Methodology ..... 8

1.4 Outline of the Thesis ..... 10

2 Climate Change Obligations under UNCLOS ..... 11

2.1 Climate Change as Pollution of the Marine Environment ..... 11

2.2 Climate-related Obligations under the UNCLOS ..... 13

2.3 Due Diligence Standard under UNCLOS ..... 16

2.3.1 Due Diligence in International Law ..... 17

2.3.2 Due Diligence in the International Climate Regime ..... 18

2.3.3 Is Following the Climate Regime enough? ..... 22

2.4 Concluding Remarks ..... 27

3 Potential of UNCLOS in Climate Change Litigation ..... 28

3.1 Contentious Litigation through UNCLOS Part XV ..... 28

3.2 Advisory Opinions ..... 35

3.3 Role of Non-State Actors in Climate Change Litigation ..... 37

3.3.1 Experts and Witnesses ..... 37

3.3.2 Amici Curiae Briefings ..... 38

3.3.3 Extended Access to UNCLOS Dispute Settlement System? ..... 39

3.4 Opportunities and Challenges of Litigating through or under UNCLOS ..... 40

3.5 Concluding Remarks ..... 46

4 Conclusion ..... 47

Bibliography ..... 49

# List of Abbreviations

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|---|---|
| CBD | Convention on Biodiversity |
| CBDRRC | Common But Differentiated Responsibilities and Respective Capacities |
| COP | Conference of the Parties |
| COSIS | Commission of Small Island States on Climate Change and International Law |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| IPCC | Intergovernmental Panel on Climate Change |
| ITLOS | International Tribunal for the Law of the Sea |
| IUU | Illegal, Unreported and Unregulated |
| NDC | Nationally Determined Contributions |
| NGO | Non-Governmental Organization |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNEP | United Nations Environment Programme |
| UNFCCC | United Nations Framework Convention on Climate Change |
| VCLT | Vienna Convention on the Law of Treaties |

# 1 Introduction

## 1.1 Background

Our planet is in danger. The latest Synthesis Report of the Intergovernmental Panel on Climate Change (IPCC), the United Nations (UN) institution for assessing the science related to climate change, draws an alarming picture. It presents the current State of the changing climate and likely future scenarios. The human-induced climate change already affects weather and climate extremes, causing damage to nature and people.[1] The report emphasizes that "adaptation options that are feasible and effective today will become constrained and less effective with increasing global warming".[2] Pointing out that the "window of opportunity to secure a liveable and sustainable future for all" is rapidly closing, the authors rather desperately note that "the choices and actions implemented in this decade will have impacts now and for thousands of years".[3] Consequently, "rapid and far-reaching transitions across all sectors and systems" are needed.[4] Against this background, it is reasonable to conclude that climate change constitutes one of the greatest challenges for mankind in this century.

Unsurprisingly, the report observes that overall, national climate policies lack ambition and are likely not sufficient to limit global warming to the 1.5°C above pre-industrial levels,[5] a goal that is also reflected in the Paris Agreement.[6] The Paris Agreement obliges the Parties to establish nationally determined contributions (NDCs) they will undertake to achieve the long-term climate reduction goal. The insufficiency of the current efforts is further portrayed by the latest UNEP Emissions Gap Report. The emissions gap is defined as "the difference between estimated global greenhouse gas emissions resulting from full implementation of NDCs, and global total greenhouse gas emissions under least-cost scenarios that keep global warming to below 2°C, 1.8°C or 1.5°C.[7] The report shows that the States must increase their NDC

[1] 'AR6 Synthesis Report: Climate Change 2023 — IPCC' 5 <https://www.ipcc.ch/report/sixth-assessment-report-cycle/> accessed 31 May 2023.
[2] ibid 20.
[3] ibid 25.
[4] ibid 30.
[5] ibid 10.
[6] Art. 2 (1)(a) Paris Agreement; Paris Agreement, Paris (adopted 12 December 2015, entered into force 4 November 2016).
[7] UNEP, 'Emissions Gap Report 2022' (2022) 32 <http://www.unep.org/resources/emissions-gap-report-2022> accessed 3 September 2023.

ambitions fivefold to achieve the 1.5°C goal.[8] Consequently, the question arises how States can be brought to implement more ambitious and immediate climate policies.

One possible tool is climate change litigation. Climate change litigation can be pursued on different avenues. Litigation can take place in front of international courts and tribunals, such as the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). It can also take place on the domestic level, where national courts may set boundaries to the legislative power. It can be initiated by a State against another State or by civil society actors and individuals. In their 2022 report on global trends in climate change litigation, Setzer and Higham have observed that the number of climate change cases is increasing.[9] Their latest report shows that the growth rate in cases seems to be slowing but that the diversity in the cases is still expanding.[10] Thus, climate change litigation appears to be of increasing importance.

The legal scholarship appears to be divided on the utility of climate change litigation. On the one hand, a recurring point of critique is that negotiation between the States would be more beneficial than litigation or, put differently, that climate change litigation might have negative effects on the negotiation process under the climate regime and therefore hinder the development towards stronger environmental commitments by States.[11] In addition, climate change is different to other environmental problems faced in the past. It has been characterized, inter alia, as a "super-wicked problem"[12] or "polycentric problem"[13]. Hence, the nature of the

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[8] ibid.

[9] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy 2022) 3 <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/> accessed 24 May 2023.

[10] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2023) 3 <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/> accessed 8 October 2023.

[11] See e.g., Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections Symposium: The Forefront of International Law' (2017) 49 Arizona State Law Journal 689; Natalie Klein, 'International Environmental Law Disputes Before International Courts and Tribunals' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 1041 <https://doi.org/10.1093/law/9780198849155.003.0060> accessed 23 August 2023; Benoit Mayer, 'International Advisory Proceedings on Climate Change' (2023) 44 Michigan Journal of International Law 41, 177.

[12] See e.g., Kelly Levin and others, 'Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change' (2012) 45 Policy Sciences 123.

[13] Aref Shams, 'Tempering Great Expectations: The Legitimacy Constraints and the Conflict Function of International Courts in International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 193.

climate change problem makes international adjudication of climate change cases a difficult task and could lead to legitimacy issues. Mayer and Van Asselt recently even argued that "international climate litigation could damage the very credibility of international legal system on which climate cooperation relies."[14]

On the other hand, these standpoints are opposed by more positive views on climate change litigation. Lowe has argued that "regardless of the outcome of the case, international litigation always has the effect of reasserting and reinforcing the institutions of international law through which the dispute is pursued, and in this way strengthening the international legal system as such".[15] Further, it is argued that adjudication provides an instrument for dialogue and awareness.[16] Peel has opined that "in the absence of strong government action to address climate change, rulings in climate change litigation may serve as a de facto source of national climate policy with very real impacts on the regulatory landscape".[17] Similarly positive, Rajamani and Werksman found that climate change litigation, "whether or not successful in courts, [has] catalyzed climate ambition in some countries, and more broadly [helps] steer the public conversation on climate ambition".[18] These contentions appear to be accurate, as in 2022 also the IPCC recognized that climate change litigation can influence "the outcome and ambition of climate governance".[19]

Against this background that a lot more must be done to curb climate change, and whilst recognizing the skepticism mentioned above, this thesis is based on the premise that climate change litigation is a useful tool to shape and influence the ambition of States in climate governance. Nevertheless, it is also aware of the fact that seeking judgment from an international Court or Tribunal is never an end in itself but a step towards a solution of a

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[14] Benoit Mayer and Harro van Asselt, 'The Rise of International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 175, 183.
[15] Vaughan Lowe, 'The Function of Litigation in International Society' (2012) 61 International & Comparative Law Quarterly 209, 213–214; Of the same opinion is also Cesare PR Romano, 'Litigating International Law Disputes: Where To?' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014) 471 <https://www.cambridge.org/core/books/litigating-international-law-disputes/litigating-international-law-disputes-where-to/3F38B66B4D61F07AC3F9F610E30CA390> accessed 6 October 2023.
[16] Hari M Osofsky, 'The Continuing Importance of Climate Change Litigation' (2010) 1 Climate Law 3, 29.
[17] Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 2011 Carbon & Climate Law Review 15, 23.
[18] Lavanya Rajamani and Jacob Werksman, 'Climate Change' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 508 <https://doi.org/10.1093/law/9780198849155.003.0029> accessed 25 August 2023.
[19] 'AR6 Climate Change 2022: Mitigation of Climate Change — IPCC' 50 <https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/> accessed 2 June 2023.

problem that needs to be complemented by other, especially political, processes.[20] Resting on this premise and with its subject area situated in the law of the sea, the thesis focuses on whether the 1982 UN Convention on the Law of the Sea (UNCLOS or the Convention) offers a useful tool for climate change litigation.[21] The almost universal multilateral treaty[22] was intended as a comprehensive "legal order for the seas and oceans".[23] It establishes a legal framework for all marine and maritime activities and provides a "stable and principled foundation for responses to contemporary challenges".[24] For this reason, it is often referred to as a "constitution for the oceans".[25] Even though climate change was not foreseen during the negotiation process, the UNCLOS' nature as a "living instrument" nevertheless allows to bring climate change into its ambit.[26]

In order to underline the relevance of the UNCLOS regulatory scope for climate change litigation, it is necessary to briefly introduce the role of the oceans in the world's climate system. The oceans cover more than 70% of the earth's surface and are home to unique ecosystems and habitats. The IPCC's 2022 special report on the ocean and cryosphere in a changing climate has shown that the oceans are "interconnected with other components of the climate system through global exchange of water, energy and carbon".[27] Furthermore, the oceans take up more than 90% of the excess heat in the climate system. As a result, the oceans suffer serious consequences from climate change, such as rising sea levels, ocean acidification, melting sea ice.[28]

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[20] See e.g., Shirley V Scott, 'Litigation versus Dispute Resolution through Political Processes' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014) 26 <https://www.cambridge.org/core/books/litigating-international-law-disputes/litigation-versus-dispute-resolution-through-political-processes/9664DF8C569BD6E18693214C5E28D9CF> accessed 6 October 2023; Lowe (n 15) 213–214.

[21] United Nations Convention on the Law of the Sea, Montego Bay (adopted 10 December 1982, entered into force 16 November 1994).

[22]See: https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm > accessed 13 August 2023.

[23] Preamble UNCLOS

[24] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Second edition, Hart Publishing 2016) 7.

[25] '"A Constitution for the Oceans" Remarks by Tommy Koh, President of the Third United Nations Conference on the Law of the Sea. 6111'.

[26] See inter alia: Jill M Barrett, 'The UN Convention on the Law of the Sea: A "Living Treaty"' in Jill M Barrett and Richard Barnes (eds), *Law of the sea: UNCLOS as a living treaty* (The British Institute of International and Comparative Law 2016).

[27] Intergovernmental Panel On Climate Change (Ipcc), *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change* (1st edn, Cambridge University Press 2022) 5 <https://www.cambridge.org/core/product/identifier/9781009157964/type/book> accessed 2 June 2023.

[28] ibid.

Part XII of the UNCLOS includes numerous provisions on the protection and preservation of the marine environment that could be interpreted in light of climate change effects on the oceans. A variety of commentators consider that Part XII of the UNCLOS requires States to take measures to protect the marine environment from the climate change effects, albeit differ regarding the extent of the obligation.[29] These will be discussed in more detail in chapter 2.

As for law of the sea-based litigation opportunities, and as elaborated upon in chapter 3, Part XV establishes a compulsory dispute settlement system for disputes about the interpretation and application of the Convention. Some commentators therefore contend that the UNCLOS could provide a mechanism for litigating climate change[30] – a mechanism of which the current Paris Agreement, the Kyoto Protocol[31] and the United Nations Framework Convention on Climate Change[32] (hereinafter together referred to as the climate regime) is lacking, since it mainly relies on non-binding compliance and conciliation.[33] Other commentators, however, take a more critical stand towards the feasibility and effectiveness of contentious litigation, and alternatively suggest using the mechanism of UNCLOS to seek an advisory opinion.[34] Their scepticism is largely based on difficult issues that arise during litigation, such as establishing causation. [35] Sands also argues that the advisory role of the international courts and tribunals could be more useful than contentious litigation because the instrument it could be more apt for

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[29] See e.g., Alan Boyle, 'Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime' in Elise Johansen, Ingvild Ulrikke Jakobsen and Signe Veierud Busch (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/law-of-the-sea-and-climate-change/protecting-the-marine-environment-from-climate-change/2FBE57DA57B6530A4FB227818F0B2716> accessed 24 May 2023; James Harrison, 'Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment', *Saving the Oceans Through Law* (Oxford University Press) <https://opil-ouplaw-com.mime.uit.no/display/10.1093/law/9780198707325.001.0001/law-9780198707325> accessed 2 September 2023; Bastiaan Ewoud Klerk, 'Protecting the Marine Environment from the Impacts of Climate Change: A Regime Interaction Study' (2023) 32 Review of European, Comparative & International Environmental Law 44.
[30] e.g. Nilufer Oral, 'Implementing Part XII of the 1982 UN Law of the Sea Convention and the Role of International Courts' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press 2013) <https://doi.org/10.1007/978-90-6704-894-1_31> accessed 12 August 2023; Roda Verheyen and Cathrin Zengerling, 'International Dispute Settlement' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 430 <https://doi.org/10.1093/law/9780199684601.003.0019> accessed 15 August 2023 et seq.
[31] Kyoto Protocol (adopted 11 December 1997, entered into force 16 February 2005)
[32] United Nations Framework Convention on Climate Change (adopted 9 May 1992 entered into force 21 March 1994)
[33] See e.g., Patricia Birnie, Alan Boyle and Catherine Redgwell, *Birnie, Boyle & Redgwell's International Law and the Environment* (4th ed, Oxford university press 2021) 395 et seq.
[34] See e.g., Seokwoo Lee and Lowell Bautista, 'Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate against Climate Change: Making out a Claim, Causation, and Related Issues Oceans and Climate Change Governance' (2018) 45 Ecology Law Quarterly 129, 154.
[35] ibid.

developing consensus and offer "clarification rather than point fingers of blame".[36] In the recent years, the advisory role of international Courts and Tribunals in the climate change context has gained increasing attention by States and commentators alike. In March 2023, the UN General Assembly adopted resolution A/77/L.58, requesting the ICJ to render an opinion on the obligations of States under international law to ensure the protection of the climate system from anthropogenic emissions of greenhouse gases and on the legal consequences if a State has caused significant harm to the climate system. This procedure takes its place alongside two other requests for advisory opinions on the climate change obligations of States currently pending before the Inter-American Court of Human Rights and the ITLOS. Because of its relevance, this thesis will therefore consider both contentious litigation and advisory jurisdiction in chapter 3.

Altogether, Lee and Bautista appeal for "a better understanding of the linkages between Parties' obligations under relevant treaties such as the UNFCCC, the Paris Agreement, and UNCLOS", as that "may provide further impetus for States to take climate change seriously and increase their efforts to negotiate additional agreements and implement them effectively".[37] It is in the hope to address these linkages and against the backdrop of a growing trend in climate litigation, the relevance of the oceans to the climate system and the obligations and mechanisms provided by Parts XII and XV of the UNCLOS that this thesis aims to contribute to a deeper understanding of the role of the law of the sea in the future of climate litigation.

## 1.2 Research Question and Scope

Keeping in mind this thesis' aim of contributing to a deeper understanding of the role of the law of the sea in the future of climate change litigation and strengthening the argumentative toolbox of international lawyers and civil society actors, the main research question that this thesis aims to answer can be formulated as follows:

"What scope is there for settling disputes over climate related obligations under the UNCLOS before international courts and tribunals?"

The term "disputes" will be understood broadly. As introduced in the opening section, international courts and tribunals may give non-adversarial advisory opinions on legal matters

[36] Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 Journal of Environmental Law 19, 20.
[37] Lee and Bautista (n 34) 155.

in addition to contentious proceedings. The purpose of advisory opinions is to offer legal advice.[38] Upon close examination, it is therefore not a mechanism for dispute settlement, but rather a judicial opinion.[39] However, Thirlway observed that the mechanism is generally discussed under the frame of judicial settlement of international disputes.[40] Hence, for the purposes of this thesis the advisory opinions will also be dealt with as an instrument of litigation on the international plane and therefore fall within the remit of the research question.

The first sub-question that arises from this overall research question is: "what are the different obligations of States regarding climate-related obligations under the UNCLOS?" Consequently, the thesis will look at the obligations contained in Part XII of the UNCLOS that are applicable in the context of climate change. More specifically, it focuses on the Arts. 192, 194, 207 and 212 of the UNCLOS. Of course, more provisions of the UNCLOS could be applicable in the broader climate change context, such as the rules on international cooperation, the obligation to conduct environmental impact assessment and the regulation of pollution by vessels. This thesis narrows the scope to the above-mentioned articles, however, because those articles could potentially establish a general standard of care that States need to follow in the face of climate change.

Thus, the second sub-question asks: "what is the potential for these obligations to be used in or through litigation?" It thus considers how the obligations established under the first sub-question could possibly be litigated, where a litigation could take place and which actors, State or non-State, could litigate them. The thesis will thus look at both contentious litigation under the UNCLOS and non-contentious advisory proceedings, with a special focus on the Advisory Opinion which is currently pending at the ITLOS. It will look at the role of non-State actors as experts or witnesses and amici curiae in both dispute settlement mechanisms.

The ITLOS concluded the public hearing in the advisory opinion requested by the Commission of Small Island States on Climate Change and International Law (COSIS) on 25 September

[38] *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinions]* (ICJ) [15].
[39] Hugh Thirlway, 'Advisory Opinions' (*Oxford Public International Law*) para 2 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e4?prd=MPIL> accessed 18 September 2023.
[40] ibid.

2023 and will now deliberate on the case.[41] The proceedings in September have been considered but, due to the limited amount of time, will not be part of the scope of this research.

## 1.3 Methodology

Having identified the contextual background and explained the purpose and scope, this section turns to the methodology applied throughout the thesis.

The thesis seeks to answer the questions "what are the different obligations of States regarding climate change under the UNCLOS?" and "how and by whom can they be litigated?" and thus seeks to identify the *lex lata*. In other words, it asks "what is the law?". For this purpose, the thesis will follow the legal doctrinal approach as suggested by Smits. He describes the doctrinal approach as "research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law".[42] The legal doctrinal approach is not without criticism.[43] According to Smits, the points of criticism can however be discarded if the doctrinal approach is applied in a methodologically sound way.[44]

Therefore, the relevant materials, that this thesis is based on, will now be presented.[45] Traditionally, Art. 38(1) Statute of the International Court of Justice (ICJ Statute)[46] is the starting point for the explanation of sources of international law.[47] The provision lists treaties and conventions, customary international law, and general principles of law as primary sources. This thesis is firmly based on the UNCLOS, which is this thesis' main source. Next to the UNCLOS, the thesis is based on the provisions from the UNFCCC and especially the Paris Agreement. Furthermore, as regards the litigation part of this thesis, the ICJ Statute, the ITLOS

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[41] 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law' <https://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 8 October 2023.
[42] Jan M Smits, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (1 September 2015) 5 <https://papers.ssrn.com/abstract=2644088> accessed 17 July 2023.
[43] See for an overview of the criticism inter alia: Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis Group 2013) 15 f. <http://ebookcentral.proquest.com/lib/tromsoub-ebooks/detail.action?docID=1318978> accessed 1 August 2023.
[44] Smits (n 42) 17.
[45] ibid 14.
[46] Statute of the International Court of Justice, (adopted 26 June 1945 entered into force 24 October 1945)
[47] Alain Pellet and Daniel Müller, 'Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (Third edition, Oxford University Press 2019) 846 para 77.

Statute and Rules are of relevance. As secondary sources Art. 38(1) ICJ Statute lists judicial decisions and the teachings of the most highly qualified publicists. This thesis has recourse to a variety of cases from the international jurisprudence. Moreover, the thesis relies to a large extent on the articles and commentaries on the topic published by the legal scholarship. Many argue that Art. 38(1) ICJ Statute reflects State practice and therefore has a declaratory character regarding the sources of international law in general, however the nature of this provision is highly debated.[48] Yet, an extensive analysis of Art. 38(1) ICJ Statute and its shortcomings would be beyond the scope of this thesis. One aspect of the discussion must nevertheless be mentioned. It is debated whether "soft law", non-binding norms beyond the list in Art. 38(1) ICJ Statute, is a further source of international law.[49] Some criticize the term "soft law" for blurring the line between the lex lata and lex ferenda, confusing the differentiation between what the law is and what the law ought to be.[50] This thesis agrees with the arguments posited in the debate that the legal value of soft law can be identified the same way as a stipulation of legally binding character,[51] and that soft law is able to modify the interpretation of existing treaty law.[52] This thesis thus follows the argumentation of Pellet and Müller that Art. 38(1) ICJ Statute that the enumeration of the sources in Art. 38(1) ICJ Statute is not exhaustive.[53] Therefore, where relevant, this thesis will also be based on soft law.

Following Smits approach, after having made the choice of materials transparent, next, light must be shed on the techniques used to describe the existing law.[54] This thesis relies on the rules of interpretation laid out in the Vienna Convention on the Law of Treaties (VCLT).[55] Art. 31 VCLT, which stipulates the general rule of interpretation, is universally considered as

[48] ibid 849 para 80; See for an overview of the discussion: Samantha Besson and Jean D'Aspremont, 'The Sources of International Law: An Introduction' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017) 2.
[49] Olufemi Elias and Chin Lim, '"General Principles of Law", "Soft" Law and the Identification of International Law' (1997) 28 Netherlands Yearbook of International Law 3, 45.
[50] See for an overview of the current debate: Malgosia Fitzmaurice, 'Part I The Histories of the Sources of International Law, s.IV The History of Article 38 of the Statute of the International Court of Justice, Ch.8 The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017) 197.
[51] Elias and Lim (n 49) 48.
[52] Fitzmaurice (n 50) 197.
[53] Pellet and Müller (n 47) 846 para 76.
[54] Smits (n 42) 15.
[55] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980)

reflecting customary international law.[56] Art. 32 VCLT contains supplementary means of interpretation. The stipulation that treaties must be interpreted in accordance with the "ordinary meaning" of the terms, giving weight to the "object and purpose" of the treaty in Art. 31(1) VCLT in conjunction with the stipulation that "any relevant rules of international law" must be "taken into account, together with the context" in Art. 31(3)(c) VCLT, buttresses the mechanism of so-called "evolutionary interpretation".[57] Evolutionary interpretation will be of special importance for this thesis because especially in the relevant Part XII the Convention uses many generic terms whose interpretation has changed over time. It is inter alia for this reason that the UNCLOS is described as a "living treaty".[58] Furthermore, Art. 31(3)(c) VCLT will be of special relevance, since this thesis' subject area is located at the nexus of the law of the sea and the international climate regime. According to the work of the International Law Commission (ILC), recourse may always be had to Art. 31(3)(c) VCLT if there is "an inconsistency, a conflict, an overlap between two or more norms".[59] This thesis thus, relies to a large extent on what has been called "harmonious interpretation" or "systemic integration".[60] Moreover, where necessary, this thesis has recourse to further collision rules such as the *lex specialis* rule.

## 1.4 Outline of the Thesis

The thesis follows the order of the sub-questions that were derived from the main research question presented above. Consequently, the first substantive chapter explores the different climate related obligations of States under UNCLOS (2). The next chapter turns to the potential of these obligations to be used in or through litigation, examining the relevant actors, State and non-State, and legal avenues in climate change litigation on the international plane (3). Finally, a conclusion is drawn (4).

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[56] Matthias Herdegen, 'Interpretation in International Law' (*Oxford Public International Law*) para 7 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e723?prd=MPIL> accessed 11 October 2023.
[57] Irina Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction' in Donald Rothwell and others (eds), *The Oxford handbook of the law of the sea* (First edition, Oxford University Press 2015) 52; See generally Eirik Bjørge, 'Evolutionary Interpretation of Treaties' (Faculty of Law, University of Oslo 2013).
[58] Barrett (n 26).
[59] International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi'' (2006) UN Doc A/CN.4/L.682 para 420.
[60] Buga (n 57) 61.

# 2 Climate Change Obligations under UNCLOS

As set out above, the following chapter addresses the question what the climate-related obligations are under the UNCLOS. Part XII, titled "protection and preservation of the marine environment" contains most of the numerous provisions on the protection of the marine environment that can be found throughout the Convention. The chapter begins with an examination of term "marine environment" and considers whether climate change impacts fall under the definition of "pollution" of the marine environment under the UNCLOS (2.1.). Then, it presents the relevant climate-related obligations UNCLOS (2.2.) and proceeds with an assessment of the due diligence standard under UNCLOS (2.3.) before some concluding remarks are made (2.4.).

## 2.1 Climate Change as Pollution of the Marine Environment

The obligations contained in Part XII UNCLOS, which are to be assessed at a later stage of this thesis, need to a large extent be interpreted with regard to the UNCLOS' definition of "pollution of the marine environment". Although Art. 1(1)(4)[61] defines the term "pollution", it is silent on the meaning of "marine environment". Neither is the term explicitly defined somewhere else within the Convention. Thus, it must first be clarified how the term "marine environment" is to be interpreted and second, whether the effects of climate change can be subsumed under the pollution definition of Art. 1(1)(4).

In accordance with Art. 31(1) VCLT, the term "marine environment" in Art. 1(1)(4) must be interpreted in the context of the provisions of Part XII, titled "protection and preservation of the marine environment". Art. 194(5) can be read as extending the term "marine environment" to "rare and fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life".[62] In its *Fisheries Advisory Opinion* the ITLOS affirmed that "living resources and marine life are part of the marine environment"[63] and recalled its earlier decision in the *Southern Bluefin Tuna Cases* according to which "the conservation of the living resources is an element in the protection and preservation of the marine

[61] Hereinafter, all articles without a specification are articles of the UNCLOS.
[62] Art. 194 (5) UNCLOS, cf. also *South China Sea Arbitration (Philippines v China)* [2016] PCA Case No 2013-19 [945].
[63] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* (ITLOS) [216].

environment".[64] Consequently, Czybulka concludes that the term "marine environment" is "comprehensive and includes the entire marine ecosystem".[65] The term "ecosystem" is also not defined in the UNCLOS, however. In the *South China Sea Arbitration* the tribunal pointed to the internationally accepted definition of the term in Art. 2 of the CBD,[66] "which defines an ecosystem to mean a 'dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'".[67] Boyle suggests that the term "marine environment" "should also be interpreted to cover protection of marine biodiversity in general".[68] It can therefore be concluded that term "marine environment" should be interpreted very broad and comprehensive.

Having established the broad definition of the "marine environment", the next question that arises is whether the climate change and its effects on the oceans can be subsumed under the definition of "pollution of the marine environment". Art. 1(1)(4) defines "pollution of the marine environment" as meaning "the introduction by man, directly or indirectly, of substances or energy into the marine environment […] which results or is likely to result in such deleterious effects as harm to living resources and marine life […]". For a thorough interpretation the context, object and purpose of the treaty must be included.[69] Therefore, again recourse may be had to the provisions of Part XII of the UNCLOS. The Arts. 192-194 oblige States to "protect and preserve the marine environment"[70] and to take "all measures […] that are necessary to prevent, reduce and control pollution of the marine environment from any source"[71]. In light of these provisions, the term "pollution of the marine environment" can be interpreted as being very broad.

Global greenhouse gas emissions and the interconnected human-induced climate change, represent a form of energy or substance that is introduced by man into the marine environment. As noted above, scientific evidence shows that the global greenhouse gas emissions and climate change have led to ocean warming, acidification, oxygen loss and a decreasing sea ice extent.

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[64] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan), Provisional Measures* [1999] ITLOS Reports 1999 280 (ITLOS) 295 para 70.
[65] Detlef Czybulka, 'Art. 192' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1287 para 25.
[66] Convention on Biological Diversity (adopted 2 May 1992, entered into force 29 December 1993)
[67] *South China Sea Arbitration (Philippines v China)* (n 62) para 945, Art. 2 CBD.
[68] Boyle (n 29) 86.
[69] In accordance with Art. 31(1) VCLT.
[70] Art. 192 UNCLOS.
[71] Art. 194(1) UNCLOS.

All of which have already had "deleterious" effects on marine life.[72] Hence, there is widespread consensus that greenhouse gas emissions and its consequences on the oceans can be regarded as "marine pollution".[73]

Having established that the global greenhouse gas emissions can be subsumed under "marine pollution" the following sections will focus more closely on the climate related obligations under the UNCLOS.

## 2.2 Climate-related Obligations under the UNCLOS

From the multitude of rules and principles on environmental protection contained in the UNCLOS, the following section will focus on the most relevant obligations in the climate change context located in Part XII of the Convention.[74]

Part XII is based on a three-pronged approach.[75] Section 1 of Part XII contains general provisions prescribing a set of measures for the protection of the marine environment. Section 5, titled "international rules and national legislation to prevent, reduce and control pollution of the marine environment", contains more specific obligations on different sources of pollution. The subsequent Section 6 lays out corresponding rules of enforcement. The following will focus mainly on steps one and two of the three-level structure. The analysis will thus start with the general obligations of Arts. 192 and 194 and end with the more specific obligations of Arts. 207 and 212.

As mentioned in the previous section, the opening provision of Part XII of the UNCLOS places the obligation on the States "to protect and preserve the marine environment".[76] The provision's

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[72] See also: Tim Stephens, '34 Warming Waters and Souring Seas: Climate Change and Ocean Acidification' (*Oxford Public International Law*) <https://opil-ouplaw-com.mime.uit.no/display/10.1093/law/9780198715481.001.0001/law-9780198715481-chapter-34> accessed 24 August 2023.

[73] See e.g. Robin Churchill, 'The LOSC Regime for Protection of the Marine Environment - Fit for the Twenty-First Century?' in Rosemary Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing Limited 2015) 29 <http://ebookcentral.proquest.com/lib/tromsoub-ebooks/detail.action?docID=4087098> accessed 25 August 2023.

[74] In addition to the obligations in Part XII, principles and rules on environmental protection can be found in other parts of the Convention see e.g. Adriana Fabra, 'The Protection of the Marine Environment Pollution and Fisheries' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 533 <https://doi.org/10.1093/law/9780198849155.003.0031> accessed 23 August 2023.

[75] Frank Wacht, 'Art. 207' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1380 Para 2.

[76] Art. 192.

high generality initiated a debate on the legal character of Art. 192 surrounding the issue whether the provision had a legal effect on States or merely needed to be understood as a political statement.[77] At the latest since the *South China Sea Arbitration*, a case that has gained a lot of attention by scholars and practitioners, the discussion appears to be settled. The tribunal held it to be "well established that Art. 192 does impose a duty on States Parties".[78] Only what does the duty comprise?

To begin with, the provision's spatial scope is very broad. It is applicable in all maritime zones, within and beyond national jurisdiction.[79] The *South China Sea Arbitration* discussed the provision's material scope at length. Relying on the ordinary meaning of the terms in the provision, the tribunal concluded that the obligation "extends both to protection of the marine environment from future damage and preservation in the sense of maintaining or improving its present condition".[80] It further reasoned that the provision "entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment".[81] Moreover, the tribunal held that the content of Art. 192 needs to be interpreted in the context of the subsequent provisions in Part XII of the UNCLOS and, by virtue of Art. 237, further applicable rules of international law.[82] This section therefore now turns to the other relevant obligations of Part XII.

Art. 194, also located within the general provisions of Part XII, requires States to take all measures that are necessary to prevent, reduce and control pollution of the marine environment from "any source"[83] and to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.[84] Art. 194(3)(a) specifies that States shall take measures designed to "minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping". Hence,

[77] For an overview of the discussion see Czybulka (n 65) 1283 para 18.
[78] *South China Sea Arbitration (Philippines v China)* (n 62) para 941.
[79] ibid 940.
[80] ibid 941.
[81] *South China Sea Arbitration (Philippines v China)* (n 62) para 941.
[82] ibid 941 f.
[83] Art. 194(1).
[84] Art. 194(2).

albeit Art. 194 is also characterized by a high degree of generality, the focus of the provision shifts in comparison to Art. 192 to the prevention of pollution.

As explained above, Section 5 of Part XII further specifies the obligation of States to protect the marine environment from pollution. For our purpose, Arts. 207 and 212 are of peculiar importance, which looks as follows. Art. 207 specifically addresses the pollution by land-based sources. It has to be noted that most of the marine pollution is not derived from maritime activities, but from anthropogenic activities linked to land-based sources.[85] However, UNCLOS does not define the term 'land-based sources'. Instead, Art. 207(1) refers exemplary to pollution by or through "rivers, estuaries, pipelines and outfall structures".[86] Art. 212, on the other hand, addresses pollution "from or through the atmosphere" and is applicable "to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry". Consequently, the question arises, whether "land-based sources" can be read as including greenhouse gas emissions from State territory or whether these emissions would fall under the remit of Art. 212. Both positions are advocated in the scholarship. Other international conventions such as the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)[87] define "land-based sources" broadly as any "point and diffuse sources on land from which substances or energy reach the maritime area by water, through the air, or directly from the coast".[88] Boyle therefore argues that Art. 207(1) can be interpreted as including "coal-fired power stations or other land-based activities which generate greenhouse gas emissions that pollute the marine environment".[89] Osborn also seems to rely on Art. 207 for CO2 that has been released within a State's territory.[90] Peel et. al equally include atmospheric pollution from land-based sources under Art. 207.[91] Wacht, on the other hand, argues that for the purposes of UNCLOS the term needs to be interpreted more restrictively,

[85] David Osborn, 'Land-Based Pollution and the Marine Environment' in Rosemary Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing Limited 2015) 81 <http://ebookcentral.proquest.com/lib/tromsoub-ebooks/detail.action?docID=4087098> accessed 25 August 2023.
[86] Art. 207(1) UNCLOS.
[87] Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998).
[88] ibid Art. 1 (e).
[89] Boyle (n 29) 87.
[90] cf. Osborn (n 85) 92.
[91] Philippe Sands and others, *Principles of International Environmental Law* (Fourth edition, Cambridge University Press 2018) 476.

since atmospheric pollution is regulated in Art. 212.[92] Harrison also relies on Art. 212.[93] The latter interpretation carries substantial weight due to the systematic argument that the scope of Art. 212 would be narrowed significantly if the CO2 emissions by factories etc. were dealt with under Art. 207. Nevertheless, there seems to be an emerging consensus that Art. 207 extends to point and diffuse input from all sources on land.[94] Ultimately, it arguably makes little or no difference which Article is relied upon.[95] For the purposes of this work, Art. 207 is therefore understood as extending to the CO2 emissions by land-based sources.

Art. 207 contains prescriptive obligations ordering States to adopt instruments on a national, regional and global level in order to fulfill their obligations from Art. 192, 194(1) and (3)(a).[96] A similar provision to Art. 194(3)(a) may be found in Art. 207(5) which specifies the obligation contained in Art. 207(1), (2) and (4). Art. 212 does not contain a comparable clause. As noted above, the release of greenhouse gases into the atmosphere and the corresponding deposition of energy into the oceans is toxic and will be persistent.[97] However, the provisions give only limited guidance on how to fulfill the obligations.[98] Boyle nevertheless concludes with regard to Art. 207(5) that States have to "do something significant about climate change" in order to comply with the obligation.[99] This conclusion may arguably be transferred equally to Art. 194(3)(e) and be therefore similarly applicable to atmospheric pollution if the argumentation was based on Art. 212. The question remains, what is required by States under these obligations.

## 2.3 Due Diligence Standard under UNCLOS

While Art. 192 establishes an obligation to protect the marine environment from all adverse effects, Art. 194 obligates the States to prevent, reduce and control the adverse effects of climate change on the marine environment with regards to pollution and Arts. 207 and 212 focus on the specific sources of land-based and atmospheric pollution. Thus, even though the wording of the different obligations differs slightly, the main difference between the obligations is their scope.[100] The obligations are not obligations of result, but obligations of conduct. Hence, the

[92] Wacht (n 75) 1383 Para. 7.
[93] Harrison, 'Saving the Oceans Through Law' (n 29) 255 et seq.
[94] Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 237, 245.
[95] Boyle (n 29) 87.
[96] Wacht (n 75) 1380 para. 1.
[97] Boyle (n 29) 85.
[98] cf. Wacht (n 75) 1390 Para. 20.
[99] Boyle (n 29) 90.
[100] Klerk (n 29) 53.

obligations require a certain behaviour by the States instead of prescribing to bring about a specific effect. The standard of care for obligations of conduct is one of due diligence.[101] Together the Arts. 192, 194, 207 and 212 indicate a due diligence obligation to take all necessary measures to protect and preserve the marine environment from the adverse effects climate change and to prevent, reduce and control pollution from all sources.[102] This section therefore examines how the concept of due diligence is characterized in the international jurisprudence (2.3.1.) Moreover, since the climate-related due diligence standard under UNCLOS can not be interpreted in isolation of further international law,[103] and Arts. 207 and 212 furthermore refer to the climate regime by rules of reference, the relevant provisions for climate change mitigation in the climate regime and current developments are presented (2.3.2). This section finally examines to what extent the climate regime informs the due diligence standard under UNCLOS Part XII (2.3.3).

### 2.3.1 Due Diligence in International Law

The concept of due diligence has been discussed repeatedly in the international jurisprudence. Acting in due diligence means to "deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain [the] result".[104] It is a "variable concept" that "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge".[105] It may also change in proportion to the risks involved, meaning that "the standard of due diligence has to be more severe for the riskier activities".[106] The ITLOS further added with regard to the obligation to prevent illegal, unreported, and unregulated (IUU) fishing that "while the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations".[107] The ITLOS Seabed Chamber moreover held that the due diligence obligation of sponsoring States demands the application of the

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[101] Lavanya Rajamani, 'Due Diligence in International Climate Change Law' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 164.
[102] Klerk (n 29) 53; Voigt (n 94) 245.
[103] Art. 31(3)(c) VCLT.
[104] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion* [2011] ITLOS ITLOS Reports 2011 10 [110].
[105] ibid 117.
[106] ibid.
[107] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* (n 63) para 138.

precautionary approach, which is an "integral part of the general obligation of due diligence", that is triggered "where there are plausible indications of potential risk.[108]

Rajamani consequently observes that "the nature and extent of due diligence required of States varies across different areas of international law, and in differing contexts".[109] The next section therefore turns to the specific question what the due diligence obligation to protect and preserve the marine environment from pollution requires in the context of climate change under the UNCLOS.

### 2.3.2 Due Diligence in the International Climate Regime

The UNCLOS obligations to protect and preserve the marine environment can not be examined in isolation of the developments in further international law. Instead, a comprehensive analysis of the due diligence obligations under UNCLOS needs to be based on the concept of systemic integration and take into account the rules of the international climate regime.[110] Therefore, it is necessary to introduce the relevant rules of the international climate regime. The climate regime consists of the 1992 UNFCCC, the Kyoto Protocol, the Paris Agreement, and the related decisions of the Parties under these instruments.[111] The most relevant treaty for the assessment of the due diligence standard under the UNCLOS is the current Paris Agreement. Consequently, the following analysis is restricted to the Paris Agreement and its latest developments.

After long negotiations, the Paris Agreement was adopted in 2015 "under the Convention [UNFCC]" but without reference to the forms regulated by the UNFCCC (amendment or protocol). It is thus a sui generis instrument.[112] Rajamani and Werksman note that it is "built on the assumption that no additional treaty negotiations or legally binding instruments are necessary to achieve its ambitious goals".[113] The objective of the Paris Agreement is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels".[114] "In order to achieve the long-term temperature goal, the parties aim to reach global peaking of greenhouse gas emissions as soon as possible […] and to undertake rapid reductions thereafter

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[108] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion* (n 104) para 131.
[109] Rajamani (n 101) 171 with further reference to ILA, Study Group on Due Diligence, Second Report 2016.
[110] Art. 31(3)(c) VCLT.
[111] Rajamani and Werksman (n 18) 493.
[112] ibid 497.
[113] ibid 502.
[114] Art. 2(1)(a) Paris Agreement.

[…] so as to achieve a balance between anthropogenic emissions by sources and removal by sinks […] in the second half of this century.[115] In addition, the Agreement aims to increase the ability to adapt to the adverse impacts of climate change, foster climate resilience and make finance flows consistent with the mitigation and adaptation objectives.[116]

In her analysis, Rajamani systemizes the obligations of the Paris Agreement using a spectrum of hard, soft and non-obligations.[117] In her words, "hard obligations" are "provisions that create rights and obligations for Parties, set standards and lend themselves to assessments of compliance/non-compliance".[118] At the other end of the spectrum are "provisions lacking in normative content that capture understandings between Parties, provide context or offer a narrative" which she calls "non-obligations".[119] In the middle are "provisions that identify actors (each Party or all Parties), set standards, albeit frequently with qualifying and discretionary elements and in recommendatory terms (should or encourage)", thus "soft obligations".[120] In other words, some of the provisions contain an obligation of result, while others are obligations of conduct. The following will examine both but focus on the due diligence obligations.

Among the set of obligations under the Paris Agreement every Party needs to "prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve".[121] The Parties shall renew their NDCs in a five-year-cycle[122] and will successively increase their commitments with the highest possible ambition.[123] Developed countries are expected to take the lead by undertaking economy-wide absolute emission reduction targets.[124] In communicating their NDCs, all Parties shall provide the information necessary for clarity, transparency and understanding.[125] The provided information must allow

[115] ibid Art. 4(1)
[116] ibid Art. 2(1)(b) and (c).
[117] See e.g. Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 Journal of Environmental Law 337.
[118] ibid 352.
[119] ibid.
[120] ibid.
[121] Art. 4(2) Paris Agreement.
[122] ibid Art. 4(9).
[123] ibid Art. 4(3).
[124] ibid Art. 4(4).
[125] ibid Art. 4(8).

to track the progress made in implementing and achieving their NDCs.[126] Most of the other obligations are obligations of conduct, and therefore form part of the due diligence standard. [127]

In contrast to the previous Kyoto Protocol, the Paris Agreement leaves the determination of the Parties' reduction goals to the discretion of the States. Similar to the UNFCCC, the implementation of the Paris Agreement is guided by the principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC).[128] The latter is altered, however, by the added qualification "in light of different national circumstance" which "arguably introduces dynamism in the interpretation of [this principle]". [129] The Paris Agreement moreover does not rely on the use of static Annexes with a differentiation between developed and non-developed countries, but instead on categories of commitments that arguably "lead towards tailored and nuanced differentiation".[130] The discretion of the States is reflected in the NDCs submitted so far. There are differences between types of targets, in the reference points for the targets as well as in the scope and coverage of greenhouse gases, which make it difficult to compare the efforts of the parties.[131] For this purpose, the Paris Agreement established an enhanced transparency framework in Art. 13, which arguably seeks to generate pressure on the States to strengthen their commitments. [132] At the COP Meeting 2018 in Katowice the States furthermore adopted the Paris Rulebook that elaborates the Parties' obligations under the Paris Agreements procedures and mechanisms. The Rulebook specifies additional information that must be submitted together with the NDCs, especially requiring States to identify indicators to assess their progress.[133] So what standard of care can be deduced from the Paris Agreement?

Voigt has in this regard recently differentiated between the level of mitigation ambition, the standard of care that States need to take when determining their ambition level, and the obligation to pursue adequate domestic measures.[134] The differentiation will also be adhered to in the following. Hence, the first point to be addressed here is the level of mitigation ambition.

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[126] ibid Art. 13(7).
[127] Voigt (n 94) 239.
[128] ibid Art. 2(2).
[129] Rajamani and Werksman (n 18) 503.
[130] ibid.
[131] ibid 505.
[132] ibid.
[133] 'Decision 4/CMA.1 Further Guidance in Relation to the Mitigation Section of Decision 1/CP. 21'' para 7 <https://unfccc.int/documents/193407> accessed 9 October 2023.
[134] Voigt (n 94).

As set out above, the States have agreed to aim to curb the increase in the global average temperature to well below 2°C and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels".[135] At subsequent COP Meetings the States concretized the temperate goal and placed a stronger emphasis on the 1.5°C limit.[136] Consequently, when interpreting the temperature goal and the corresponding obligation of States, in accordance with Art. 31(3)(a) VCLT, the 1.5°C limit should now be considered to carry more normative weight than the less ambitious 2°C goal.[137] Furthermore, for States to act in compliance with Art. 4 (1), they need to act "in accordance with best available science". The best available science arguably refers to the assessments of the IPCC.[138] Therefore, the provision contains a dynamic element that is open for development.[139] Thus, if the scientific knowledge on the climate change advances, the content of the due diligence obligation alters as well.[140] It can hence be noted that even though Arts. 2(1) and 4(1) of the Paris Agreement are not in themselves binding, they still guide the conduct expected by the parties.[141]

Secondly, the standard of care for parties when determining their level of ambition. Art. 4(3) provides that the submitted NDCs will represent a progress compared to the earlier submissions and represent the States "highest possible ambition, reflecting its CBDRRC in the light of different national circumstances". The term "highest possible ambition" is not defined by the Paris Agreement, nor was it defined in the Paris Rulebook.[142] It can arguably be understood as the substantial expectation that each party deploys its "best efforts", yet mindful of the different (economic) capacities.[143] Voigt therefore suggests that the States need to engage in a comprehensive and holistic assessment of all mitigation options across all relevant sectors, taking into account the national peculiarities, when preparing their NDCs to successfully discharge the obligation in Art. 4(3).[144]

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[135] Art. 2(1) Paris Agreement.
[136] First established through 'Decision 1/CMA.3 Glasgow Climate Pact' para 21 <https://unfccc.int/event/cma-3#decisions_reports> accessed 9 October 2023; Reaffirmed through 'Decision 1/CMA.4 Sharm El-Sheikh Implementation Plan' <https://unfccc.int/event/cma-4#decisions_reports> accessed 9 October 2023.
[137] Voigt (n 94) 240.
[138] ibid.
[139] ibid.
[140] ibid.
[141] ibid.
[142] Rajamani (n 101) 169.
[143] Voigt (n 94) 240.
[144] ibid.

Thirdly, by virtue of Art. 4(2) of the Paris Agreement the States shall pursue domestic mitigation measures, with the aim of achieving the objectives set out in their respective NDCs. While this is arguably also not an obligation of result, it does require an appropriate conduct of the parties and is therefore as well part of the due diligence standard.[145] Thus, States must take best, effective and serious efforts in pursuit of reaching their NDCs.[146]

For Doelle it seems clear "that anything short of best efforts to get to net zero greenhouse gas emissions as quickly as possible will not pass any reasonable equity test".[147] Rajamani argues that the rules of conduct under the Paris Agreement "exercise considerable normative pull".[148] She positively notes that "to the extent that parties can be held to a high standard of due diligence in the discharge of their obligations of conduct under the climate regime, it may trigger an ever-increasing cycle of ambitious action, which could eventually meet the goals of the climate regime".[149] Whether these expectations are valid will depend on the future development of State practice. Successive NDCs will be due for the first time in 2025 and the global stocktake mechanism established by the Paris Agreement is due to conclude at the end of 2023.[150] Having thus demonstrated the level of due diligence required under the climate regime, to which the UNCLOS implicitly refers, the next section returns to the question of climate-related due diligence under the UNCLOS.

### 2.3.3 Is Following the Climate Regime enough?

The analysis of the climate regime has shown that the standard of conduct depends on a variety of factors and is subject to further development in the future. However, to what extent does the climate regime inform the due diligence standard under Part XII of the UNCLOS? Would a State that followed the standard of care placed on them by the international climate regime also act in accordance with the due diligence obligations under the UNCLOS at all times? Or is there room for a stand-alone due diligence standard under the UNCLOS? And what would the consequences be? These issues will be addressed in the following.

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[145] ibid 243.
[146] ibid.
[147] Meinhard Doelle, 'Chapter 22 Assessment of Strengths and Weaknesses' in Daniel R Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 387.
[148] Rajamani (n 101) 169.
[149] ibid 180.
[150] Doelle (n 147) 378.

On the one hand, the international climate regime becomes relevant for the interpretation of the UNCLOS obligations on the basis of Art. 31(3)(c) VCLT. On the other hand, the international climate regime could become relevant for the interpretation of the UNCLOS provisions through the mechanism of rules of reference. In general, rules of reference provide a mechanism for adaptation of the UNCLOS to modern challenges and interaction with other regimes.[151] Through rules of reference other rules and standards may be incorporated into the UNCLOS.[152] Since the referenced rules are subject to development and change, rules of reference are considered to be dynamic benchmarks.[153] This section thus now turns to the application of the rules of reference contained in Arts. 207(1) and 212(1) in light of the developments in the climate regime.

A typical rule of reference contains two elements, namely, the rule that is being referenced and the extent of the obligation that is imposed on the States.[154] Both Art. 207(1) and 212(1) refer to "internationally agreed rules, standards and recommended practices and procedures" and Art. 212(1) additionally refers to "the safety of air navigation". Since this thesis follows Boyle's consideration that Art. 207 extends to the greenhouse gas emissions by land-based sources, the following focuses on the term "internationally agreed rules and standards" that is also contained in Art. 207(1). The term is not defined by the UNCLOS. Thus, the question arises when a rule or a standard could be considered "internationally agreed". Upon literal interpretation "internationally agreed" could set a low threshold and apply to any agreement between two or more States. Nevertheless, given the high number of ratifications of the Paris Agreement and the UNFCCC it appears to be undisputed that through the reference to "internationally agreed rules and standards" in Arts. 207(1) and 212(1) the rules of the international climate regime are brought within the remit of the UNCLOS. Hence, the Paris Agreement may be seen as the relevant benchmark for the purposes of the due diligence obligation under UNCLOS.[155]

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[151] See e.g. Buga (n 57) 66.
[152] Lan Ngoc Nguyen, 'Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits' (2021) 52 Ocean Development & International Law 419, 421.
[153] Catherine Redgwell, 'The Role of GAIRS in UNCLOS Implementation' in Jill M Barrett and Richard Barnes (eds), *Law of the sea: UNCLOS as a living treaty* (The British Institute of International and Comparative Law 2016) 174.
[154] Nguyen (n 152) 421.
[155] See inter alia James Harrison, 'Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime', *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 422 <https://brill.com/display/book/edcoll/9789004447615/BP000020.xml> accessed 24 May 2023 et seq; and Boyle (n 29) 95.

As to the extent of the obligation, Art. 207(1) and Art. 212(1) both prescribe that the States need to "take into account" the internationally agreed rules and standards during the implementation of national laws and regulations to prevent, reduce and control pollution of the marine environment "from land-based sources" or "from or through the atmosphere". Taken that the Paris Agreement is the relevant benchmark for Arts. 207(1) and 212(1), what does it mean that the States are required to take them "into account" when adopting national measures? The term "taking into account" can be interpreted as meaning that States must merely consider international instruments.[156] This is the weakest form of rules of reference contained in the provisions on pollution in Section 5 of Part XII. The measures taken under those provisions shall be either "no less effective than"[157] or "at least have the same effect" as international rules and standards.[158] The decision of the drafters to soften the obligation for land-based and atmospheric pollution, arguably reflects the States' hesitation to curtail their sovereignty, as these sources of pollution are closely linked to the activities of States within their sovereign territory.[159] A stricter standard would have severe restrictions of industrial and other activities.[160] It is thus suggested that States have a wide margin of discretion as to how they fulfill their obligations under Art. 207.[161] Wacht points to Art. 300 as the limit of this discretion, as the States have to fulfill their UNCLOS obligations in good faith.[162] A literal interpretation of the rules of reference in Arts. 207(1) and 212(1) would therefore lead to the result that the parties to the UNCLOS only need to consider the obligations of the climate regime but are free to adopt measures that are less stringent. That would mean that the Paris Agreement would have only a small effect on the obligations contained in Arts. 207(1) and 212(1). However, most of the States Parties to UNCLOS are also State Parties to the UNFCCC and the Paris Agreement. Would the same interpretation be applicable to those States?

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[156] Wacht (n 75) 1384 Para. 9.
[157] Arts. 208 (3), 209 (2), 210 (6).
[158] Art. 211 (2).
[159] Doris König, 'Marine Environment, International Protection' (*MPEPIL*) para 26 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1594?prd=MPIL> accessed 5 September 2023.
[160] ibid.
[161] Wacht (n 75) 1385 Para. 9; Myron H Nordquist, Shabtai Rosenne and Satya Nandan (eds), 'Article 207 - Pollution from Land-Based Sources (IV)', *United Nations Convention on the Law of the Sea* (Brill) para 207.7(a) <https://referenceworks.brillonline.com/entries/united-nations-convention-on-the-law-of-the-sea/article-207-pollution-from-land-based-sources-iv-LAOS_9780792307648_125_134#book> accessed 2 October 2023.
[162] Wacht (n 75) 1385 para. 9.

Boyle argues that for States that are also State Parties to the Paris Agreement the "taking into account" can only be read as requiring them to implement the Paris Agreement, however not as requiring them to go beyond the Paris Agreement.[163] Hence, in his view, the Paris Agreement sets the mark for the obligation to protect and preserve the marine environment under the UNCLOS. This view is opposed by Klerk, who argues that since the Paris Agreement does not effectively protect the oceans, the UNCLOS obligations could go beyond the Paris Agreement and require more ocean-oriented efforts by States.[164] While under the international climate regime States could in theory be considered to act in accordance with the applicable standard of care if they focused on the reduction of greenhouse gases other than CO2, it is possible to argue that under the UNCLOS States would be required to focus on their effects on the marine environment.[165] The States could thus be required to specifically aim at a reduction of CO2, as it is the main greenhouse gas leading to ocean acidification.[166] Thus, if States focused their reduction targets solely or predominantly on other greenhouse gases, they would not act in accordance with the obligations laid out by the UNCLOS.[167] This view is shared by Harrison and Scott.[168] In effect, the issue that divides these two points of view is whether the climate regime sets the level of the climate-related obligations under UNCLOS or the UNCLOS contains climate-related obligations that are independent from the international climate regime.

Boyle rejects the latter notion, basing his argumentation mainly on the *lex specialis* rule and Art. 193.[169] According to the ILC the *lex specialis* rule suggests that, if a matter is regulated by a general standard as well as by a more specific rule, then the latter should take precedence over the former.[170] It should, however, be "read and understood within the confines or against the background of the general standard".[171] An interpretation of the Paris Agreement against the background of the UNCLOS arguably leads to the finding that States should take due consideration of the impact of climate change on the oceans.[172] The interpretation by Klerk, Harrison and Scott is therefore arguably compatible with the *lex specialis* rule. Art. 193

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[163] Boyle (n 29) 94.
[164] Klerk (n 29) 55.
[165] ibid.
[166] ibid.
[167] ibid.
[168] Harrison, 'Saving the Oceans Through Law' (n 29) 257; Karen N Scott, 'Ocean Acidification: A Due Diligence Obligation under the LOSC' (2020) 35 The International Journal of Marine and Coastal Law 382, 402.
[169] Boyle (n 29) 93–94.
[170] International Law Commission (ILC) (n 59) para 56.
[171] ibid.
[172] Klerk (n 29) 55.

indicates the balancing act that is to be struck between obligations to protect the marine environment and the freedom of States to exploit their natural resources by Part XII of the UNCLOS. Boyle thus considers Art. 193 to be an expression of the States' right to sustainable development and highlights its importance for the interpretation of Art. 207.[173] Klerk argues that "interpreting the Paris Agreement whilst giving due consideration to marine issues does not necessarily require States to make deeper cuts in their emissions, it merely requires States to adopt a more diverse and refined set of measures" and would therefore be compatible with Art. 193.[174] This thesis agrees with Klerk's findings and thus shares the argument that the UNCLOS and the Paris Agreement are disjunct and that the UNCLOS establishes an "autonomous due diligence standard" that may require different measures than the Paris Agreement.[175]

Thus, the final consideration of this section will be the extent of the independent due diligence obligation to protect and preserve the marine environment from climate change effects under UNCLOS. Considering the jurisprudence outlined above, the standard of the due diligence obligation under UNCLOS needs to be proportional to the involved risks and sufficiently precautionary. As shown in the introductory chapter and the section about pollution of the marine environment, the oceans are under substantial pressure by the climate change effects and the longer it takes to reduce the deleterious greenhouse gases, the stronger the consequences will be on the oceans. Hence, it can reasonably be argued that the UNCLOS requires a high level of due diligence for the protection of the marine environment.[176] The NDCs communicated under the Paris Agreement can arguably still be used as strong evidence of what action may be appropriate to tackle climate change for the purposes of UNCLOS, since they "represent a statement of what that State considers to be an appropriate contribution to the global mitigation objective at a particular point in time".[177] However, at least as long as the current NDCs collectively fall short of reaching temperature goal set out in the Paris Agreement, it can be argued that due diligence under UNCLOS obliges States to do more.[178]

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[173] Boyle (n 29) 94.
[174] Klerk (n 29) 55.
[175] ibid 56; Utilizing the term 'autonomous due diligence standard' Harrison, 'Litigation under the United Nations Convention on the Law of the Sea' (n 155) 425.
[176] cp., Klerk (n 29) 54.
[177] Harrison, 'Litigation under the United Nations Convention on the Law of the Sea' (n 155) 425.
[178] 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 Review of European, Comparative & International Environmental Law 217, 223.

To conclude, the thesis shares the argument that the UNCLOS establishes an "autonomous due diligence standard" that to some extent goes beyond the Paris Agreement and requires the States to duly consider the oceans in their climate policies. Voigt, however, fears that "the establishment of alternative standards on climate change action could potentially undermine the legal and political relevance of the Paris Agreement and lead to further fragmentation of international law".[179] This thesis disagrees with her concerns and finds that the arguments presented above indicate that the independent due diligence standard under UNCLOS could help readjusting the national measures in order to better reflect the ocean issues within the broader system of climate mitigation measures.

## 2.4 Concluding Remarks

This chapter has shown that the term "marine environment" must be interpreted extensively and established that the climate change impacts of the greenhouse gas emissions can be subsumed under "marine pollution". The climate related obligations under Arts. 192, 194, 207 and 212 UNCLOS give rise to a due diligence obligation to protect and preserve the marine environment that is autonomous from the due diligence obligation under the Paris Agreement. The chapter has further shown that the standard of care under the UNCLOS may require more, but at least different measures than the Paris Agreement. Nevertheless, it is argued in the legal literature that it is unlikely that a Court or Tribunal would follow this argumentation.[180] The following chapter thus focuses on the potential of the UNCLOS obligation in climate change litigation.

[179] Voigt (n 94) 239.
[180] See above all Boyle (n 29) 93; Voigt (n 94) 239.

# 3 Potential of UNCLOS in Climate Change Litigation

Chapter 2 has elaborated on the content of the climate change obligations under the UNCLOS. Having in mind the overall research question of the thesis, this chapter aims to clarify the different legal pathways through which the UNCLOS climate change obligations could possibly be litigated and how civil society actors may use/influence these avenues. Therefore, this chapter is driven by the following further considerations: How can the obligations be litigated? Where can they be litigated? Who can litigate them? And, importantly, what outcomes can be expected to result from the judicial decisions? On the international plane, clarification of legal issues can be pursued through either contentious proceedings or non-adversarial advisory opinions. Both will be presented in turn (3.1.). Subsequently, the attention turns to the role of non-State actors in the legal procedures under UNCLOS (3.2.). Finally, a conclusion is drawn on the potential of the climate related UNCLOS obligations in or through litigation (3.3.).

## 3.1 Contentious Litigation through UNCLOS Part XV

In the plethora of international treaties, the UNCLOS stands out because of its compulsory dispute settlement system established by Part XV. Upon ratification, the States Parties subject themselves to one of the judicial fora listed in Art. 287(1). The States may opt between the ITLOS, the ICJ, an arbitral tribunal constituted in accordance with Annex VII, and special arbitral tribunal constituted in accordance with Annex VIII.[181] Any dispute that arises shall be dealt with by the chosen forum if the other State Party has accepted the same procedure, unless the Parties agree otherwise.[182] In case the Parties to the dispute have not accepted the same procedure, the dispute shall be dealt with by an arbitral tribunal constituted in accordance with Annex VII of the UNCLOS.[183] The latter seems to be the most relevant, since only about one third of the States has made a declaration indicating their choice of forum.[184] If a dispute arises, each Party to the UNCLOS may institute proceedings against another Party by virtue of Art. 286. Thus, the first point of consideration is that there must be a dispute.[185]

[181] Art. 287 (1).
[182] Art. 287 (4).
[183] Art. 287 (5).
[184] Harrison, 'Litigation under the United Nations Convention on the Law of the Sea' (n 155) 419.
[185] See e.g., the opening provision of Part XV, Art. 279.

In international law the term dispute refers to "a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons".[186] This definition by the Permanent Court of International Justice was upheld in the international jurisprudence ever since.[187] For a dispute resolution under the UNCLOS, the dispute must furthermore concern "the interpretation and application of the Convention".[188] As examined in chapter 2 above, a dispute about climate change obligations could arise under both the climate regime and the UNCLOS. Would that potentially hinder the court or tribunal seized through the UNCLOS from having jurisdiction? In *MOX Plant* the ITLOS held that although different treaties "contain rights or obligations similar to or identical with the rights and obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention".[189] The *South China Sea Arbitration*, followed the reasoning of the ITLOS and held that "a dispute under UNCLOS does not become a dispute under the CBD merely because there is some overlap between the two", in fact "parallel regimes remain parallel regimes".[190] Both decisions indicate that there can be a dispute concerning the interpretation and application of the UNCLOS at the same time as a dispute concerning the interpretation and application of a different treaty, for example the Paris Agreement. The characterization of disputes as falling within the subject-matter of Art. 288(1) is a question of law for the determination of the court or tribunal in pursuit of their so-called "*compétence de la compétence*" provided by Art. 288(4).[191] The correct application of Art. 288 is subject to debate.[192] Nevertheless, a dispute about the interpretation and application of Arts. 192, 194, 207 and 212 would arguably fall well within the definition of Art. 286 and 288(1).[193] The compulsory procedures of Section 2 of Part XV will, however, only be triggered if the State Parties were unable to settle their dispute in accordance with Section 1.[194] This section thus continues with an elaboration on the relevant provisions under Section 1 of Part XV.

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[186] *Mavrommatis Palestine Concessions Case (Greece v United Kingdom)* [1924] PCIJ PCIJ Series A No. 2, 5 [11].
[187] Andrew Serdy, 'Art. 279' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1815 Para 6.
[188] Arts. 286 and 288(1) UNCLOS.
[189] *MOX Plant (Ireland v United Kingdom), Provisional Measures* [2001] ITLOS ITLOS Reports 2001 95 106 Paras. 48.52.
[190] *South China Sea Arbitration (Philippines v China) Jurisdiction and Admissibility* (PCA) [177 and 283–285].
[191] James Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation' (2017) 48 Ocean Development & International Law 269, 273.
[192] For an overview of the issues see Harrison, 'Defining Disputes and Characterizing Claims' (n 191).
[193] See e.g., Boyle (n 29) 97.
[194] Art. 286.

The claimant State would need to demonstrate to the Court or Tribunal the existence of a dispute with the respondent State. In climate change litigation, this is where a claimant State could face a potential hurdle because it would need to display that its claim is "positively opposed by the other [State]".[195] However, the existence of a dispute is determined objectively and not subjectively, meaning that a State cannot simply deny the existence of a dispute.[196] Therefore, commentators suggest that raising the dispute with the potential respondent State in diplomatic contacts, *notes verbales*, etc. is of special importance.[197]

The raising of the dispute is of equal importance for the fulfillment of the requirements set out by Art. 283(1). The provision stipulates that "when a dispute arises […] the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". The Courts and Tribunals appear to take a lenient approach towards the requirement of a previous exchange of views as for example the *Chagos Marine Protected Area* and the *Arctic Sunrise* Cases indicate.[198]

However, as stated above, disputes about climate change impacts on the marine environment are located at the nexus between the law of the sea, the international climate regime, and other international environmental agreements. In other words, multiple international agreements are of relevance for one problem. Thus, Arts. 281 and 282 might bar the application of the compulsory procedures of Section 2, for the following reasons.

Art. 281(1) gives the States the right to seek the settlement of a dispute by other peaceful means. The procedures provided for in Section 2 of Part XV apply only where no settlement has been reached and the agreement between the parties "*does not exclude any further procedure*" (emphasis added). The issue of whether an agreement in fact does exclude further procedure has been subject to different reasonings in the international jurisprudence. In the *Southern Bluefin Tuna Arbitration* the majority of the tribunal held that an implied exclusion was enough to bar the application of the compulsory dispute settlement system.[199] Sir Kenneth Keith argued

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[195] *South West Africa (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, Judgment* ICJ Reports 1962 319 328.
[196] Serdy, 'Art. 279' (n 187) 1815 Para 6.
[197] Boyle (n 29) 100.
[198] Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48 Ocean Development & International Law 216, 222.
[199] *Southern Bluefin Tuna Arbitration (Australia and New Zealand v Japan), Jurisdiction and Admissibility* (2000) XXIII RIAA (Annex VII Arbitral Tribunal) [56–59].

in a dissenting opinion that only an explicit statement would suffice.[200] The decision was followed by a lively discussion in the scholarship and received substantial criticism.[201] The later *South China Sea Arbitration* declined the approach taken in *the Southern Bluefin Tuna Arbitration* and held that only a clear exclusion would bar the Part XV procedures.[202] Similarly, the tribunal in the *Timor-Leste* conciliation precisely followed the wording of the exclusion clause contained in the treaty between Timor-Leste and Australia closely and thereby established its jurisdiction.[203] That decision also attracted criticism by some commentators.[204] Mossop therefore concludes that there remain substantial unclarities regarding the correct interpretation of Art. 281.[205] She suggests that the right interpretation should lie at a point between the decisions of the *Southern Bluefin Tuna Arbitration* and the *South China Sea Arbitration* but notes that the exclusion of further procedures should be made as clear as possible.[206] In the climate regime, Art. 14 UNFCCC establishes rules on the settlement of disputes, which are applicable *mutatis mutandis* to the Paris Agreement by virtue of Art. 24 of the Paris Agreement. However, neither the UNFCCC nor the Paris Agreement expressly exclude the application of the UNCLOS Part XV procedures. Thus, if the Court or Tribunal followed the reasoning by the *South China Sea Arbitration*, recourse could be had to the UNCLOS compulsory arbitration or adjudication.[207] Taking the wording of Art. 14 UNFCCC into account, it seems reasonable to argue that also under the more moderate approach suggested by Mossop the compulsory dispute settlement system under Part XV would not be excluded. Having declined the applicability of Art. 281 in the climate change context, now it will be assessed whether Art. 282 could hinder the jurisdiction of a court or tribunal under Part XV.

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[200] *Southern Bluefin Tuna Arbitration (Australia and New Zealand v Japan), Jurisdiction and Admissibility, Separate Opinion of Sir Kenneth Keith* (2000) XXIII RIAA (Annex VII Arbitral Tribunal) [18] et seq.
[201] For an overview of the discussion see Andrew Serdy, 'Art. 281' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1823 Para 10.
[202] *South China Sea Arbitration (Philippines v China) Jurisdiction and Admissibility* (n 190) para 286.
[203] *Timor Sea Conciliation (Timor Leste v Australia)* [2016] Annex V Conciliation Commission PCA Case Nº 2016-10 [59] et seq.
[204] See e.g, Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 The International Journal of Marine and Coastal Law 332, 340.
[205] Joanna Mossop, 'Reimagining the Procedural Aspects of Part XV of the United Nations Convention on the Law of the Sea' (2023) 38 The International Journal of Marine and Coastal Law 378, 387.
[206] ibid 388.
[207] Natalie Klein, 'Adapting UNCLOS Dispute Settlement to Address Climate Change' in Jan McDonald, Jeffrey McGee and Richard Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing Limited 2020) 102 <http://ebookcentral.proquest.com/lib/tromsoub-ebooks/detail.action?docID=6422494> accessed 12 September 2023.

The choice of forum clause contained in Art. 282 stipulates that other dispute resolution mechanisms shall be applied in lieu of the Part XV procedures if States have agreed on a different procedure "that entails a binding decision". The emphasis lies on "binding decision".[208] Thus, any procedure that results in mere recommendations to the parties does not fulfill this requirement, even if the procedure itself is binding on the parties.[209] Under the above-mentioned dispute settlement clause of the UNFCCC only negotiation and non-binding conciliation are compulsory for the parties. Only if both disputants have accepted the compulsory jurisdiction of the ICJ or arbitration under Art. 14(2) UNFCCC the outcome would be binding.[210] As of today, only the Netherlands have accepted both mechanisms contained in Art. 14(2) UNFCCC and the Solomon Islands and Tuvalu have subjected themselves to the compulsory arbitration of Art. 14(2)(b) UNFCCC.[211] Therefore, it does not surprise that the instrument has never been used in practice.[212] Consequently, it can be argued that the climate regime does not fulfill the requirements of Art. 282.[213] Thus, courts or tribunals under Part XV could be seized for climate change litigation if the matter is not excluded from their jurisdiction for other reasons.

The jurisdiction of courts and tribunals under Part XV is limited by Art. 297 and 298 provides the States with the opportunity to exclude further matters from the scope of the dispute settlement system. Both articles were introduced because of the close relation of the regulated matters with the sovereignty or sovereign rights of the States.[214] However, climate change issues that relate to the application of Arts. 192, 194, 207 or 212 are arguably not excluded of the dispute settlement system.[215] Taking all the above into account, a good argument can be made that disputes regarding climate change impacts on the marine environment would fall under the jurisdiction conveyed by Part XV.[216]

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[208] Andrew Serdy, 'Art. 282' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1828 Para 11.
[209] ibid Para 11.
[210] Birnie, Boyle and Redgwell (n 33) 397.
[211] 'Declarations by Parties | UNFCCC' <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties> accessed 7 October 2023.
[212] cp. Verheyen and Zengerling (n 30) 420.
[213] Klein, 'Adapting UNCLOS Dispute Settlement to Address Climate Change' (n 207) 102.
[214] Mossop (n 205) 382.
[215] Boyle (n 29) 97.
[216] ibid.

Therefore, as pointed out above, separate disputes could arise under both the UNFCCC/Paris Agreement and the UNCLOS. This raises the question as to what extent it is disruptive to have different parallel proceedings. Against this background, Klein notes the difficulty to achieve a balance between ensuring the integrity of the UNCLOS regime through the compulsory jurisdiction under Part XV on the one hand, and respecting the parties' selection of a varied dispute settlement procedure in other agreements that relate to the ocean use, on the other.[217] This issue is of special importance as the jurisdiction of the international courts and tribunals are ultimately based on the principle of consent, meaning that sovereign States may only be bound by the decisions of a court or tribunal whose jurisdiction they have agreed to.[218] An adjudicative body that showed that it was aware of the difficulty was the arbitral tribunal in the *MOX Plant* Order no. 3 which deferred its case to the European Court of Justice on the basis of "considerations of mutual respect and comity which should prevail between judicial institutions".[219] Thus, because of the multi-polar nature of climate change, especially in climate change litigation, jurisdictional deference should be considered as an instrument of conflict avoidance to ensure legitimate decisions are firmly based on the consent of the States.

A further point to be addressed is not only whether a court or tribunal would have jurisdiction, but whether a dispute would be admissible, and, in particular, the issue of standing. However, the issue seems to be straight forward in the context of disputes about the obligations under UNCLOS Part XII to protect the marine environment. According to the authoritative case law by the ICJ any party to an agreement has standing to sue another party with regard to *erga omnes* obligations. They are "obligations of a State towards the international community as a whole" that are "the concern of all States" and "all States can be held to have a legal interest in their protection".[220] The *South China Sea Arbitration* showed that the duty to protect the marine environment can be considered an obligation *erga omnes*.[221] Thus all States would have the necessary standing to sue under Part XV of the UNCLOS.

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[217] Natalie Klein, 'Law of the Sea Dispute Settlement Outside of the United Nations Convention on the Law of the Sea (UNCLOS)' (*Oxford Public International Law*) para 40 <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3766.013.3766/law-mpeipro-e3766?prd=MPIL> accessed 29 September 2023.
[218] Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (n 204) 362.
[219] *MOX Plant Case (Ireland v United Kingdom) Order No 3* (PCA) [28].
[220] *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain, Judgment, Merits, Second Phase]* [1970] ICJ Rep 3 [33].
[221] *South China Sea Arbitration (Philippines v China)* (n 62) paras 939–993.

Taken the case that all the requirements for jurisdiction are fulfilled, Art. 293 prescribes what law the Court or Tribunal may use for its reasoning. They shall apply the UNCLOS and "other rules of international law not incompatible with [the] Convention". An issue might arise as to which international agreements the Court or Tribunal may have resource to. In this regard, Doelle opined that Court or Tribunal may only use an international agreement other than the UNCLOS as an interpretative tool where the involved parties are bound by both treaties, unless the other agreement has reached the status of customary law.[222] Lee and Bautista present a similar argument.[223] The consensus seems to follow a more literal interpretation of Art. 293, however. "Other rules of international law" therefore needs to be understood broadly as including any other treaty, customary law or general principles of law compatible with the UNCLOS.[224] Consequently, the emphasis does not lie on the applicability of a potential international agreement between the parties of the dispute but on the compatibility of the said agreement with the UNCLOS.[225] Thus, since the UNCLOS is not a self-contained regime, and "does not provide all of the law needed to resolve certain aspects of a dispute", a Court or Tribunal may have recourse to any rule of international law to endeavor the normative content of the Convention.[226] To be clear, this does not expand the jurisdiction of the Court or Tribunal.[227] As the Tribunal in the *South China Sea Arbitration* had recourse to the CBD "for the purposes of interpreting the content and standard of Articles 192 and 194 [UNCLOS]", a court or tribunal could have recourse to the climate regime in order to interpret and inform the content and standard of the above-mentioned due diligence obligation to protect the marine environment from pollution in the climate change context. Moreover, since most parties to the UNCLOS are also party to the Paris Agreement the issue might not be raised in potential inter-State climate litigation.

To conclude, a dispute about the interpretation and application of Arts. 192, 194, 207 and 212 would fall within the limited jurisdiction of the international courts or tribunals of Section 2 of

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[222] Meinhard Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention' (2006) 37 Ocean Development & International Law 319, 324.
[223] Lee and Bautista (n 34) 135.
[224] Pablo Ferrara, 'Art. 293' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1894 Para 6.
[225] See also Myron H Nordquist, Satya Nandan and Shabtai Rosenne (eds), 'Article 293 - Applicable Law', *United Nations Convention on the Law of the Sea* (Martinus Nijhoff Publishers 2013) para 293.3 <https://referenceworks.brillonline.com/entries/united-nations-convention-on-the-law-of-the-sea/*-LAOS_9780792307648_050_068> accessed 13 September 2023.
[226] Ferrara (n 224) 1895 Para 6.
[227] Peter Tzeng, 'Jurisdiction and Applicable Law under UNCLOS Comment' (2016) 126 Yale Law Journal [i], 242.

Part XV of the UNCLOS. The compulsory dispute settlement system under Part XV of the Convention is in principle therefore a suitable avenue to initiate climate action. The question as to what the opportunities and challenges of contentious climate change litigation are, will be discussed at the end of this chapter (3.4.).

## 3.2 Advisory Opinions

Having elaborated on the initiation of contentious proceedings under the UNCLOS in the previous section, this section expands on advisory opinions as a mechanism for clarification of legal questions surrounding the climate change obligations under UNCLOS.

As introduced in the opening chapter, the efforts to pursue advisory opinions in the context of climate change have recently gained considerable momentum. In light of the handful of cases centered around climate change issues currently pending before the various courts and tribunals, there appears to be disagreement in the scholarship as to which forum would be the best-suited to deliver an advisory opinion on the climate-related obligations. In broad terms, the fora may be distinguished between the international court of justice as a forum of "general jurisdiction" on the one hand, and, for instance, ITLOS, being based solely on the UNCLOS, as a tribunal of "limited jurisdiction" on the other.[228] The ICJ possesses a broad legal basis to give an advisory opinion on "any legal question" in Art. 96 UN Charter[229] and Art. 65 ICJ Statute.[230] Conversely, the competence of the ITLOS to give advisory opinions is not founded on a similarly firm basis.[231] Its competence for advisory opinions by the full tribunal is subject to debate.[232]

Against this background, some commentators signal their preference of the ICJ, since its broad jurisdiction would allow the court to deal with all the key legal questions arising in the climate

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[228] See generally Ruth MacKenzie and others, 'The Manual on International Courts and Tribunals', *The Manual on International Courts and Tribunals* (Oxford University Press) <https://opil-ouplaw-com.mime.uit.no/display/10.1093/law/9780199545278.001.0001/law-9780199545278> accessed 28 September 2023.
[229] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).
[230] Thirlway (n 39) para 18.
[231] See generally Alexander Proelss, 'Advisory Opinion: International Tribunal for the Law of the Sea (ITLOS)' (*Oxford Public International Law*) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3689.013.3689/law-mpeipro-e3689?prd=MPIL> accessed 27 September 2023.
[232] Richard Barnes, 'An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?' (2022) 53 Ocean Development & International Law 180; See inter alia, Yoshifumi Tanaka, 'The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility' (2023) 32 Review of European, Comparative & International Environmental Law 206.

change context.[233] Others take a more positive stand towards the advisory opinions of courts of limited jurisdiction. Feria-Tinta, for instance, draws on the decision in the *Torres Strait Islanders* case by a human rights body, to argue that also international courts of limited jurisdiction can indeed contribute to a broader response to climate change challenges[234] and submits that "ITLOS has the potential role of delivering a pivotal opinion at a crucial time in the health of the Oceans".[235] In a similar vein, Roland Holst argues that the potential value and significance of the upcoming ITLOS advisory opinion for the law of the sea and governance challenges arising at the ocean-climate nexus should not be underestimated.[236]

In general, history shows a willingness of international courts and tribunals to deal with advisory opinions which arguably supports the view that they are indeed an important mechanism for the clarification of questions of international law.[237] Lachs has pointed out that "advisory opinions offer the Court a much greater potential to further develop the law than […] judgments in contentious proceedings" as they are "not limited to a strict analysis of the facts and submissions that are presented to the court".[238] In the same vein, it is notable that advisory proceedings offer a wider platform for the court to deal with legal questions, as the participation is not limited to the parties of the dispute and States permitted to intervene, but a variety of stakeholders can be involved.[239] Advisory proceedings allow all States to participate and voice their opinion.[240] Furthermore, civil society actors can take a far more active role in advisory proceedings compared to contentious proceedings.[241] The next section thus turns to the role of non-State actors in climate change litigation in both advisory and contentious proceedings (3.3), before in section (3.4) the challenges and opportunities of climate change litigation under or through the UNCLOS will be discussed.

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[233] See e.g. Sands (n 36) 20; A similar argument is made by Klein, 'Adapting UNCLOS Dispute Settlement to Address Climate Change' (n 207) 113.
[234] Monica Feria-Tinta, 'On the Request for an Advisory Opinion on Climate Change under UNCLOS before the International Tribunal for the Law of the Sea' (2023) 14 Journal of International Dispute Settlement 391, 392.
[235] ibid 406.
[236] Roland Holst (n 178) 224.
[237] Barnes (n 231) 181 et seq.
[238] Manfred Lachs, 'International Court of Justice' (1983) Vol. 10 (2) Syracuse journal of international law and commerce 239, 249.
[239] Bodansky (n 11) 711.
[240] ibid.
[241] See Section 3.2 below.

## 3.3 Role of Non-State Actors in Climate Change Litigation

Having presented the legal mechanisms for litigation on the international plane, this section focuses on the role of non-State actors in climate change litigation and how they could potentially shape and influence the litigation. First, it must be noted that the rules of ITLOS and the ICJ are both silent on the participation of NGOs in the judicial proceedings, thus they do not have standing. With that in mind, this section starts by presenting the function of NGOs and individuals as witnesses and experts (3.3.1) and amici curiae (3.3.2) in international proceedings. Finally, it elaborates on ideas of extended access to the proceedings (3.3.3).

### 3.3.1 Experts and Witnesses

To begin with, by virtue of Art. 289 UNCLOS, a court or tribunal may, in disputes "involving scientific or technical matters", select a maximum of two experts that sit with the court or tribunal but do not have a right to vote. Thus, the experts under this provision have a peculiar position, that arguably is "something more than purely scientific or technical help for the tribunal" and requires "the trust of each party in at least one of [the experts]".[242] In practice, nevertheless, Art. 289 has never been used.[243]

"Experts" under the ITLOS Rules are fundamentally different to the "experts" mentioned in Art. 289 UNCLOS. Under the ITLOS Rules, an expert is a person with specific knowledge on a matter and a witness is a person that can give an account of facts.[244] Usually, the experts are called by the parties. In that case, their participation is regulated by Arts. 72, 73, 78 and 80 ITLOS Rules. In addition, Art. 82 ITLOS Rules provides the Tribunal with the right to request an expert opinion if it considers it to be necessary. A similar provision for procedures at the ICJ is Art. 50 ICJ Statute. The courts and tribunals could thus theoretically hear representatives of environmental NGOs as experts upon their own initiative.

In any case, NGOs may appear as experts or witnesses called by a party to a dispute or by statements included in the pleadings of a party.[245] In the *Whaling Case* the ICJ has indicated a

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[242] Tullio Treves, 'Art. 289' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: a commentary* (CH Beck ; Hart ; Nomos 2017) 1866 Para 11.
[243] ibid Para 12.
[244] Philippe Gautier, 'Experts before ITLOS: An Overview of the Tribunal's Practice' (2018) 9 Journal of International Dispute Settlement 433, 433.
[245] Rüdiger Wolfrum and Mirka Möldner, 'International Courts and Tribunals, Evidence' (*Oxford Public International Law*) para 54 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e26?prd=MPIL> accessed 18 September 2023.

strong preference to have experts presented as expert witnesses, because witnesses can be cross-examined during the oral proceedings.[246] The practice in international adjudication shows that while the main responsibility of producing evidence lies with the parties, the court or tribunal can play an effective role in ensuring the impartiality and credibility of experts and witnesses by using their room for maneuver offered to them by their founding Statutes and procedural rules.[247] At the time of the decision, the court or tribunal selects the evidence it considers to be relevant and evaluates it in order to come to a conclusion.[248] Thus, the evidence delivered by experts and witnesses is valuable and an immediate tool to influence the judicial deliberations.

### 3.3.2 Amici Curiae Briefings

Another form of participation by non-State actors in international litigation is the mechanism of *amici curiae*. Art. 84 and 133 of the ITLOS Rules provide the legal basis for non-State actors to furnish amicus curiae briefings to the Tribunal in contentious and advisory proceedings respectively. However, neither provision finds an express legal foundation in the UNCLOS or the ITLOS Statute, thus there is some debate on the power of the ITLOS to address these matters.[249] Be that as it may, both articles are restricted to "intergovernmental organizations". As the denied request from Greenpeace International in the Arctic Sunrise Case indicates, Art. 84 ITLOS Rules needs to be interpreted as including only "intergovernmental" and excluding non-governmental organizations from contentious proceedings.[250] The ITLOS practice further shows that also in advisory proceedings NGOs do not have the access to furnish amicus curiae briefings to the Tribunal.[251] Instead, statements by NGOs are published on the ITLOS website under a separate heading, but do not become part of the case file. Nevertheless, by posting the statements they arguably become a "publication readily available" in the meaning of Art. 71(5) ITLOS Rules and can therefore be relied upon by the parties.[252] On the case website of the currently pending ITLOS advisory opinion ten different amicus briefs by NGOs and other non-state actors and non-intergovernmental organizations were published, in comparison to a single

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[246] Klein, 'International Environmental Law Disputes Before International Courts and Tribunals' (n 11) 1049.
[247] Gautier (n 243) 439.
[248] Wolfrum and Möldner (n 244) para 24.
[249] Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (2018) 193 <https://directory.doabooks.org/handle/20.500.12854/29549> accessed 12 August 2023.
[250] Vladyslav Lanovoy, 'Access to and Participation in Proceedings Before International Courts and Tribunals' in Edgardo Sobenes, Sarah Mead and Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (TMC Asser Press 2022) 428 <https://doi.org/10.1007/978-94-6265-507-2_14> accessed 7 October 2023.
[251] See e.g. Wiik (n 248) 193.
[252] ibid 194.

contribution by NGOs in both the *Responsibilities* and the *SRFC Advisory opinion*.[253] This could indicate that the public interest in the topic of this advisory opinion were higher than in the other advisory proceedings by ITLOS. Still, Lanovoy doubts whether greater participation of non-parties results in their views being taken into account by the court or tribunal in its decision-making process. He bases this assumption, which he admits is yet to be tested, on the limited space devoted to the analysis of amicus curiae submissions in the reasoning of international courts and tribunals so far.[254]

Participation and access of non-State actors in or to proceedings at the ICJ are to a large extent similar to the ITLOS.[255] Due to the use of the term "any [...] international organization", Art. 66 of the ICJ Statute sparked a debate about whether NGOs are included under the term and can therefore furnish amicus curiae briefings on their own initiative.[256] In practice, however, the ICJ seems to apply a narrow interpretation and restrict the organizations to "public international organizations" as provided for in the respective Art. 34(2) of the ICJ Statute, which is applicable in contentious proceedings.[257]

To conclude this section, even though the access to the proceedings via Art. 84 or 133 ITLOS Rules is restricted for NGOs, the publications of the case website arguably generate at least some influence on the outcome of the case, because they can be relied upon by the parties during the proceedings.

### 3.3.3 Extended Access to UNCLOS Dispute Settlement System?

There have been some thoughts on opening the UNCLOS dispute settlement system for individuals and NGOs.[258] The most radical change would arguably be to confer standing on citizens and NGOs and thereby enabling them to file claims against a State for not having complied with their obligations under UNCLOS.[259] However, considerable skepticism remains.[260] It has also been suggested to extend the access to the dispute settlement system for UN bodies or a 'hybrid' State/NGO such as the International Union for Conservation of Nature

[253] See <https://www.itlos.org/en/main/cases/list-of-cases/case-no-17/> accessed 7 October 2023; and <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21/> accessed 7 October 2023.
[254] Lanovoy (n 249) 443.
[255] ibid 426.
[256] ibid 422.
[257] ibid.
[258] See e.g., Sands (n 36) 21.
[259] See e.g., Verheyen and Zengerling (n 30) 439.
[260] Mossop (n 205) 399.

(IUCN) for example, and grant them the right to request an advisory opinion before the ICJ or ITLOS.[261] This proposal is less radical, because it would keep the scope of eligible entities narrow and rely on the existing framework that gives intergovernmental organizations, to which the IUCN is considered to be a part, access as amici curiae.

The accessibility of the ITLOS is based on Art. 20(2) ITLOS Statute which provides that "the tribunal shall be open to entities other than State Parties […] in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case". This wording thus arguably indicates that the Tribunal is potentially accessible for non-State actors.[262]

Furthermore, it has been posited that environmental NGOs with an interest in the protection of the marine environment should have the right to submit amici curiae statements in both contentious and advisory proceedings before the Tribunal in order to put the Tribunal into a better position to successfully accommodate environmental protection interests in its deliberations.[263]

## 3.4 Opportunities and Challenges of Litigating through or under UNCLOS

Having presented the mechanisms for clarification of legal issues concerning the interpretation and application of the UNCLOS via either contentious or advisory proceedings and the role of non-State actors therein in the sections above, this section discusses the potential of the climate related UNCLOS obligations examined in chapter 2 to be used in or through litigation. It does so from the viewpoint of the so-called "pro"-litigation. Pro-litigation describes cases initiated with the aim of achieving a policy change in contrast to "anti"-litigation, which has the resistance to change as its object.[264] This section thus assesses contentious litigation and advisory proceedings about the climate related obligations under UNCLOS on the underlying premise that a rapid and far-reaching change in climate policy is needed in the face of the climate emergency as outlined in the introductory chapter. Ultimately, States base their

[261] Verheyen and Zengerling (n 30) 439.
[262] Cathrin Zengerling, *Greening International Jurisprudence : Environmental NGOs before International Courts, Tribunals, and Compliance Committees* (Brill 2013) 252 <https://directory.doabooks.org/handle/20.500.12854/77833> accessed 15 August 2023.
[263] ibid.
[264] See e.g., Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"', *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 366 <https://brill.com/display/book/edcoll/9789004447615/BP000018.xml> accessed 11 October 2023.

decisions to initiate litigation on an individual calculation of costs and potential benefits.[265] Just as the States outweigh their individual costs and benefits, this section tries to outweigh the potential challenges and opportunities of climate change litigation under the UNCLOS assessing both contentious litigation and advisory proceedings and having in mind the potential role that non-State actors may play.

To begin with, the international community of States appears to be very hesitant to instigate litigation against other States on climate change grounds. The low number of climate change cases in inter-State litigation could indicate that so far, the costs have mostly outweighed the potential benefits. Boyle, for instance, emphasizes that especially the small island States, which are the most affected by the climate change, would face a considerable political challenge when litigating against the big emitters of greenhouse gases.[266] The main reason of this political challenge arguably lies in the dependence by the small States on a stable economic and diplomatic relationship with the potential respondent States.[267] In a broader frame, Mossop notes that the international system in general is reciprocal, meaning that "good relations between States is currency".[268] Thus, the hesitation to initiate State v. State litigation seems understandable.

For the sake of the argument, taken that a State has initiated a contentious proceeding under Part XV of the UNCLOS on the grounds of an alleged breach of the above-discussed obligation to protect and preserve the marine environment from climate related pollution based in Arts. 192, 194, 207 and 212. What could potential outcomes of the litigation be?

It would seem possible for a State to invoke State responsibility for the breach with the aim of compensation. However, a claim for damages would lead to difficult issues surrounding the establishment of causation of harm, its foreseeability, the allocation of responsibility between multiple respondents and more.[269] Nevertheless, it has been argued, that a claim directed at finding that the respondent State is not meeting its requirements under the UNCLOS without requiring compensation could sidestep those difficult issues.[270] A potential decision by a court

[265] Scott (n 20) 40.
[266] Boyle (n 29) 97.
[267] ibid.
[268] Mossop (n 205) 399.
[269] See questions raised by Lee and Bautista (n 34) 149; Savaresi (n 263) 281.
[270] Savaresi (n 263) 381 citing; Millicent McCreath, 'The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes' in Douglas A Kysar and Jolene Lin (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020).

or tribunal in the above scenario could for instance be an order against the respondent State to communicate NDCs of sufficient ambition to comply with Article 4 Paris Agreement.[271] It could also order the respondent State to reflect their contribution to ocean acidification in their overall emissions reduction policies in a precautionary manner.[272] Harrison has stressed that an international court or tribunal seized under the UNCLOS can not decide "precisely what action is required by a particular State, but rather whether or not a State has done enough to meet its due diligence obligation".[273]

Even if a decision can only be expected on a State's compliance or incompliance with the due diligence obligation, it has been pointed out that the judicial procedure itself can offer opportunities. Sands, for example, has argued that a consideration of scientific or technical issues by an international court or tribunal could give them the authority of a judicial determination which could potentially help opposing the framing of some people that the IPCC publications on climate change are just "scientific opinions".[274] This would however require judges willing to engage in the complicated scientific issues surrounding climate change.[275]

In this regard, it is worth noting that the ITLOS has established several special chambers for dealing with particular categories of disputes, inter alia one special chamber for marine environment disputes. So far, the chamber has never been used. Treves therefore contends that "these chambers may be seen as a form of public relations exercise to convey the message that the Tribunal is ready to deal with specialized categories of disputes".[276] Verheyen and Zengerling have posited a different view in 2016 and anticipated an increasing importance of the special chambers in the context of climate change litigation.[277] Moreover, recently Mossop has argued, albeit with regard to all the special chambers established by ITLOS and the ad hoc chambers constituted upon agreement by the disputing parties in accordance with Art. 15(2) of the ITLOS Statute, that the chambers may be of increasing interest for future litigations.[278] Thus, even though the surge in importance still appears to not have come yet, the special chambers seem to be a viable option for climate change litigation in the future. They would

[271] Boyle (n 29) 101.
[272] Harrison, 'Litigation under the United Nations Convention on the Law of the Sea' (n 155) 427.
[273] ibid 426.
[274] Sands (n 36) 15.
[275] Cp. Verheyen and Zengerling (n 30) 439.
[276] Treves (n 241) 1864 Para 2.
[277] Verheyen and Zengerling (n 30) 430.
[278] Mossop (n 205) 385.

have similar advantages to arbitration but a lower cost.[279] Since litigation is expensive and could potentially fail, the financial expenses arising during litigation on the international avenue are a further point that would need to be kept in mind when deciding on the initiation of a inter-State litigation.[280]

Moreover, commentators have suggested ideas that could arguably increase the dynamic in contentious climate change litigation. Bodansky has pointed to the interesting alternative of two similarly-inclined States agreeing to have the ICJ hear a "contentious" case between themselves to keep control of the issues.[281] This could potentially lower the hesitation of the States to initiate proceedings. This idea could also be worth considering regarding a litigation at the ITLOS or through UNCLOS Part XV. However, it could raise issues as to whether there is indeed a dispute as elaborated on above. Another idea that could potentially have strong effects would be the above-mentioned extended access to Courts and Tribunals for individuals or NGOs, because it could potentially generate pressure on the States to comply with their obligations under the UNCLOS in order to avoid reputational damage.[282]

The currently pending advisory opinions on the climate related obligations of States will arguably also bring more dynamic into the broader topic of climate change litigation. However, the legal scholarship appears to be divided on the question of utility of advisory opinions as a vehicle for clarification of climate-related issues.[283] While some commentators positively note that advisory proceedings might be the right instrument to deal with the climate change problem[284], others are far more skeptical.[285]

The recurring arguments for a more careful assessment of the value of advisory opinions in the climate change context can be grouped around the following issues that will be each be presented in turn: the (fragile) jurisdictional basis, the highly political nature of the topic and therefore the importance of achieving consent and prior authorization of affected States, and doubt with regard to compliance with the decisions and influence of State behavior.

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[279] ibid.
[280] Boyle (n 29) 97.
[281] Bodansky (n 11) 712.
[282] Mossop (n 205) 399.
[283] Barnes (n 231) 181.
[284] See e.g. Sands (n 36) 20.
[285] See e.g. Mayer (n 11).

As described above, especially the ITLOS needs to carefully consider its jurisdiction to give an advisory opinion in the full tribunal. However, even if the decision in the currently pending ITLOS advisory opinion attracted similar criticism as the *SRFC advisory opinion*, the decision on the substance could nevertheless carry significant normative weight.[286]

Difficulties arise as well due to the nature of the climate change problem. Various commentators emphasize the highly political character of the climate change advisory proceedings.[287] Mayer, argues that any decision by the court or tribunal would be criticized. For example, if the ultimate decision was too vague and cautious in the eyes of some observers, it could be criticized for having missed out on an opportunity. However, if the decision had far-reaching consequences opponents could argue that the procedure was only politically motivated.[288] The fact that the political nature of climate change in general should not be underestimated is indicated by a very drastic description by Bodansky, who compares climate change with the highly controversial issue of abortion in the United States.[289] In light of the opposing views, ensuring consent and prior authorization seems key for reaching a decision that would be accepted by the international community of States.[290]

The next issue is whether an advisory opinion could be successful in changing State behavior and rely on broad compliance by the international community. Bodansky skeptically points out that even in contentious proceedings there have been States that decided to ignore the decision binding to them and argues that there would be even less pressure to comply with a non-binding advisory opinion.[291] He assumes that if the advisory opinion was too broad, States would simply say they are following it and if was too specific, States would just reject the court's or tribunal's conclusion.[292] Mayer takes the argument even further and suggests that if compliance is not assured through careful consideration of the States consent and prior authorization, an advisory opinion could "erode the credibility of international institutions".[293] These arguments are opposed by more positive notions in the scholarship. Roland Holst concludes with regard to the

[286] Roland Holst (n 178) 224.
[287] See e.g., Mayer (n 11) 113.
[288] See e.g., ibid.
[289] Daniel Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions' (2023) 32 Review of European, Comparative & International Environmental Law 185, 190.
[290] Barnes (n 231) 199; Mayer (n 11) 114.
[291] Bodansky (n 288) 189 et seq.
[292] ibid.
[293] Mayer (n 11) 114.

ITLOS advisory proceeding that a decision might persuade "at least some States to think about including ocean-related measures and ambitions in their NDCs".[294]

Moreover, Roland Holst argues that the advisory opinions could produce a legal basis "for further cooperation, developments in State practice, or potentially even contentious proceedings under Part XV UNCLOS".[295] This brings us back to the starting point of this section. This section has shown that both contentious litigation and advisory proceedings about the climate related obligations under UNCLOS each offer opportunities and at the same time impose challenges which need to be carefully outweighed. In both types of dispute settlement system the tension between the principle of effectiveness on the one hand, and the principle of consent on the other hand becomes apparent.[296] Thus, on the one hand it can be argued with Oral that "the very purpose of the compulsory dispute resolution provisions in Part XV was to give international judicial bodies the legal mandate to take an active role in the implementation of the Convention".[297] And on the other hand, if the principle of consent and prior authorization is not sufficiently respected one could argue with Mayer and Van Asselt that "international climate litigation could damage the very credibility of international legal system on which climate cooperation relies."[298] In light of the above, this thesis is of the opinion that climate change litigation on the basis of the Part XII obligations on the protection of the marine environment through Part XV UNCLOS would be able to achieve that balance and should be considered as a forum for future climate action. Both contentious and advisory proceedings offer some possibilities for non-State actors to contribute to the decision-making process of international courts and tribunals. The advisory proceedings, however, have the potential to allow for more inclusive participation of all actors in the protection of the marine environment.[299] This thesis therefore agrees with Roland Holst that the advisory opinions will be the basis for further climate action – in State practice or in litigation.

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[294] Roland Holst (n 178) 224.
[295] ibid 225.
[296] Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (n 204) 362.
[297] Oral (n 30) 420.
[298] Mayer and van Asselt (n 14) 183.
[299] Lan Ngoc Nguyen, 'International Tribunal for the Law of the Sea' in Edgardo Sobenes, Sarah Mead and Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (TMC Asser Press 2022) 93 <https://doi.org/10.1007/978-94-6265-507-2_3> accessed 7 October 2023.

## 3.5 Concluding Remarks

This chapter has shown that a dispute about the interpretation and application of Arts. 192, 194, 207 and 212 would fall within the limited jurisdiction of the international courts or tribunals of Section 2 of Part XV of the UNCLOS and thus that the compulsory dispute settlement system under Part XV of the Convention is in principle a suitable avenue to initiate climate action. Advisory proceedings also offer a mechanism to bring clarity to the legal issues. The role of non-State actors on the international plane is restricted to appearances as experts or witnesses in contentious proceedings. In advisory opinions intergovernmental organizations may furnish amicus curiae opinions to the case. The ITLOS has established the practice that NGOs can submit statements to the tribunal that do not become part of the case file but will be made public on the website and submitted to the parties. Thereby, they can have some influence on the deliberations, although the extent to which they do so is unclear. The ideas for an extended access of NGOs or individuals should thus be further considered. Finally, this chapter has shown the difficult balance that needs to be achieved between the different opportunities and challenges that both dispute settlement mechanisms offer and impose. First and foremost, the courts and tribunals need to ensure that they act with the necessary consent of the parties. Both in establishing jurisdiction under Part XV for contentious proceedings and for the advisory proceedings.

# 4 Conclusion

The research question of this thesis was: “what scope is there for settling disputes over climate related obligations under the UNCLOS before international courts and tribunals?"

Chapter 2, guided by the question: “what are the climate-related obligations under UNCLOS?”, has shown that the Arts. 192, 194, 207 and 212 give rise to a due diligence obligation to protect and preserve the marine environment that is autonomous from the due diligence obligation under the Paris Agreement and may require more measures.

Subsequently, chapter 3 was guided by the question: “what is the potential for these obligations to be used in or through litigation?” In light of the analysis of the contentious and non-adversarial dispute settlement mechanisms under the UNCLOS and the role of non-State actors in the proceedings, this thesis is of the opinion that climate change litigation on the basis of the UNCLOS obligations on the protection of the marine environment through Part XV UNCLOS offers promising opportunities. Therefore, it considers the due diligence obligation examined in chapter 2 to have a high potential to be litigated through or under the UNCLOS.

The UNCLOS could thus be a valuable addition to the broader efforts for climate change litigation set out in the opening chapter. Nevertheless, it must be repeated, litigation on the international plane should be only a step towards a solution of a problem that needs to be complemented by other, especially political, processes.[300]

It is thus worth recalling that “in the absence of strong government action to address climate change, rulings in climate change litigation may serve as a de facto source of national climate policy with very real impacts on the regulatory landscape”.[301] Domestic courts could in theory ensure that national governments comply with international judicial decisions.[302] International adjudication could thus create the ground for further-reaching decisions on the national plane, where there has arguably been more progress pushing the limits of the law.[303] The due diligence standard developed by international courts and tribunals could have a significant normative

[300] See e.g., Scott (n 20) 26; Lowe (n 15) 213–214.
[301] Peel (n 17) 23.
[302] Mayer and van Asselt (n 14) 182.
[303] Lee and Bautista (n 34) 152.

value that could help national courts to critically engage with the national climate policies.[304] In this regard, Johansen has argued that UNCLOS Part XII "offers a normative basis that can be utilized in ocean-related climate-change cases, due to the close connection between [greenhouse gas] emissions and degradation of the marine environment"[305] and concludes that the law of the sea remains an "untapped resource for legal bases and arguments in climate-change litigation".[306]

In the end, climate change remains one of the greatest challenges for mankind in this century. We should utilize all the mechanisms available of bring States to increase their mitigation ambitions and to effectively protect the (marine) environment from the adverse effects of climate change. Even if the role of non-State actors on the international plane seems small, it is herewith submitted that they should continue to exert pressure on the governments and use their opportunities to shape a better future.

[304] See e.g., Kathryn M McKenzie, 'Due Diligence as a Bridge between the Law of the Sea and Domestic Climate Change Litigation' (University of Strathclyde 2022) <https://stax.strath.ac.uk/concern/theses/bc386j75x> accessed 24 May 2023.
[305] *Ibid*. p. 168.
[306] *Ibid*. p. 169.

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