Webinar on The ITLOS Advisory Opinion on Climate Change: What Does it All Mean?
23 July @ 4 pm SGT

In a first for an international court or tribunal, the International Tribunal for the Law of the Sea (ITLOS) issued a unanimous advisory opinion on States' obligations to protect and preserve the world's oceans from climate change impacts on 21 May 2024 within the framework of the United Nations Convention on the Law of the Sea (UNCLOS). ITLOS found that GHG emissions absorbed by the oceans constitute marine pollution and that States are consequently required to take "all necessary measures" in line with best available science to prevent, control, and reduce their GHG emissions to the fullest possible extent. The Tribunal also underscored that States' obligations to protect and preserve the marine environment include mitigation and adaptation measures tackling the deleterious effects of ocean warming, acidification, and deoxygenation provoked by the introduction of GHG emissions. This webinar, convened by the Centre for International Law sought to lay out the key aspects of the advisory opinion and understand its implications and significance for States, corporations, and civil society.

Dr. Nilüfer Oral, Director of the NUS Centre for International Law and part of the legal expert team of the proponent of the advisory opinion- the Commission on Small Island States (COSIS), emphasized the robust, unanimous, authoritative, and — in many respects — unprecedented character of the opinion. She highlighted the leading role that COSIS, a group of small island developing States, took in seeking the determination of international law as the urgency of the climate crisis is perhaps most evident in these vulnerable countries. She also emphasized COSIS' approach in assembly a diverse legal team for the proceedings. Dr. Oral praised the advisory opinion for establishing that GHG emissions are a form of marine pollution, providing more stringent requirements for environmental impact assessments, strengthening the role of land-based activities in marine environment conservation, and clarifying that adaptation is an integral part in the obligation to protect and conserve the marine environment. While there had been some uncertainty as to the applicability of Paris Agreement obligations with the UNCLOS, Dr. Oral stated that the Opinion made clear that UNCLOS stood on its own and the Paris Agreement informed it on matters such as the temperature target. She also underscored the significance of the decision for domestic, regional, and international policymaking as well as climate litigation.

Dr. Thi Lan Anh Nguyen, Associate Professor at the Diplomatic Academy of Vietnam, noted with appreciation the inclusiveness of the proceedings, in part through its acceptance of amicus curiae submissions, with more than 60 written statements from States, intergovernmental organisations, and NGOs. Dr. Nguyen underscored the importance of the constitutional framework nature of UNCLOS and the coherence of the international legal framework. She highlighted the Tribunal's exercise of systemic integration, bearing in mind scientific developments and the broader international legal order, while keeping to its mandate to provide clear interpretations of the UNCLOS. She also expressed that the Tribunal's reading of the common but differentiated responsibilities (CBDR) principle into UNCLOS Article 194(1) was enough for developing States to conciliate their obligations under UNCLOS with commitments undertaken within the framework of the 1992 UN Framework Convention on Climate Change (UNFCCC), which are based on the CBDR principle. This ensures that developing countries are not disproportionately burdened by additional obligations but rather, promotes an equitable and realistic approach.

Ms. Amanda Chong, Deputy Senior State Counsel at Singapore's Attorney-General's Chambers, spoke about what complementarity between the UNCLOS and UNFCCC regimes entailed and elaborated on the ITLOS' reasoning regarding the relationship between UNCLOS and the UNFCCC, particularly the 2015 Paris Agreement. She observed that it was a widely shared view among participants of the ITLOS advisory proceedings that both regimes should be interpreted and applied in a complementary and mutually reinforcing manner, but that there was a divergence of opinion on what this complementarity entailed exactly. She took note of the Tribunal's understanding that the UNFCCC regime is not *lex specialis* with regard to UNCLOS, and therefore the Paris Agreement "does not modify or limit" or supersede the obligations under UNCLOS. Importantly, she highlighted the ITLOS's view that the enforcement provisions for land-based and atmospheric pollution under UNCLOS Articles 213 and 222

to "adopt laws and regulations and take other measures necessary to implement applicable international rules and standards" referred to the implementation of rules and standards that are binding upon the State concerned either as treaty or customary international law. Therefore, the failure to comply with the legally binding obligation under Article 4 of the Paris Agreement to prepare, communicate and maintain successive nationally determined contributions (NDCs), with a view to achieving the purposes in Article 2 of the Paris Agreement (including the temperature goal) can amount to a breach of Articles 213 and 222 of UNCLOS and would entail possible recourse under the UNCLOS compulsory dispute settlement regime

Ms. Sophie Marjanac, Lead of Accountable Corporations at Client Earth, examined the influence the opinion might have in domestic legal systems, particularly in view of the differences in the 'monist-dualist' spectrum. She believes that the UNCLOS might figure more prominently in framework climate cases against governments. Ms Marjanac also considered the impact of the opinion on corporations, highlighting the Tribunal's findings on States Parties' obligation under UNCLOS Article 206 to conduct environmental impact assessments (EIA). In particular, she pointed to the ITLOS' findings that the content of EIAs shall embrace not only the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment. As such, while the GHG emissions of a specific planned activity might not cause substantial pollution of or significant and harmful changes to the marine environment, EIAs should bear in mind the cumulative impacts, including the downstream impacts thereof (this includes Scope 3 emissions), of these activities using a stringent due diligence test.

Ms. Danielle Yeow, Adjunct Senior Research Fellow and Lead of the Climate Change Law and Policy programme at the NUS Centre for International Law, moderated the interactive discussion. On the topic of the advisory opinion's impact on further international and domestic climate litigation, Dr. Nguyen clarified that there was no discussion on liability. However, as explained by Ms. Marjanac, the opinion may expand the scope of sustainability reporting requirements, referring specifically to the requirements under the EU's Corporate Sustainability Due Diligence Directive and require more companies to look into the impact of their activities to the marine environment. These obligations however, as clarified by Ms. Chong, are obligations of conduct and not result and the Tribunal recognised that stringent due diligence does not mean the immediate cessation of GHG emissions. She noted that the Tribunal did not elaborate what this stringent due diligence standard entails. She observed that multiple factors would come into play to assess a State's compliance with due diligence obligations (such as under Article 194 of UNCLOS), but it is unclear how future courts and tribunals may weigh these factors as well as address questions of causation.

On the issue of the intersection of international human rights law with UNCLOS and Paris Agreement obligations. Ms. Marjanac noted that "human rights" was mentioned once in paragraph 66 of the advisory opinion, noting that climate change "represents an existential threat and raises human rights concerns". She opined that this may directly influence human rights bodies as they do refer to advisory opinions. Ms Chong emphasized that while there are UNCLOS provisions which refer directly to human rights (e.g. Art 230(3)), Art 192 does not provide a legal basis for the wholesale incorporation of external rules of international law which do not deal with protection of the marine environment. A State may still be liable for breaches of human rights law obligations for not taking adequate climate action. However, the remedy should be found outside of UNCLOS. Both Ms. Chong and Dr. Nguyen noted that while applying human rights to the implementation of UNCLOS provisions on the preservation and conservation of the marine environment may go beyond the ITLOS' mandate and jurisdiction, ITLOS' interpretation of UNCLOS obligations may be relied on by human rights courts and tribunals.

On the role of the IPCC and the ITLOS' guidance to use best available science in the implementation of UNCLOS obligations, Dr. Nguyen noted that this will widen the scope of the IPCC as it will now serve as scientific authority not only in the UNFCCC, but in other legal systems that touch upon climate change as well. Lastly, the application of the advisory opinion in the context of the South China Sea was discussed. Dr. Oral hopes that countries within this region, a majority of whom are highly vulnerable to the impacts of climate change, will use this powerful outcome to inspire stronger

collective action and suggested that ASEAN could look into doing so. Finally, Dr. Nguyen said that this advisory opinion can be used to promote cooperation in the region and facilitate sufficient means of implementation for climate action.