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# India's Submission to the ITLOS Climate Change Advisory Opinion: A Lost Opportunity

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## ABSTRACT

*The authors argue that India's submission to the ITLOS for the proceedings concerning the Advisory Opinion on Climate Change was a lost opportunity. India could have led the voices of developing countries and countries with a marine environment vulnerable to climate change, but India failed to do so. Additionally, India could have presented a more coherent and robust submission while aligning it with India's other international submissions and its domestic policies on climate change, as well as contributing to global climate law and its judicial interpretation.*

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## KEYWORDS

*ITLOS, advisory opinion, India, CBDR-RC, maritime law, climate change, lex specialis*



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## Introduction

In the 1970s, when the third Law of the Sea Convention was undergoing deliberations and negotiations, scholars like R. P. Anand argued that the world was undergoing rapid technological, social, political, economic, and sociological changes and that these transformations should be reflected in a change in the law (Anand, 1977). Anand concluded that this transformative new law cannot be founded on old laws, practices, and dogmas (Anand, 1977). Today, the law of the sea is undergoing a massive transformation by looking into the interlinkages and aspects of the law of the sea in the context of “climate change” – a term/phrase/phenomenon that does not find a place in the United Nations Convention on the Law of the Sea (UNCLOS). The current debate at the intersection of climate change and UNCLOS is at the heart of protecting and preserving the marine environment and marine biodiversity under the existing provisions of UNCLOS (Koh, 1984). During UNCLOS negotiations, new interest groups of states beyond traditional socioeconomic dichotomies emerged, like “coastal states, the group of landlocked and geographically disadvantaged States, the group of Straits States, the group of archipelagic States, and many others” (Koh, 1984). The negotiations, however, did not see a group of states vulnerable to climate change – like the Commission of Small Island States on Climate Change and International Law (COSIS), because the science of climate change was not strong enough during the negotiations to allow these special interest groups to emerge. This coalition is one of the newest characteristics emerging at the intersection of climate change and UNCLOS, and “these concepts have been important from the overall Third World perspective on Climate Change” (Khoday, 2022).

However, historical comparisons between the developed and developing world point to a “pattern of inequity” emerging due to inequity in international climate space. Despite

these new alliances, UNCLOS negotiations still retained a similar approach, as the developing world established the “Group of 77” to join against and to moderate the dominant Western and Northern economic and political powers. The commonality of argument for developing countries has occurred both in the maritime space with UNCLOS and in the climate change regime through the United Nations Framework Convention on Climate Change (UNFCCC) to support the creation of an international law that can benefit the developing world through many possible channels.

The efforts of COSIS in requesting the Advisory Opinion from ITLOS go beyond pushing for an international law that benefits developing countries. COSIS’s request attempts to ensure a legal interpretation of UNCLOS to further equity and climate justice in international law for the most vulnerable small island states. With this background, the authors of this paper analyze India’s submission to ITLOS and attempt to understand if India’s submission aims to address the inequities and injustices that currently exist at the intersection of climate law and UNCLOS and secondly, if all the submission takes into account the idea of justice for the most climate vulnerable group in the international community – small islands states, and in the case of ITLOS advisory opinion – specifically COSIS. This intersection of climate change and the law of the sea is exciting and unique because developing countries like India have been arguing for equity and justice in the climate change space. Still, they prefer such discussions to remain with UNFCCC rather than be adjudicated in ITLOS.

### **Sources, Methodology, and Brief Argument**

The source of this research is positivist documents submitted to ITLOS in the request for an Advisory Opinion on Climate Change and documents submitted to ITLOS by state parties during deliberations of the last Advisory Opinion related to state responsibilities towards various types of illegal fishing. Additional research considered India’s policies related to the overlap of ocean policy and climate change, both domestically and internationally. These primary documents and some secondary commentary related to these documents are compared for consistency and substantive growth. Through this article, the authors argue that India’s submission was a lost opportunity to present its issues on climate change before ITLOS and contribute to the judicial interpretation of State obligations.

### **1. Summary of India’s Submission**

In December 2022, COSIS requested from the International Tribunal for the Law of the Sea (ITLOS) an Advisory Opinion on the impact of climate change on the obligations of parties to the United Nations Convention on the Law of the Sea Convention (UNCLOS) to prevent and mitigate the damages of climate change. Throughout 2023, over thirty countries, as well as additional international organizations and NGOs, provided submissions to ITLOS outlining their positions on questions of procedural jurisdiction as well as substance. (See ITLOS Case 31) India submitted its position on the Advisory Opinion after the time limit that was fixed by the International Tribunal for the Law of the Sea (ITLOS). India’s submission can be generally divided into jurisdiction and merits of the case, and both will be analyzed below.

### **2. Submissions on Jurisdiction**

India’s submission to the ITLOS tribunal is divided into two parts, with the first arguing about the tribunal’s jurisdiction and the second related to the merits (Republic of India, 2023b). The jurisdictional argument is also divided into two steps, first noting that the tribunal “lacks advisory competence” and then suggesting that even if there is jurisdiction, the tribunal has “discretion to decline the request,” which it should avail (Republic of India,

2023b). India's main argument for the lack of advisory competence is based on the language of UNCLOS, specifically, Article 288, found in Part XV, Section 2, and then Article 21, found in Annex VI, the Statute of ITLOS (Republic of India, 2023b). India argues that Section 2 of Part XV is titled "Compulsory Procedures Entailing Binding Decisions" and does not entertain advisory jurisdiction (Republic of India, 2022). Likewise, the language of Article 21 states, "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it under this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" (Republic of India, 2023b). Since only "disputes" are expressly provided for, India argues that advisory jurisdiction does not exist (Republic of India, 2023b). This argument is bolstered by the language of UNCLOS, specifically providing advisory jurisdiction to the Seabed Disputes Chamber (SDC) in Articles 191 and 159(10) (Republic of India, 2023b). Since there are specific grants for the SDC to exercise advisory jurisdiction, the lack of any express language providing for general ITLOS advisory jurisdiction would then mean that the UNCLOS statute had the opportunity to provide such jurisdiction and decided not to provide such powers (Republic of India, 2023b).

India next turns to the grant of advisory jurisdiction that ITLOS relies upon: Article 138 of their Rules of Procedure (Republic of India, 2023b). While the basis for such rules is provided in Article 16 of the ITLOS Statute found in Annex VI of UNCLOS ("[t]he Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure"), India argues that the Rules of Procedure are "not a negotiated text between the States Parties" (Republic of India, 2023b). As such, rules of procedure should only indicate "proper conduct" and not "include the conferral of a new jurisdiction" (Republic of India, 2023b). India thus argues that the parties did not consent to be subject to such jurisdiction. This is consistent with India's submissions in the *Enrica Lexie case* (2015), where, among other examples, India complies with "rule 75 of the Rules of Procedure, [noting,] a copy of the written text of the submissions is being communicated to the Registrar of the Tribunal."

This argument is similar to one presented by the United Kingdom (UK) and others before ITLOS considered its first request for an advisory opinion related to obligations concerning instances of illegal, unreported, and unregulated (IUU) fishing activities, submitted in 2013 by the Sub-Regional Fisheries Commission (SRFC) and decided as Case 21 in 2015. In their submission, the UK argued that Article 138 of the Rules of Procedure was *ultra vires* because, as an entity created by a Treaty, ITLOS does not "possess a general competence" (United Kingdom, 2013). Using language from International Court of Justice Advisory Opinions, including *Reparations for Injuries Suffered in the Service of the United Nations* (1949) and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1996), the UK submission argues there while there are some "implied powers" which "are conferred upon [the organization] by necessary implication as being essential to the performance of its duties," creating an entirely new form of jurisdiction is outside such competence" (United Kingdom, 2013).

While the Indian submission in this case is not as detailed as the UK submission in the previous case, it is essential to note that ITLOS rejected the arguments made by the UK and others and accepted jurisdiction to deliver an advisory opinion about IUU fishing responsibility. In the fishing case, the UK submission consisted of 58 paragraphs over 31 pages, including discretions between the English and French text, the history of negotiations regarding the potential to provide express advisory jurisdiction for ITLOS, the origin of Article 138 of the Rules of Procedure, and how other international courts have been granted powers of jurisdiction for advisory opinions (United Kingdom, 2013). Even though these arguments were all defeated when the Tribunal chose to exercise advisory jurisdiction in 2015, India still recites them back to the Tribunal (Republic of India, 2023b).

In the IUU fishing advisory opinion, ITLOS clarified that their jurisdiction arises from Article 21 becoming interconnected with the “other agreement” referred to in that Article about “all matters” specifically provided for in the “other agreement” (SRFC-ITLOS, 2015). They continue by explaining that Article 138 of their rules “does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction” (SRFC-ITLOS, 2015). Those prerequisites are “an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on “a legal question” (SRFC-ITLOS, 2015). Here, ITLOS notes how the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (MCA Convention) provides that “[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion” (SRFC-ITLOS, 2015). Under that provision, a request was duly requested by the Conference of Ministers and transferred to the Tribunal (SRFC-ITLOS, 2015). The Tribunal then notes that the MCA Convention is an “agreement closely related to the purposes of the [Law of the Sea] Convention,” which specifically provides for a request and that the questions asked are legal, as they require identification and interpretation of UNCLOS and the MCA Convention (SRFC-ITLOS, 2015). Since such jurisdiction extends only to “all matters specially provided for in any other agreement which confers jurisdiction, the Tribunal then asks “whether the questions posed by the SRFC constitute matters which fall within the framework of the MCA Convention” and finds that there is enough of a “specific connection” between the question and the MCA Convention to allow for jurisdiction limited to the exclusive economic zones (EEZ) of the SRFC member states (SRFC-ITLOS, 2015).

Unfortunately, the Indian submission to ITLOS does not address any specific elements related to the nature of the agreement, an authorized body, or the legal question (Republic of India, 2023b). Perhaps India could have challenged the propriety of the “Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS),” which, though specifically having Article 2(2) an authorization “to request advisory opinions from the International Tribunal for the Law of the Sea (“ITLOS”) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules,” can be argued is not the proper type of international agreement related to the purposes of UNCLOS, as required (COSIS Agreement, 2021). Instead, the Indian submission repeats the general arguments rejected by ITLOS in the IUU fishing advisory opinion (Republic of India, 2023b).

Next, the Indian submission contends that even if advisory jurisdiction is present, ITLOS still has the discretion to decline to hear the case. When the Tribunal considered that issue in the IUU fishing advisory opinion, it took reference from the ICJ’s refusal to deliver an advisory opinion in the Legality of the Threat or Use of Nuclear Weapons case (International Court of Justice, 1996), then focused on whether there were “compelling reasons” why the IUU fishing case should be similarly denied (SRFC-ITLOS, 2015). Those reasons include a legal question that is too vague or unclear, an answer that would constitute *lex ferenda*, or the impact on third-party obligations (SRFC-ITLOS, 2015). There, the Tribunal acknowledged the claims that the questions may be vague and legislative rather than judicial but still declared that by issuing advisory guidance, they will “assist the SRFC in the performance of its activities and contribute to the implementation of the [MCA] Convention” (SRFC-ITLOS, 2015).



Rather than focus on the elements of the “compelling reasons” test to advocate for discretionary dismissal, India’s submission states that the Tribunal should decline because “the question prima facie appears to be unconnected to the Convention” (Republic of India, 2023b). To support this argument, India first quotes UNCLOS Article I(4), defining pollution of the marine environment, then recites the Articles of Part XII, entitled “Protection and Preservation of the Marine Environment” (Republic of India, 2023b). Continuing with Article 192, providing that “States have the obligation to protect and preserve the marine environment,” India states that this is “an obligation of conduct, as opposed to an obligation of result” (Republic of India, 2023b). From there, Article 194(1) and the Articles making up Section 5 of Part XII, consisting of the different sources of marine pollution, are quoted and labeled as “a minimum threshold of due diligence applications to be undertaken by States to protect and preserve the marine environment” (Republic of India, 2023b).

After noting that States have the right to exploit their marine resources and the principles of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) apply, the Indian submission suggests that “it is thus seen that there is nothing in the Convention to prevent, reduce and control pollution that results or likely to result from climate change” (Republic of India, 2023b). They continue this conclusion by declaring that “there [is no] mandate to protect and preserve the marine environment concerning climate change impacts” in UNCLOS (Republic of India, 2023b). The reason for this is because the “United Nations Framework Convention on Climate Change (UNFCCC), along with its Kyoto Protocol and its Paris Agreement, is the multilateral treaty regime that deals with the subject of climate change.” The general terms of UNCLOS must take a backseat to those specific regimes under the doctrine of *generalia specialibus non-derogant* (Republic of India, 2023b). The Indian submission then asserts that since the Tribunal may refer to the specific principles of UNFCCC law, it could broaden the responsibilities under Part XII, for which parties never consented (Republic of India, 2023b). The submission suggests that with similar proceedings in ITLOS and ICJ, the “deliberate pursuit of parallel proceedings may lead to the inevitable risk of conflicting opinions and findings” (Republic of India, 2023b). However, this ITLOS decision would be specific to the obligations in the Law of the Sea Convention, providing states with an interpretation of Part XII, which has never been the subject of any contentious disputes. Considering the reasons provided in the ITLOS IUU fishing opinion, the reasons presented by India will likely not be enough to persuade the court that they do not have jurisdiction or that such jurisdiction can be declined.

### 3. Submission on Merits

India’s submission on the merits of the questions before ITLOS mainly asserts that ITLOS “may refrain from rendering an opinion on the direct linkages between climate change and pollution of the marine environment” (Republic of India, 2023b). According to India, refraining is the best action because of (i) issues concerning *lex specialis* (ii) obligations of state parties under Part XII expanding through interpretation, (iii) and the science on this issue is still evolving (Republic of India, 2023b). These issues are discussed separately below.

*Issues concerning lex specialis.* India continues their argument that *lex specialis* requires declining jurisdiction by also arguing that the existence of ongoing Conference of Parties (COP) under the UNFCCC regime means that this more democratic body should be charged with determining obligations related to climate change rather than ITLOS judges (Republic of India, 2023b). Unlike this narrow ITLOS approach, India argues that the UNFCCC framework proceeds in a “manner that respects the delicate balance of the different aspects of climate change that need to be seen together as a whole, including mitigation, adaptation, means

of implementation and support in terms of climate finance, development and transfer of technology, and capacity building" (Republic of India, 2023b).

However, several other states and international organizations view obligations concerning marine pollution in the context of climate change as separate and distinct under the Paris Agreement, UNFCCC, and UNCLOS (Written Statement: Bangladesh, Micronesia, Indonesia, International Union for Conservation of Nature and Natural Resources et al., 2023; Commission of Small Island States on Climate Change and International Law, 2023). Watson agrees and argues that obligations of Parties under the Paris Agreement and UNCLOS to prevent marine pollution is "insufficient" (Watson, 2020). For example, the Paris Agreement "requires national GHG inventories, including offshore oil and gas (O&G) emissions," and UNCLOS "requires national laws and regulations" to "control, prevent and reduce" pollution to the marine environment (Watson, 2020). Moreover, issues at the heart of climate change and marine pollution, like "ocean acidification," are completely outside the Scope of UNFCCC and the Paris Agreement (Harrould-Kolieb, 2023). The Indian submission does not specifically delve into the issue of "ocean acidification," "sea-level rise," or "coastal erosion" as more specific events/adverse effects of climate change that are also relevant in the Indian context.

India submits that UNCLOS does not cover climate change within its regime and that any issue concerning climate change should be addressed under the UNFCCC and Paris Agreement regime. This does not align with India's overall view and domestic policy concerning oceans, shipping and ports. India's 2023 National Action Plan for Green Shipping, developed with DNV, states that the "Paris Agreement was adopted in 2015 in response to the increasing signs of global climate change, shipping was not included. Instead, the IMO was asked to develop their GHG emission reduction scheme". Even though high seas emissions are not attributed to state inventories, and instead reported to the UNFCCC as "memo items" in national inventories and not attributed to state inventories the UNFCCC and IMO have worked together since the Paris Agreement to develop a "Strategy on Reduction of GHGs from Ships" (MEPC, 2023) India's Action Plan also recognizes the success of IMO in developing carbon reduction through MARPOL (which has been occurring since 1998), and discusses the impacts of potential carbon trading plans either through IMO or even the European Union and separate from the UNFCCC, implying that even if UNFCCC is *lex specialis* for climate change, IMO, and especially MARPOL remain *lex specialis* for high seas issues. Domestically, India's Minister for Ports, Shipping and Waterways, declared in 2023 that India's entire coastal and inland fleet will be converted to renewable energy in five years (Kumar & Verma, 2024). While renewable ships currently only make up about 10 % of the 1,500 fleet, the new plan includes to more than triple the overall number with only renewable ships, as well as create a Maritime Development Fund to build green hydrogen hubs at several ports (Kumar & Verma, 2024).

In IMO's own submission to ITLOS, they recognize that they are the "competent international organization(s) for matters relating to protecting and preserving the Marine Environment" (International Maritime Organization, 2023). Under Annex VIII, Article 2 (1) of UNCLOS, IMO is recognized in the field of "navigation, including pollution from vessels and by dumping". The IMO also acknowledges that the obligations of State Parties under the IMO instruments are derived from UNCLOS (International Maritime Organization, 2023). IMO also accepts and acknowledges that IMO precedes UNCLOS, yet "UNCLOS today still provides the general jurisdictional framework for the use and regulation of ocean spaces," including shipping and pollution to the marine environment (International Maritime Organization, 2023). Since India admits that the Paris Agreement does not cover shipping, it raises the question of what *lex specialis* should provide the legal regime for preventing ship-based marine pollution, which India's submission notes is contained in UNCLOS Art. 211 (Republic of India, 2023b). Further,

India's recent submission of India to Global Stocktaking by the UNFCCC Secretariat, the terms "marine environment", "marine pollution", etc. were completely missing, highlighting the gap that the UNFCCC and Paris Agreement together create in the context of climate change and marine environment (Republic of India, 2023b). Suppose the UNFCCC framework displaced shipping and ocean climate policy. In that case, their recent COP decision not to issue policy is either an abrogation or acknowledgment of the primacy of UNCLOS and the IMO on maritime policy, including at the overlap of maritime law and climate change.

*Obligations of state parties under Part XII will be expanded through judicial interpretation.* India's submission indicates it prefers holistic discussions at UNFCCC COP rather than the judicial interpretation that ITLOS would supply. Specifically, India cites the "deploy [ment of] low-carbon climate technologies at a significant scale" and "a facilitative global technology transfer regime," with "incremental and associated costs of these technologies are met by grant-based and concessional public-sources finance provided by developed countries" as only possible through democratic collaboration (Republic of India, 2023b). India then cites its record of "ambitious domestic actions" and "pioneering . . . global initiatives" achieved through COP as a reason to eschew any ITLOS mandates on obligations (Republic of India, 2023b). The heart of these initiatives is the ability of States at COP (unlike ITLOS) to reckon with Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC) that take into account historical responsibilities and "equitable space for developing countries" (Republic of India, 2023b). It is unclear why India does not think ITLOS can consider these concepts, even though they are not directly referenced by the specific question presented to the tribunal, especially since India acknowledges that "[s]ome of the rudiments of the principle . . . are clearly seen in Part XII of the Convention" (Republic of India, 2023b). In fact, the Indian submission explicitly cites Art. 194 earlier, including the language that States should use the "best practicable means at their disposal and in accordance with their capabilities" (Republic of India, 2023b; UNCLOS, 1982).

India's preference for the UNFCCC framework rather than the more general language of UNCLOS is perhaps best explained by the only Article of the UNFCCC cited in the India submission, 4.7, which states that "economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties" (UN General Assembly, 1994). The circumstances of India's extreme poverty are dire: some international groups said in 2017 that 650 – 763 million people, over half the population, are in "Multi-Dimensional Poverty" (Alkire, 2011) though more recent accounts suggest that only 150 million are living below the \$2.15 a day poverty line, though still acknowledging that 800 million receive subsidies for food and other services and utilities (Kumar, 2023). The primacy of economic factors in UNFCCC would thus allow for more development like the Tata Mundra Power Plant in Gujarat, which has had a negative impact on marine life and air quality since it became operational in 2012 (*Jam v. Int'l Fin. Corp.*, 2016).

India's insistence that international cooperation is only fulfilled through the UNFCCC and Paris Agreement also seems to ignore UNCLOS Art. 197, which is not cited in the submission (Republic of India, 2023b). Art. 197 specifically provides that "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards, and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features" (UNCLOS, 1982). India's submission concludes by saying that "[a] global cooperative framework . . . [is] crucial for enabling developing countries to take effective climate action" but it is unclear why only the COP framework is acceptable rather than the one outlined

in Article 197 (Republic of India, 2023b). It is also difficult to see how an advisory opinion regarding obligations could modify the duties of Article 197, which already contains a binding obligation to cooperate and where India is effectively already in compliance.

*Science on this issue is still evolving.* The Indian position is that because the science on the issue of climate change is still evolving, ITLOS should not make any decisions on interlinkages between climate change and the sea, only the UNFCCC COP (Republic of India, 2023b). However, this position of India contradicts its own science and positions at other international and national forums where India established scientific and legal interlinkages between climate change and issues of oceans and sea. For example, the Ministry of Earth Sciences, Government of India, runs the “Ocean Acidification and its Potential Impacts on Biological Resources from the Indian Coastal Seas” program, which confirms interlinkages between increasing global atmospheric carbon dioxide emissions and ocean acidification (Centre for Marine Living Resources & Ecology, n.d.). The US National Oceanic and Atmospheric Administration runs the BOBOA (Bay of Bengal Ocean Acidification Mooring, and confirms the interlinkages (Pacific Marine Environmental Carbon Program, n.d.). BOBOA studies the ocean-atmospheric interactions in the Bay of Bengal (Pacific Marine Environmental Carbon Program, n.d.). Additionally, academics like Roshan T. Ramessur et al. (Ramessur et al., 2022), Sridevi and Sarma (Sridevi & Sarma, 2021) & Panchang and Ambokar (Panchang & Ambokar, 2021) also confirm interlinkages between climate change / anthropogenic emissions and ocean acidification.

India’s legal and political position reaffirmed the interlinkages between climate change and Marine Pollution at the UN Ocean Conference 2022, which endorsed the Lisbon Declaration, stating that:

“climate change is one of the greatest challenges of our time, and we are deeply alarmed by the adverse effects of climate change on the ocean and marine life, including the rise in oceans temperatures, ocean acidification, deoxygenation, sea level rise, the decrease in polar ice coverage, shifts in the abundance and distribution of marine species, including fish, decrease in marine biodiversity, as well as coastal erosion, and extreme weather events and related impacts on the island and coastal communities, as highlighted by the Intergovernmental Panel on Climate Change in its special report entitled *The Ocean and Cryosphere in a Changing Climate* and its successive reports.” (UN Ocean Conference, 2022).

#### **4. A Suggested Way Forward**

Firstly, it is essential to identify that the Indian submission is a lost opportunity for India to lead climate change discussions from a developing country standpoint. As a developing country, India should have treated this submission as an opportunity to put forward an Indian perspective on international law or the Third World approach to international law. However, India’s submission only briefly champions its actions but uses this to ask for ITLOS not to take action rather than follow its example. In the past, India has been at the forefront of fighting for an application of CBDR-RC. Still, in its submission, India merely mentions CBDR-RC without discussing how it would like the general language of Article 197 to be interpreted by ITLOS. India’s overall position on issues of responsibility in the context of climate change has been deeply rooted in historic responsibilities (Republic of India, 2023a) and CBDR-RC (Republic of India, 2023a). This has overall been based on the abstract use of words like “finance”, “technology transfer”, and “capacity building”. This submission was a lost opportunity to assert and bring to the surface “respective capabilities” and “respective national need”, in the context of climate change and marine environment.

For example, India has established domestic science on ocean acidification (Centre for Marine Living Resources & Ecology, n.d.), supported by the Intergovernmental Panel



on Climate Change's report on ocean acidification (Pörtner et al., 2019). India could have highlighted the science and submitted for specific relief countries' needs in such situations. Moving forward more specifically in the Indian context, "Lohachara" is considered by some scientists to be an island that has submerged due to the rise of sea levels (Raha et al., 2014). In 2008, the International Organization for Migration released a report that mentioned Lohachara but also asserted that there is no scientific consensus on this issue (Brown, 2008). This submission was India's opportunity to highlight the adverse effects of anthropogenic emissions on its marine environment, land, and maritime boundaries. The lack of scientific and political consensus implies that Indian Islands in the Bay of Bengal are not sinking or submerging due to sea-level rise or, more generally, due to anthropogenic influence. Prominent scientists and literature accepted that Lohachara and Ghoramara were submerging due to sea-level rise in the Indian Bay of Bengal (Schofield & Freestone, 2013). Similarly, more recent scientific scholarship confirms that anthropogenic climate change is causing the submergence of these islands (Chowdhury et al., 2022). However, it is difficult to get a general scientific and political agreement on climate challenges in Global South countries like India. The sixth assessment of the IPCC report confirms that it is rather difficult to link specific events to climate change, even with all the scientific advances (Pörtner et al., 2022). It is twice as difficult to establish these scientific linkages in developing countries because of the lack of long-established meteorological data on these scientific issues. In such a case, the vulnerability of people, states, and entities, combined with the needs of the vulnerable groups, should guide climate protection laws (Pörtner et al., 2022). With that being said, India could have used this submission as an opportunity to highlight the most climate-vulnerable groups within its jurisdiction, assert the science that India has on issues like sinking Indian islands (regardless of the scientific or political disagreements), and push for climate justice for the most vulnerable.

Secondly, moving forward, India should ensure coherence between India's submission to the judicial bodies and its submission to other international bodies and organs. India should have looked into its SDG 14 Commitments and recent recommendations made to the 2022 UN Ocean Conference (India Ministry of Earth Sciences, 2022b) where it took part in "deliberations and suggest solutions on issues like marine pollution, promoting and strengthening sustainable ocean-based economies, managing, protecting, conserving and restoring marine and coastal ecosystems, managing and addressing ocean acidification, deoxygenation, and ocean warming and making fisheries sustainable" (India Ministry of Earth Sciences, 2022a). India participated in the conference and agreed to the science-establishing interlinkages between climate change and oceans. However, this fact contradicts India's position before ITLOS, where India asserts that ITLOS "may refrain from establishing linkages" between climate change and the marine environment (Republic of India, 2023b). Additionally, India is a party to the UNFCCC and the Paris Agreement, which define "climate system" as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions". This implies a discussion or rule of law concerning climate systems is highly likely to include discussions jointly and separately between hydrosphere, biosphere, geosphere, and atmosphere. The overlapping nature of international agreements should also tend towards harmonization rather than siloing of interests. India's objections to jurisdiction echo some of the problems of fragmentation raised by the International Law Commission's 2006 report on "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law". Though the ILC acknowledges the potential to "create conflicts between rules and regimes in a way that might undermine their effective implementation" and the principle of *lex specialis derogat lego generali* which India relies upon, they suggest that "special law may be used to apply, clarify, update or modify as well as set aside general law (Study Group

of the International Law Commission. Considering that ITLOS already accepted advisory jurisdiction in their IUU fishing opinion, India could adopt the ILC position and encourage ITLOS, the specialized UNCLOS judicial body, to interpret UNCLOS provisions in a way most favorable to its national interests. Furthermore, India does not have a climate law domestically, which means, India uses fragmented policies and legislation for its domestic climate action. India's position on fragmentation in international climate law does not seem to align well with its own positioning both internationally and domestically.

Tigre and Rocha (2023) state that "judicial development of the existing law relies on coherence" between different rules and obligations, interpretations, and applications. This stands true even for a coherent position between different international stances, as well as international and domestic interpretations of not just rules and obligations, but also of science. India's submission can be seen as a setback against some of its recent work and certainly a missed opportunity to advance its ambitions (Tigre & Silverman-Roati, 2023).

Finally, India should ensure coherence between its submissions to international forums and its domestic policies and practices. The discussion above provides evidence of a gap between the domestic policy or internal position of India, and the submissions to the ITLOS. This position also contradicts India's domestic scientific, legal, and policy work on climate change and oceans. For example, India's domestic scientific experts have already established solid linkages between climate change and ocean acidification which causes marine pollution (Ministry of Statistics and Program Implementation, 2015). However, through its submissions to ITLOS, India states that the science is evolving and that ITLOS should refrain from establishing such interlinkages.

Overall, India's delayed but incoherent submission raises several questions. However, moving forward India can bolster its position at the international judicial forums by engaging climate law experts to prepare their submissions. Experts can likely improve the coherence that India's submission lacks before ITLOS.

## REFERENCES

- Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*, 2021. <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf>
- Alkire, S. (2011). *Multidimensional Poverty and its Discontents*. OPHI Working Paper No. 46. [https://ophi.org.uk/sites/default/files/2024-03/OPHI-WP-46-May-12\\_0.pdf](https://ophi.org.uk/sites/default/files/2024-03/OPHI-WP-46-May-12_0.pdf)
- Anand, R. (1977). Winds of change in the Law of the Sea. *International Studies*, 16(2), 207–226. <https://doi.org/10.1177/002088177701600202>
- Centre for Marine Living Resources & Ecology. (n.d.). *Ocean Acidification and its potential impacts on biological resources from the Indian coastal seas*. India Ministry of Earth Sciences. <https://cmlre.gov.in/research-programs/ocean-acidification-and-its-potential-impacts-biological-resources-indian-coastal>
- Chowdhury, G. W., Koldewey, H. J., Niloy M. N. H., & Sarker, S. (2022). The ecological impact of plastic pollution in a changing climate. *Emerging Topics in Life Sciences*, 6(4), 389–402. <https://doi.org/10.1042/ETLS20220016>
- Commission of Small Island States on Climate Change and International Law. (2022, December 12). *Request for an Advisory Opinion*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request\\_for\\_Advisory\\_Opinion\\_COSIS\\_12.12.22.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf)
- Commission of Small Island States on Climate Change and International Law. (2023). *Case No. 31. Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/2/C31-WS-2-4-COSIS.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-4-COSIS.pdf)
- Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (CRFC)*, 2012. <https://faolex.fao.org/docs/pdf/mul215451E.pdf>

- Datta, A. (2010). Brown, Oli (2008): Migration and climate change, international organization for migration (IOM), 56 S. In *ZEP Zeitschrift für internationale Bildungsforschung und Entwicklungspädagogik*, 33(3), 39–41. <https://doi.org/10.25656/01:9757>
- Federated States of Micronesia. (2023). *Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. International Tribunal for the Law of the Sea [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-30-FS\\_Micronesia\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-30-FS_Micronesia_01.pdf)
- Harrould-Kolieb, E. R. (2019). (Re)Framing ocean acidification in the context of the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement. *Climate Policy*, 19(10), 1225–1238. <https://doi.org/10.1080/14693062.2019.1649994>
- India Ministry of Earth Sciences. (2022a, June 26). *Press Release on the Eve of 2022 UN Ocean Conference*. India Press Information Bureau. <https://pib.gov.in/PressReleasePage.aspx?PRID=1837127>
- India Ministry of Earth Sciences. (2022b, July 27). *Unstarred Question No. 1683. UN Ocean Conference*. <https://www.moes.gov.in/sites/default/files/LS-in-English-1683-27-07-2022.pdf>
- Indian Coastal Green Shipping Programme White Paper, 2023*. <https://www.dnv.com/maritime/publications/indian-coastal-green-shipping-programme/>
- International Convention for the Prevention of Pollution from Ships (MARPOL), 73/78*. <https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/Documents/MARPOL%201973%20-%20Final%20Act%20and%20Convention.pdf>
- International Court of Justice. (1949, April 11). *Reparation for Injuries Suffered in the Service of the United Nations*. <https://www.icj-cij.org/case/4>
- International Court of Justice. (1996, July 8). *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. <https://www.icj-cij.org/case/93>
- International Maritime Organization. (2023). *Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/2/C31-WS-2-3-IMO.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-3-IMO.pdf)
- International Tribunal for the Law of the Sea. (2015, July 24). *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-24/>
- International Tribunal for the Law of the Sea. (2015). *Case No. 21. Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21/>
- International Union for Conservation of Nature and Natural Resources, World Commission on Environmental Law, Ocean Law Specialist Group. (2023). *Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/2/C31-WS-2-2-IUCN.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-2-IUCN.pdf)
- Jam v. Int’l Fin. Corp.*, 172 F. Supp. 3d 104 (D.D.C. 2016).
- Khoday, K. (2022). Decolonizing the environment: Third World approaches to the planetary crisis. *Indonesian Journal of International Law*, 19(2). <https://scholarhub.ui.ac.id/cgi/viewcontent.cgi?article=1558&context=ijil>
- Koh, T. (1984). Negotiating a New World Order for the Sea. *Virginia Journal of International Law*, 24, 761. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/vajint24&div=32&id=&page=>
- Kumar, M. (2023, July 17). *One-tenth of India’s population escaped poverty in 5 years – government report*. Reuters. <https://www.reuters.com/world/india/one-tenth-indias-population-escaped-poverty-5-years-government-report-2023-07-17/T>
- Kumar, M., & Verma, N. (2024, March 7). *India aims for green shipping on inland waterways in five years – officials*. Reuters. <https://www.reuters.com/world/india/india-aims-green-shipping-inland-waterways-five-years-officials-2024-03-07/>
- Marine Environment Protection Committee. (2023, July 23). *Resolution on 2023 IMO Strategy on Reduction of GHG Emissions From Ships (MEPC.377(80))*. International Maritime Organization. <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/annex/MEPC%2080/Annex%2015.pdf>
- Ministry of Statistics and Programme Implementation. (2015). *Statistics Related to Climate Change – India 2015*. [https://www.mospi.gov.in/sites/default/files/publication\\_reports/climateChangeStat2015.pdf](https://www.mospi.gov.in/sites/default/files/publication_reports/climateChangeStat2015.pdf)

- Pacific Marine Environmental Laboratory Carbon Program. (n.d.). *Bay of Bengal Ocean Acidification (BOBOA) Mooring (15°N, 90°E)*. <https://www.pmel.noaa.gov/co2/story/BOBOA>
- Panchang, R., & Ambokar, M. (2021). Ocean acidification in the Northern Indian ocean : A review. *Journal of Asian Earth Sciences*, 219, 104904. <https://doi.org/10.1016/j.jseaes.2021.104904>
- People's Republic of Bangladesh. (2023). *Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-21-Bangladesh.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-21-Bangladesh.pdf)
- Pörtner, H.-O. et al. (Eds.). (2019). *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*. [https://www.ipcc.ch/site/assets/uploads/sites/3/2019/12/SROCC\\_FullReport\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/sites/3/2019/12/SROCC_FullReport_FINAL.pdf)
- Pörtner, H.-O. et al. (Eds.). (2022). *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge University Press. <https://doi.org/10.1017/9781009325844>
- Raha A.K. et al. (2014). Sea Level Rise and Submergence of Sundarban Islands: A Time Series Study of Estuarine Dynamics. *Journal of Ecology and Environmental Sciences*, 5(1), 114–123. [https://bioinfopublication.org/files/articles/5\\_1\\_2\\_JEES.pdf](https://bioinfopublication.org/files/articles/5_1_2_JEES.pdf)
- Ramessur, R. et al. (2022). Ocean acidification: A hidden risk to sustainable development in the Western Indian Ocean. *WIO Science - Policy Platform Series*, 1, 167–171. [https://www.researchgate.net/publication/366714324\\_Ocean\\_Acidification\\_A\\_hidden\\_risk\\_to\\_sustainable\\_development\\_in\\_the\\_Western\\_Indian\\_Ocean](https://www.researchgate.net/publication/366714324_Ocean_Acidification_A_hidden_risk_to_sustainable_development_in_the_Western_Indian_Ocean)
- Republic of India. (2023a). *Submission to the UNFCCC Consideration of Outputs of the First Global Stocktake*. <https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202309151444---India%20Submission%20-%20Consideration%20of%20Outputs%20of%20the%20First%20Global%20Stocktake.pdf>
- Republic of India. (2023b). *Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31)*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/3/C31-WS-3-4-India.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf)
- Republic of Indonesia. (2023). *Written Statement on Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-13-Indonesia.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-13-Indonesia.pdf)
- Schofield, C., & Freestone, D. (2013). Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise. In Gerrard M. B., & Wannier, G.E. (Eds.). *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (pp. 141–166). Cambridge University Press.
- Sridevi, B., & Sarma, V. V. S. S. (2021). Role of river discharge and warming on ocean acidification and pCO levels in the Bay of Bengal. *Tellus B: Chemical and Physical Meteorology*, 73(1), 1971924. <https://doi.org/10.1080/16000889.2021.1971924>
- Study Group of the International Law Commission. (2006, July 18). *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l702.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l702.pdf)
- Sub-Regional Fisheries Commission. (2014, April 14). *Request for Advisory Opinion*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/advisory\\_opinion\\_published/C21\\_ord\\_140414.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/C21_ord_140414.pdf)
- Tigre, M. A., & Rocha, A. (2023). Competing Perspectives and Dialogue in Climate Change Advisory Opinions. *American Journal of International Law*, 117, 287–291. <https://doi.org/10.1017/aju.2023.50>
- Tigre, M. A., & Silverman-Roati, K. (Eds.). (2023). *ITLOS Advisory Opinion on climate change: Summary of briefs and statement submitted to the tribunal*. Columbia Law School, Scholarship Archive. [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1209&context=sabin\\_climate\\_change](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1209&context=sabin_climate_change)
- UN General Assembly. (1994, January 20). *Resolution on the United Nations Framework Convention on Climate Change (A/RES/48/189)*. <https://www.refworld.org/legal/resolution/unga/1994/en/26583>
- UN Ocean Conference. (2022, May 25). *Final Draft of the Political Declaration*. [https://sdgs.un.org/sites/default/files/2022-06/UNOC\\_political\\_declaration\\_final.pdf](https://sdgs.un.org/sites/default/files/2022-06/UNOC_political_declaration_final.pdf)
- United Kingdom. (2013). *Written Statement on Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*. International Tribunal for the Law of the Sea. [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/written\\_statements\\_round1/C21\\_Response\\_Round\\_1\\_UK.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_Response_Round_1_UK.pdf)



*United Nations Convention on the Law of the Sea, 1982.* [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

*United Nations Framework Convention on Climate Change, 1992.* [https://treaties.un.org/doc/treaties/1994/03/19940321%2004-56%20am/ch\\_xxvii\\_07p.pdf](https://treaties.un.org/doc/treaties/1994/03/19940321%2004-56%20am/ch_xxvii_07p.pdf)

Watson, S. M. (2020). Greenhouse gas emissions from offshore oil and gas activities – Relevance of the Paris Agreement, Law of the Sea, and Regional Seas Programmes. *Ocean & Coastal Management, 185*, 104942. <https://doi.org/10.1016/j.ocecoaman.2019.104942>

**Бхардвадж Ч., Стейн Д. Подання Індії щодо консультативного висновку ITLOS про зміну клімату: втрачена можливість. – Стаття.**

Автори стверджують, що подання Індії до ITLOS щодо консультативного висновку про зміну клімату було втраченою можливістю. Індія могла б очолювати голоси країн, що розвиваються, і країн з морським середовищем, вразливим до зміни клімату, але їй не вдалося цього зробити. Крім того, Індія могла б подати більш погоджений та обґрунтований документ, пов'язавши його з іншими міжнародними позиціями Індії та її внутрішньою політикою щодо зміни клімату, а також зробити значний внесок у глобальне кліматичне законодавство та його судове тлумачення.

**Ключові слова:** ITLOS, консультативний висновок, Індія, CBDR-RC, морське право, зміна клімату, *lex specialis*.

