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Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention

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This article explores the connection between obligations to reduce greenhouse gas (GHG) emissions under the climate change regime and obligations to protect the marine environment under the United Nations Convention on the Law of the Sea (UNCLOS). Within the context of the state of the science on the links between climate change and the marine environment, the article considers whether the emission of greenhouse gases as a result of human activity constitutes a violation of various obligations under the UNCLOS. Having identified a number of possible violations, the article proceeds to consider the application of the binding dispute settlement process under the UNCLOS and the possibility of a successful claim.

Keywords  climate change, dispute settlement, Law of the Sea Convention

Introduction
The Kyoto Protocol is the first international agreement with legally binding commitments to begin to address climate change by reducing greenhouse gas (GHG) emissions. Pursuant to the Protocol, most of the developed world will be committed to modest reduction targets over the next few years. The two largest per capita emitters, the United States and Australia, have so far opted not to join this modest effort to address climate change, and developing countries, while party to the Kyoto process, are presently engaged only in voluntary action to reduce emissions.

One of the reasons for the slow progress internationally in addressing climate change has been the complexity of the issue, in part at least due to the connection between climate change and economic, equity, and other environmental issues. Many observers, for example, have considered the Kyoto Protocol to be as much a trade agreement as an environmental agreement. Similarly, there are clear connections between climate change and other environmental issues such as desertification, biological diversity, resource depletion, threats to the marine environment, land use conflicts, and ozone layer depletion, among others. Last, but certainly not least, equity, both in terms of intragenerational and intergenerational, has added a layer of complexity that has made progress a challenge.

This article explores whether the interconnections between climate change and these related environmental issues can contribute to progress on climate change policy either
within or outside the Kyoto process. Specifically, the links between climate change and the marine environment are explored in this article.

The scientific link between climate change and marine environmental protection has been identified and has been highlighted in part through the work of the Intergovernmental Panel on Climate Change (IPCC). Considering the slow progress on climate change mitigation under the climate change regime to date, linkages between climate change and state obligations under other existing regimes could become more and more important in shaping the global response to climate change.

In this article, two central questions are posed. First, can a state be found to be in violation of its obligations under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) for failing to mitigate climate change? This issue is considered in the context of parties’ obligations under UNCLOS with respect to the protection and preservation of the marine environment. Second, can the binding dispute settlement process in UNCLOS be used to require parties to take appropriate action to reduce their GHG emissions?

The first section, climate change and the oceans, briefly reviews the state of science on the links between climate change and the marine environment. The second section, climate change under UNCLOS, proceeds to consider the marine environmental protection provisions of Part XII of UNCLOS from a climate change perspective. The third section, The Dispute Settlement Procedures under UNCLOS, provides an overview of the binding dispute settlement process under Part XV of UNCLOS. The implications of recent rulings by various international tribunals on the ability to bring a claim under Part XV of UNCLOS are also considered in this section. Finally, the conclusion offers some parting thoughts on the likely treatment of climate change under UNCLOS should a claim be brought.

Climate Change and the Oceans

A comprehensive assessment of our scientific understanding of past and predicted future impacts of climate change, and specifically its impacts on the marine environment, is not necessary here, because much has been written on both. A general overview of the state of knowledge on this issue is provided as scientific evidence would be the foundation for any claim against a state for failure to mitigate climate change brought under the UNCLOS dispute settlement procedures. What follows is an overview of the conclusions reached by the IPCC in its Third Assessment Report of 2001 with respect to climate change impacts on the marine environment.

Ocean-related impacts of human-induced climate change identified by the IPCC include the following:

- global average sea level rises of 0.09–0.88 m by 2100;
- reductions in sea-ice cover;
- elevated average sea surface temperatures (SSTs);
- increased storm floods worldwide;
- accelerated levels of coastal erosion;
- increased seawater intrusions into fresh surface and groundwater;
- accelerating adverse impacts on marine fish; and,
- impacts on aquaculture.

In summary, the primary physical changes of sea level rise, increases in sea surface temperature, an increase in extreme weather events and reductions in ice cover are predicted to lead to a long list of changes to marine ecosystems. Specific aspects of the marine
environment threatened include coral reefs,6 polar mammals, coastal ecosystems, and
commercial and noncommercial species of marine life alike. Resulting social and economic
impacts range from loss of property (including land mass), loss of access to potable water,
and loss of coastal infrastructure to the potential depletion of a number of commercial fish
stocks.7

The message from the IPCC’s Third Assessment Report is clear: Climate change poses
a serious risk to many marine species, many ecosystems, and to the marine environment
as a whole, and will result in secondary social and economic impacts. This leads to the
central question posed in this article: Do the provisions of UNCLOS designed to protect and
preserve the marine environment provide any legal avenues to motivate states to take action
to mitigate climate change so as to reduce its impacts on the marine environment. More
specifically, does UNCLOS provide a mechanism for states to seek recourse against other
states that have not taken or are not taking adequate action to reduce their contributions to
climate change?8

Climate Change under UNCLOS

There is little indication from either the text of UNCLOS or historical accounts of the
negotiations that climate change per se was on the minds of negotiators at the time the
Convention was developed.9 The protection and preservation of the marine environment,
however, has a prominent place among the objectives of UNCLOS. In this section, the extent
to which the objectives of protecting and preserving marine ecosystems were translated
into firm obligations and commitments will be considered. Next, the link between these
obligations and responsibilities and climate change mitigation will be explored.

General Provisions of UNCLOS

In the Preamble of UNCLOS, the importance of establishing a legal order for the oceans that
promotes, among other things, the protection and preservation of the marine environment
is recognized. At the same time, the Preamble recognizes the tension that exists between
these and other objectives designed to protect the common interest in the oceans on the one
hand, and state sovereignty on the other. The Preamble specifically urges parties to adopt a
holistic approach to ocean issues.

UNCLOS, Article 1 includes the following definition of “pollution of the marine
environment”: the introduction by man, directly or indirectly, of substances or
energy into the marine environment, including estuaries, which results or is
likely to result in such deleterious effects as harm to living resources and
marine life, hazards to human health, hindrance of marine activities, including
fishing and other legitimate uses of the sea, impairment of quality for use of
sea water and reduction of amenities.

A traditional interpretation of UNCLOS wording, including the definition of pollution,
would tend to focus on what the parties contemplated at the time UNCLOS was negotiated.
Using this approach, it could be argued that climate change was not on the minds of
negotiators and, therefore, the term energy in the definition of pollution of the marine
environment was not intended by the parties to include increases in ocean temperature
resulting from GHG emissions.
It is suggested that such an interpretation is inappropriate for a number of reasons. First, this approach would be an unduly restrictive interpretation of the intention of the parties at the time. It seems clear from the plain wording that the overriding objective of the definition of pollution was to capture a full range of possible threats to the marine environment. There is no indication that the parties were intending to limit the definition to only those specific threats that were clearly identified at the time. Secondly, this interpretative approach would treat UNCLOS as a contract, frozen in the time it was negotiated. Such an approach to general treaty interpretation would relegate many international treaties to irrelevance soon after they are negotiated. For international treaties to serve a constructive role over time, they should be interpreted in light of changing circumstances.

Furthermore, while the specific cause of temperature increase from climate change may not have been on the minds of negotiators, it is clear from the work of the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) that the potential impact of temperature changes to marine ecosystems was within the contemplation of negotiators. The sources of energy under consideration at the time may have been more local, such as land-based effluent from industrial facilities, and likely did not include climate change. The threat of temperature change to the marine environment, however, was clearly identified. The inclusion of “energy” in the definition of pollution can be read as an indication that negotiators were aware of this threat.

Finally, Article 293 of UNCLOS specifically opens the door to a progressive interpretation of UNCLOS obligations by bringing in other sources of international law not inconsistent with UNCLOS. Taking this into account, it is suggested that a broader interpretation of pollution is more consistent with the plain wording of Article 1 and its purpose at the time it was negotiated. It is also one that commentators have advocated in the context of Part XII. Crylle de Klemm, for example, suggested even before the completion of UNCLOS that the general provisions on the marine environment in UNCLOS had to be read to include an obligation to protect threatened species and ecosystems. At the same time, others argued that these provisions include an obligation to protect the fauna and flora of the seafloor from harm.

Assuming it can be shown that GHG emissions lead to an increase in ocean temperature, it would seem that human-induced GHG emissions fit within the definition of marine pollution in UNCLOS in two respects. First is through the reference to energy in the Article 1 definition; the other through an effect based interpretation of pollution. These two approaches are briefly considered below.

At the heart of the science behind climate change is the greenhouse effect which predicts an overall increase in energy within the atmosphere resulting from an increase of GHGs. This, in turn, is predicted to lead to a rise in energy in the oceans. It is this increase in energy that is predicted to have significant harmful effects on living resources and marine life through changes in water temperature, sea level, ocean currents, and sea ice. A recent, yet unpublished, study has concluded that there is a clear correlation between GHG emissions and ocean temperature over the past 40 years. In other words, based on this study, there is no reasonable explanation for the changes in global ocean temperatures over the past 40 years other than GHG emissions.

Assuming the science is convincing, there is a strong basis for the position that GHG emissions cause marine pollution due to the increase in energy in the oceans resulting from GHG emissions. An alternative approach is to take an “effects-based” view of marine pollution, to include within marine pollution the release of any substance that causes harm to the marine environment. Either approach can lead to the conclusion that GHG emissions result in marine pollution as defined in Article 1 of UNCLOS.
Part XII of UNCLOS, Marine Environmental Protection

Part XII of UNCLOS deals generally with state obligations with respect to the marine environment. As early as 1991, Part XII was characterized by academics as constitutional in character, reflecting in part existing customary international law, but at the same time providing the first comprehensive statement on the protection of the marine environment in international law. The starting point for Part XII is the general obligation under Article 192 to “protect and preserve the marine environment,” balanced with a reaffirmation of the right of states to exploit their natural resources “in accordance with their duty to protect and preserve the marine environment.” Pursuant to Article 194, states are obligated to take all measures consistent with the Convention necessary “to prevent, reduce and control pollution of the marine environment from any source, using the best practical means.” Article 194 is central to any analysis of state obligations under UNCLOS to mitigate climate change as it provides the foundation for the following specific obligations that provide some further guidance on what a state may be expected to do to protect and preserve the marine environment:

- an obligation for states to act individually or jointly as appropriate;
- an obligation to take all measures necessary to prevent, reduce, and control pollution of the marine environment;
- an obligation for states to use best practical means at their disposal;
- an obligation for states to act in accordance with their capabilities;
- an obligation to endeavor to harmonize policies with other states;
- an obligation for states to control activities under their control or jurisdiction so as to not cause damage by pollution to other states and their environment;
- an obligation to prevent pollution from spreading to areas outside of a state’s jurisdiction of control; and
- a specific obligation for the preservation and protection of rare or fragile ecosystems, and the habitats of species at risk.

Article 195 directs states in taking measures to prevent, reduce, and control pollution of the marine environment, to prevent the transfer of harm from one type of area to another. While the exact scope of this provision is not clear, it does at a minimum introduce the concept that mitigation measures must be designed so as to not result in other environmental damage, an issue that has been the subject of considerable controversy in the context of climate change. In so doing, UNCLOS may have been ahead of its time by providing a simple, yet potentially very effective, tool to require states to take a holistic approach to addressing environmental issues.

Article 212 is another provision of UNCLOS that, while not drafted with climate change in mind, can now be reasonably interpreted to apply to the issue. Article 212 obligates states to adopt laws and regulations and take other necessary measures “to prevent, reduce and control pollution of the marine environment from or through the atmosphere.” It essentially obligates states to prevent or control pollution from or through any air space over which a state has jurisdiction.

Similarly, Article 207, dealing with pollution from land-based sources, is sufficiently broad to cover GHG emissions. It requires states to endeavor to establish regional and global rules to prevent, reduce, and control marine pollution from land-based sources. In determining a party’s contribution to such efforts, economic capacity and need for economic development are to be taken into account. Article 213 requires states to enforce domestic laws passed in accordance with Article 207 and any other international obligation to address...
land-based sources of marine pollution. Overall, these provisions appear to be weaker than Articles 192 to 195 in that they require states only to endeavor to control pollution, and therefore are less likely to play a significant role in determining state obligations to mitigate climate change.

Part XII and the Duty to Mitigate Against Climate Change

On their face, the provisions of UNCLOS, particularly Part XII, are sufficiently broad to allow for a state to claim that a failure by another state to mitigate climate change violates its obligations to preserve and protect the marine environment. Particularly relevant in this regard, as noted earlier, is the definition of marine pollution to include energy. Obligations under Article 194 to preserve and protect the marine environment through the prevention, reduction, and control of pollution, and the obligation to use the best practical means in accordance with a state’s capabilities may also be important provisions. Finally, the obligation to prevent pollution from spreading outside a state’s jurisdiction may prove to be a significant provision. The substance of Part XII has not been interpreted by any international tribunal. The Malaysia and Singapore dispute over land reclamation activity by Singapore made reference to Articles 192 and 194. However, in the decision on the request for provisional measures, the International Tribunal for the Law of the Sea (ITLOS) undertook no substantive analysis of these provisions. In 2005, Malaysia and Singapore reached an agreement that ended the threat of litigation through arbitration. Many of the Part XII articles were raised by Ireland in its dispute with the United Kingdom regarding the MOX plant in Sellafield. ITLOS made no substantive comment on these provisions in the decision rejecting Ireland’s request for provisional measures. The arbitration panel established to hear the merits has been suspended.

One issue that will be interesting to follow when the Part XII provisions are interpreted by international tribunals is the connection made, if any, to other international agreements. In particular, for UNCLOS parties that are also parties to the Convention on Biological Diversity (CBD), the CBD may provide a new context for understanding marine pollution and the effort required to meet the obligations under UNCLOS to protect and preserve the marine environment. Given the wide acceptance of both Conventions, the influence of the CBD on the interpretation of the marine environment provisions of UNCLOS may turn out to be substantial. In the context of the interpretation of parties’ obligations under UNCLOS, an interesting connection is the general recognition that climate change is a significant threat to biological diversity, and the further recognition that biological diversity is crucial to good ecosystem health. By providing this context to the connection between climate change and obligations to protect and preserve the marine environment under UNCLOS, the CBD may play a significant role in interpreting obligations of parties to mitigate climate change. As indicated above, UNCLOS Article 293 invites the application of the CBD as an interpretative tool to the extent that it is not incompatible with UNCLOS. The application of the CBD as an interpretive tool is, of course, limited to disputes involving parties who are bound by both treaties.

Making Out a Claim, Causation, and Related Issues

Assuming that the obligation of states to protect and preserve the marine environment under UNCLOS extends to mitigating climate change, and assuming that the IPCC’s Third
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Assessment Report is sufficient to establish a connection between GHG emissions and current and predicted future climate change, this leaves the question of causation. The main challenge in any claim made against a state that its failure to mitigate climate change violates its obligations under UNCLOS would be the ability of the claimant to establish the link between the failure of a particular state to reduce GHG emissions on the one hand, and the impacts of climate change on the marine environment on the other hand.

One way to approach the causation analysis is to consider the standard against which a state will be measured as a way to decide on its contribution to the problem. One possibility would be that the standard is whether the state cooperated with the international community, perhaps through the United Nations Framework Convention on Climate Change (UNFCCC) or the Kyoto Protocol. The UNFCCC does not impose any binding obligations on states. The Kyoto Protocol is inadequate in its collective obligations on states in addressing the climate change problem; it therefore is also an inadequate standard against which to measure whether a given state has complied with the UNCLOS obligation to protect and preserve the marine environment. This may change as more effective future commitments are negotiated under the UNFCCC or the Kyoto Protocol. Alternatively, the standard could be an allocation of GHG emission rights based on factors such as per capita plus/minus depending on historical contribution, capacity, and national circumstances. Finally, one author, P. Barton has considered the standard question with respect to climate change, but not in the context of the UNCLOS obligations. He has suggested a reasonable care standard that starts with the state’s emissions in the year 1990, the year taken as the time international awareness and understanding was sufficiently high to expect states to act. He then proposed that the reasonable care standard be applied to compare from that point forward what a state reasonably could have been expected to do relative to what was done to mitigate climate change. The gap between the two is what a state would be responsible for.

It may be useful to consider the causation issue in the context of a hypothetical claim. The claim under UNCLOS could reasonably be brought by a number of small island states whose existence is threatened by sea level rise. Small island states are an obvious claimant for two reasons: they have generally contributed little to the problem, as their GHG emissions are minimal; and the threat of climate change to these states is immediate and serious. It would be reasonable to assume that the claim would be brought against a state with a high economic capacity to address the problem and high historical per capita contributions to GHG concentrations in the atmosphere above natural levels. Further criteria might be that the state has not ratified the Kyoto Protocol, that its per capita emissions are among the highest in the world, and that it is a party to UNCLOS, the CBD, and the UNFCCC. A state that meets all these criteria is Australia.

A claim against Australia might be brought on the basis that it has contributed more than other states to human-induced climate change on a per capita basis, it is among the highest in economic capacity and responsibility to mitigate climate change, and allegedly it has done less than most other nations to address climate change either in the context of international cooperation or domestic action. An obvious response to such a claim is that, while Australia’s per capita contribution is high and has been high historically, its contribution is nevertheless insignificant in the global context, and even if it was possible to eliminate Australia’s GHG emissions completely, the impact of the elimination on climate change would be minimal. Furthermore, any claim purely based on a standard of international cooperation (i.e., Australia’s decision to not ratify the Kyoto Protocol) could be countered on the basis that the difference between business as usual and compliance with the first commitment period targets set out in the Kyoto Protocol...
would be minimal. As suggested above, the Kyoto Protocol, while perhaps a factor in an overall determination of whether a state has taken adequate measures to mitigate against climate change impacts on the marine environment, clearly is not an adequate standard to hold states to in the context of UNCLOS.55

A detailed analysis of the causation issue is not possible here. However, given that this issue is likely to be central to any claim under UNCLOS, a few further thoughts on how this issue might be addressed are warranted. One way of avoiding the defense that the impact would have occurred even if Australia had reduced its emissions would be to bring a claim collectively against a sufficient number of states to overcome the causation problem. Accepting that ratification of the Kyoto Protocol is an insufficient answer to responsibility under UNCLOS, other states that could be part of such a claim would include Canada, Japan, and the European states that are parties to UNCLOS. Collectively, these states would find it much harder to take the position that their impact on climate change was insignificant and that the claimants have failed to establish causation. Such an approach, however, could only be effective, only if a tribunal was prepared to consider causation in the context of a collective claim.

Market share liability has been applied successfully to establish causation in the United States and would appear to be a reasonable principle to deal with causation.56 Applied to the issue of climate change, principles for the distribution of responsibility could include per capita emissions, historical contribution, economic capacity to mitigate, or some combination of such factors. The starting point for allocation of responsibility based on such factors can be found in the factors that influenced the allocation of the first commitment period targets negotiated in the Kyoto Protocol. While the targets were pledge-based and not determined on clear principles of responsibility, such principles clearly influenced the negotiations and have since been the subject of much debate in the context of discussions about allocation of responsibility for mitigating climate change beyond 2012.57

One further issue that could arise in the context of causation and liability is whether the concept of balancing environmental protection with economic development would provide a legitimate reason for parties to not do more about climate change. In other words, could Australia take the position that it is not required to do more about climate change because the economic cost of doing more is too high, and it is entitled to make decisions about how to balance its obligation to protect and preserve the marine environment against its right to economic development? Given the repeated reference in UNCLOS to the concept that parties are to act according to their economic capability, it is difficult to see how such a position is supportable for most developed countries, including Australia.

Economies in transition and developing countries are more likely to be able to rely on the provisions of economic capability to defend inaction on climate change. How successful such a position might be is far from clear. The concept of “common but differentiated responsibility” is not reflected in UNCLOS to the extent that it has been reflected in more recent MEAs.58 There are, however, indications in Article 119(1)(a) of UNCLOS that the special needs of developing countries are to be taken into account in establishing fishery conservation measures on the high seas. In addition, Article 194 obligates parties to act in accordance with their capabilities. There is little else, however, to indicate how economic capacity might influence UNCLOS obligations for environmental protection including climate change mitigation.59

It is important to note in considering this question that the wealthier countries have contributed and continue to contribute more to the problem, they have accepted more of an obligation under the UNFCC to address it,60 and arguably their economies are strong
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enough to favor environmental protection over economic development. In fact, for there
to be an overall balance, recognizing the relative inability of developing countries to give
priority to environmental protection, it is argued that there has to be a heavy burden on
developed countries to give priority to this issue.61

In the context of the obligations under Part XII of UNCLOS, an attempt by developed
countries to justify inaction on climate change with an economic development imperative
argument should carry little weight. The weight given for less developed countries would
depend on the level of responsibility for climate change, the current level of contribution to
the problem, and the capacity to address the problem. For developed countries generally—
and Canada, Australia, and the United States particularly—the factors all point toward
an obligation to give priority to environmental protection generally and climate change
mitigation specifically.

It has been suggested that, even before UNCLOS came into force, much of its
substance was already part of customary international law.62 If this extends to Part XII of
UNCLOS, and the requirement to protect and preserve the marine environment recognized
as customary international law, the duty to take effective climate change mitigation measures
could extend beyond UNCLOS parties to all states. If this transition takes place, all states
would have an obligation to mitigate climate change, but only parties to UNCLOS would
have access to its binding dispute settlement process to resolve disputes about the adequacy
of such efforts for the protection and preservation of the marine environment.

The Dispute Settlement Procedures under UNCLOS

The UNCLOS dispute settlement procedures have been described as rivaling the process
set up under the World Trade Organization in terms of potential for resolving party-to-party
disputes and the power conferred on dispute resolution tribunals, although they are limited
in scope to narrowly defined subject matters set out in UNCLOS.63 The process has three
parts. The first provides an opportunity for the parties to agree on a dispute settlement
mechanism.64 The second sets rules for initiating a dispute settlement process in the absence
of agreement.65 The third provides limited subject area exceptions to binding dispute
settlement.66 Two features of the UNCLOS process that have been particularly noted by
commentators are the ability to initiate the process without having to agree on a procedure
and the binding nature of the outcomes.67

This section will consider how the dispute settlement process under UNCLOS would
respond to a claim that a state’s failure to take climate change mitigation seriously violates
its obligations to protect the marine environment. The focus is on aspects of the UNCLOS
dispute settlement process that are likely to be relevant to a dispute over the adequacy of a
party’s climate change mitigation measures.

As with many international dispute settlement procedures, the overriding obligation
on parties is to resolve disputes through peaceful means.68 Parties are encouraged to seek
agreement on how to resolve disputes, and the binding settlement process set out in Part
XV of UNCLOS is intended as a safeguard for cases where disputes cannot be resolved by
parties on their own.69 Consensus on the mechanism to be used to resolve a dispute will
often take the form of a specific agreement reached after the dispute arises. Agreement on a
mechanism to be used can also arise from state obligations enshrined in another treaty that
the disputing countries are parties to, if that treaty sets out a process for resolving disputes
under UNCLOS.70 Whether the UNCLOS dispute settlement process can be initiated
depends on whether a settlement is reached through an alternate process agreed to by the
parties, and whether the alternate process excludes the application of the UNCLOS dispute settlement process. Subject to the above conditions, any party to UNCLOS can initiate a binding dispute settlement process against another party to the Convention. The choice of procedure is determined based on a number of factors including declarations filed by the parties under Article 287(1) on which of the following procedures are acceptable to it:

- the ITLOS set out in Annex VI;
- the International Court of Justice (ICJ);
- an arbitral tribunal established under UNCLOS, Annex VII; or
- a special arbitral tribunal established under UNCLOS Annex VIII.

In the absence of a declaration or where two parties to a dispute have not selected any common procedure in their respective declarations, the arbitral tribunal procedure under Annex VII is deemed to be the procedure selected by a party. Regardless of the choice of procedure, the tribunal chosen has general jurisdiction concerning the interpretation and application of UNCLOS and has the authority to determine its own jurisdiction to hear a particular dispute. As already noted, in addition to UNCLOS, a tribunal selected to resolve a dispute under these provisions is authorized to consider other rules of international law to the extent that they are not incompatible with the rules set out in UNCLOS. A tribunal’s findings are final and binding on the parties to the dispute, but not binding on other parties to UNCLOS, and therefore, at least in theory, are not precedent setting for purposes of interpreting the provisions of UNCLOS.

While there are a number of differences between the four procedures set out in Article 287, the most important factor for parties is likely to be the level of control over the selection of members of a tribunal on the one hand, and the level of expertise of those members on the other. The ITLOS and ICJ have the advantage of being permanent tribunals and, as such, are more likely to make predictable rulings and rulings that take into account the implications of specific rulings for the future of dispute settlement under UNCLOS. The arbitration process under Annex VII has the advantage of providing parties with more control over the membership of the specific tribunal hearing a dispute. In addition, the Annex VIII special arbitration tribunal process has the advantage of the flexibility to be able to ensure specific expertise in the subject matter under dispute.

Important for purposes of this analysis of whether a party can successfully bring a claim under UNCLOS is the question of jurisdiction with respect to the claim, as well as substantive issues related to such a claim. On the issue of jurisdiction to obtain a tribunal ruling under UNCLOS, the most important decisions have been the rulings related to the dispute involving Australia, Japan, and New Zealand over southern bluefin tuna.

**The Bluefin Tuna Decisions**

There have been two rulings by two different tribunals which have dealt with aspects of the dispute between Australia, New Zealand, and Japan over the management and protection of bluefin tuna. These rulings provide the first indications of the application of the binding dispute settlement procedure under UNCLOS in a factual situation that overlaps with dispute settlement processes under other international treaties. These rulings assist in predicting how the problem of overlapping dispute settlement processes under UNCLOS and UNFCCC and/or the Kyoto Protocol might be resolved.
The initial ruling in the Southern Bluefin Tuna dispute was a finding by ITLOS for the prescription of preliminary measures against Japan. The ITLOS concluded that there was prima facie jurisdiction under UNCLOS to hear the dispute between the parties over Japan’s actions with respect to the conservation of bluefin tuna. The issue of jurisdiction was raised by Japan with Japan’s position being that the dispute arose under the Convention for the Conservation of Southern Bluefin Tuna (CSBT Convention) and not under UNCLOS. In the alternative, Japan argued that Australia and New Zealand had failed to attempt “in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1.” Japan further argued that the dispute was a scientific dispute rather than a legal dispute. Australia and New Zealand countered that the dispute was at least in part a dispute over the interpretation and application of provisions of UNCLOS, and that both Australia and New Zealand had in good faith attempted to reach a settlement.

ITLOS concluded that the fact that Australia and New Zealand were alleging violations of various provisions of UNCLOS by Japan, including Articles 64 and 116 to 119, and that Japan denied it was in violation of these provisions, supported the position that there was a prima facie legal dispute under UNCLOS. The ITLOS also concluded that the parties to the CSBT Convention did not exclude the rights and obligations under UNCLOS. Furthermore, the ITLOS found that “the fact that the Convention of 1993 applies between the Parties does not preclude recourse to the procedures in Part XV, Section 2” of UNCLOS. It was on the above basis that the ITLOS determined that there was prima facie jurisdiction under Part XV of UNCLOS to arbitrate the dispute.

The Arbitral Tribunal, established in accordance with Annex VII of UNCLOS, heard the parties arguments on the jurisdictional issue in May 2000 and issued its ruling denying it had jurisdiction under Part XV of UNCLOS on August 4, 2000. The Arbitral Tribunal went to great lengths to point out that it did not reject any of the conclusions on jurisdiction reached by the ITLOS, noting that the ITLOS had made a preliminary ruling of prima facie jurisdiction that was not based on a consideration of all the jurisdictional arguments. The Arbitral Tribunal agreed with the ITLOS that the issues raised by Australia and New Zealand did constitute a dispute over the application and interpretation of UNCLOS, and that the CSBT Convention did not displace obligations under UNCLOS. The Arbitral Tribunal also confirmed that Australia and New Zealand had made sufficient efforts to settle the matter before invoking the binding dispute settlement process under Part XV of UNCLOS.

The Arbitral Tribunal concluded, however, that there was a key issue of jurisdiction that had not been argued before the ITLOS. That issue was the link between Article 16 of the CSBT Convention and Article 281 of UNCLOS, and it was this issue that lead to the ruling that there was no jurisdiction to apply the binding dispute settlement process under UNCLOS. The essence of the Arbitral Tribunal’s ruling is that the parties to the dispute had agreed through Article 16 of the CSBT Convention, which directs parties to the CSBT Convention to resolve disputes following a process selected “with the consent in each case of all parties to the dispute,” to exclude any dispute settlement procedure that could be initiated by a single party and that Article 16, pursuant to Article 281(1) of UNCLOS, prevented a party from initiating the binding dispute settlement procedure under UNCLOS. There was no express statement in Article 16 of the CSBT Convention to exclude “any further procedure.” Nevertheless, the Arbitral Tribunal concluded that the intention of the parties evidenced in Article 16 was to exclude other dispute settlement procedures even where they could not agree on a process for settling the dispute. A reasonable alternative
interpretation would have been that, in the absence of any other procedure, the parties had agreed to continue their efforts to resolve matters in accordance with Article 16 through the UNCLOS dispute settlement procedures. Instead, the Arbitral Tribunal determined that the parties to the CSBT Convention had replaced the binding dispute settlement process under UNCLOS with a nonbinding process under the CSBT Convention even though no express wording in the CSBT Convention excluded the UNCLOS binding dispute settlement process.99

The ruling is not binding on future tribunals tasked with determining the jurisdiction to initiate the binding dispute resolution process under UNCLOS. However, as the first such ruling, it undoubtedly will influence future rulings on jurisdiction. It is to be noted that what was in question (Article 16 of the CSBT Convention) was a provision in a regional fisheries agreement specifically contemplated under UNCLOS as a preferred mechanism for the implementation of the general obligations under UNCLOS.100

While upholding the ITLOS finding that the existence of the CSBT Convention did not preclude a dispute from arising under UNCLOS, the Arbitral Tribunal was clearly influenced by the fact that the parties to the dispute had included in the CSBT Convention provisions for the resolution of issues related to bluefin tuna conservation, the very issue that was the subject of the dispute. It, therefore, is unlikely that this aspect of the ruling will have much influence with respect to a question of jurisdiction in case of conflicts with dispute settlement procedures under a completely separate regime, such as under the UNFCCC.

It is disappointing to see how willing the Arbitral Tribunal was to replace the binding dispute settlement process under UNCLOS with a noncompulsory process under CSBT Convention, one that can be permanently stalled by one party’s refusal to agree on a process for resolving the dispute. If nothing else, one would hope that future rulings will clarify that Article 281 of UNCLOS only allows parties to exclude the UNCLOS dispute settlement process in cases of agreement on a binding dispute settlement process to take its place or in the case of an actual agreement on the process for resolving a particular dispute. At a minimum, explicit language should be required to exclude a binding dispute settlement process and replace it with a nonbinding process. Otherwise, a more appropriate interpretation of the intention of the parties would be that the nonbinding process needs to be explored before there can be recourse to the binding process rather than completely blocking access to a process the parties agreed to in the context of UNCLOS.101

**Implications for the Future Role of UNCLOS Dispute Settlement Process**

In considering the implications of the Southern Bluefin Tuna rulings for the future of the UNCLOS process, it is important to keep in mind that these are only the first rulings on jurisdiction under Part XV of UNCLOS and that these rulings are not binding on future tribunals. Furthermore, it is unusual for international arbitral tribunals to decline to exercise jurisdiction.102 On most of the points raised by Japan in its submissions before both tribunals, the two tribunals agreed with Australia and New Zealand in rejecting Japan’s arguments against jurisdiction. On the argument made by Japan which prevailed, that the CSBT Convention amounted to an agreement to exclude the binding dispute settlement process, while the Arbitral Tribunal suggested that this issue may not have occurred to or been raised before the ITLOS,103 this must be considered unlikely. More reasonably, the ITLOS dismissed the possibility because there is no indication in Article 16 of the CSBT Convention that the parties intended to exclude the UNCLOS process. Arguably, this leaves conflicting rulings (ITLOS and the Arbitral Tribunal) and leaves the door open
for future tribunals to clarify how specific parties have to declare their intention to exclude the UNLCS process.\(^{104}\)

**Implications for Dispute Settlement over Climate Change**

Returning to the relationship between UNCLOS and climate change, and the UNFCCC more specifically, assuming all the relevant parties have ratified both Conventions, a response to a claim under the UNCLOS process might be that the parties agreed to settle their disputes with respect to climate change mitigation under the dispute settlement process in the UNFCCC. This is, however, a difficult argument to make, because there are no binding obligations in the UNFCCC on individual states to take action to prevent impacts of GHG emissions originating from their territories from harming the marine environment. Similarly, the Kyoto Protocol, which relies on the same dispute settlement process as the UNFCCC,\(^{105}\) does not impose obligations on parties to prevent harm to the marine environment, rather it imposes obligations on certain parties to reduce GHG emissions by 2012. A dispute over whether the GHG emissions originating from a given state cause harm to the marine environment is unlikely to be considered a dispute under the UNFCCC or the Kyoto Protocol.

Assuming an UNCLOS tribunal (ITLOS, ICJ, or an arbitral tribunal) found that the dispute was a dispute under the UNFCCC or the Kyoto Protocol, Article 14 of the UNFCCC sets out the dispute settlement process under the UNFCCC and the Kyoto Protocol. The starting point is negotiations between the parties or other mutually agreed means of resolution. The parties have the option to agree on a binding dispute resolution process,\(^{106}\) but the UNFCCC does not mandate a binding dispute settlement process. In the absence of a declaration by a state expressly agreeing this option, after 12 months of negotiation, any party to the dispute can refer the matter to conciliation which involves a commission appointed by the parties.\(^{107}\) The commission is to make a recommendatory award with respect to the dispute that is to be considered by the parties in good faith.\(^{108}\)

An important difference between the UNFCCC process and the CSBT Convention process is that the latter essentially required the parties to continue their efforts to reach agreement on a mutually acceptable process, whereas the UNFCCC process has a definite endpoint, but one that may not resolve the dispute. The conciliation commission’s recommendations is the endpoint in the UNFCCC process; however, it is conceivable that the parties may not accept the recommendations. In that case, there would appear to be no legal impediment to a party initiating the UNCLOS dispute settlement process, even if the dispute was considered to be one under UNFCCC, and the UNFCCC was considered to take precedence, both of which must be considered unlikely. In the final analysis, therefore, the *Southern Bluefin Tuna* rulings do not appear to impose any legal impediments to a claim for failure to implement effective climate change mitigation.

**Conclusion**

The work of the IPCC suggests that a convincing case can be made that failure to mitigate climate change results in pollution of the marine environment as defined under UNCLOS. Failure to prevent pollution can be considered a violation of parties’ UNCLOS obligations to protect and preserve the marine environment. There is an issue of causation with respect to the extent to which the contribution to climate change by a particular party or number of
parties can be isolated, how much higher the contribution of that country is relative to other
countries, how relevant is the capacity to reduce emissions, and the effect of the historical
contribution to the problem in determining whether a party has failed to take sufficient
action to mitigate its climate change impact on the marine environment.

The conclusion that there may be a breach of UNCLOS obligations and that the claim
of a breach may be brought under the UNCLOS binding dispute settlement process raises a
number of questions. Who can bring such a claim, and against what countries could such a
claim be brought? What is the likelihood of such a claim? What would be the implications
of such a claim for the climate change regime and international relations more generally? To
what standard would a party be held? Finally, there are questions about possible remedies.

Would remedies be limited to a finding that a party was in violation of its obligations, or
would they extend to an order to reduce GHG emissions, either generally or by a specific
amount. Furthermore, could remedies include an award of damages or perhaps even an
order to assist other parties in adapting to climate change?

Most likely a claimant state would be a developing country with low GHG emissions, a
high vulnerability to climate change, and a high social and economic reliance on the marine
environment. The defending party would most likely be a developed state, with high per
capita or total GHG emissions. The higher the overall historic and present contribution
to global emissions by the defending party, arguably the better the chance of a successful
outcome. Whether or not a state is party to the UNFCCC or the Kyoto Protocol is not likely
to be determinative, although compliance with current and future emission reduction targets
may influence a tribunal’s finding of whether mitigation measures have been adequate to
reduce or eliminate liability.

The United states has not ratified UNCLOS and therefore is not at risk of being brought
before an UNCLOS tribunal. Even if the relevant provisions of protection of the marine
environment are declared as customary international law, since the United states does not
accept the compulsory jurisdiction of the ICJ, the International Court would be without
authority. Canada and Australia, the two other nations with the highest per capita GHG
emissions, would be the next most obvious targets. Both are parties to UNCLOS, with
the main difference between them being that Canada has ratified the Kyoto Protocol. This
leaves Australia as the most likely target.

Even if no claim is commenced, the above analysis demonstrates the linkages between
parties’ obligations under UNCLOS and UNFCCC and the Kyoto Protocol. A better
understanding of such linkages may provide additional motivation for states to take climate
change seriously and increase their efforts to seek agreement internationally and implement
those agreements effectively.

Notes

1. The 1997 Protocol to the U.N. Framework Convention on Climate Change (the Kyoto
22. The U.N. Framework Convention on Climate Change (UNFCCC), done 9 May 1982, entered into
2. For a detailed review of the Kyoto Protocol, see M. Doelle, "From Kyoto to Marrakech: A Long Walk Through the Dessert, Mirage or Oasis?" Dalhousie Law Journal 25 (2000): 113, and
M. Doelle, From Hot Air to Action? Climate Change, Compliance and the Future of International
Environmental Law (Carswell, 2005), 23.
3. The Intergovernmental Panel on Climate Change (IPCC) was set up jointly by the World
Meteorological Organization (WMO) and the United Nations Environment Program (UNEP) to
assess science, technology, and socioeconomic information relevant to climate change. In particular, the IPCC is to enhance the understanding of climate change impacts and adaptation and mitigation options. See www.ipcc.ch.


8. Ibid., at 348.

9. Ibid., at 349. See also at 801 with respect to changes in polar regions. One of many species predicted to be impacted by these changes is the polar bear, whose hunting season is already being affected by the increasing ice melt.

10. Ibid., at 348, 356–362.

11. Ibid.

12. Ibid.

13. Ibid.


15. Ibid., at 354.


18. The question of what level of climate change mitigation action is adequate for a given country will be one of the challenging evidentiary issues in any such dispute. For a more detailed discussion of the tension between the environmental objectives and the short-term economic cost of meeting these environmental objectives, see J. L. Hafetz, “Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention,” Ann. U. Int’l L. Rev. 15 (200): 583.


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24. The most obvious examples would be the impact of water temperature on marine life. Some marine life, such as sockeye salmon, will have a significantly reduced living space due to sensitivity to higher ocean temperatures. Others, such as the Atlantic cod, will have significantly lower growth rates. Another striking example is the polar bear, whose hunting season is being affected by the reduction in sea ice. See *Impacts, Adaptation and Vulnerability Report*, supra note 5, at 348.


28. Article 192 is considered to reflect customary international law. See Hafetz, supra note 18, at 598.

29. UNCLOS, art. 193. This Article is also considered to reflect customary international law. See Hafetz, supra note 18, at 598.

30. UNCLOS, art. 197, 207(4), and 212(3).

31. The definition of pollution includes the addition of energy to the marine environment.

32. UNCLOS, art. 194(1).

33. Ibid.

34. Ibid.

35. UNCLOS, art. 194(2).

36. Ibid.

37. UNCLOS, art. 194(1), (2), and (5).

38. Especially in the context of the use of mitigation measures such as nuclear power and carbon capture to offset emissions, see Doelle, *From Hot Air to Action*, supra note 2, at 31, 43.


41. See *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Award on Agreed Terms, available at the Web site of the Permanent Court of Arbitration, www.pca-cpa.org.

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43. See The MOX Plant Arbitration (Ireland v. United Kingdom), Order No. 3 and Order No. 4, available at the PCA Web site, supra note 41.
45. For a recent assessment of links between climate change and biodiversity, see Intergovernmental Panel on Climate Change, Climate Change and Biodiversity (Technical Paper, IPCC Working Group II, Technical Support Unit) (IPCC, Apr. 2002).
46. See Klein, supra note 21, at 58.
47. Unless or until the substance of the CBD is recognized as customary international law.
51. Ibid., Figure 3.
52. Jonathan Charney has argued that any state with a concern about marine protection may initiate dispute resolution, not just directly affected states. See Charney, supra note 39, at 737. See also Klein, supra note 21, at 161.
53. For a good overview of current and predicted future total and per capita emissions from various developed countries, including Australia, see Farhana Yamin, The International Climate Change Regime: A Guide to Rules, Institutions and Procedures (Sussex: Cambridge University Press, 2005), Country Fact Sheet Annex.
55. See also Yamin, supra note 53, Country Fact Sheet Annex.
56. See, generally, Baumert, supra note 49, and Ott, supra note 49.
57. See Doelle, From Hot Air to Action, supra note 2, at 279.
58. See, for example, UNFCCC, art. 3.1.
59. See Hafetz, supra note 18, at 600, on balancing of economic and environmental objectives under UNCLOS. See also Hafetz, at 621, on the economic value of the environment. The latter supports the concept, which appears more and more apparent on the climate change issue, that effective climate change mitigation is a precondition for long-term global economic health, not a competing interest to be balanced.
60. See UNFCCC, art. 3.1.
61. See, generally, Baumert, supra note 49, and Ott, supra note 49.
63. While there are no indications that the marine environmental protection provisions are on the brink of being recognized as customary law, there are signs that the provisions of UNCLOS are
broadly accepted and may have become customary international law. See M. L. McConnell, supra note 27, at 84.

63. See Hafetz, supra note 18, at 597, 632. See also D. Brack, *International Environmental Disputes* (Royal Institute of International Affairs, 2001), at 11.

64. See UNCLOS, part XV, art. 279–285.

65. UNCLOS, art. 286–296.

66. UNCLOS, art. 297–299. The opportunities to limit the areas for binding dispute settlement do not appear to apply to obligations and responsibilities in UNCLOS that could be relevant to a dispute over climate change mitigation, and therefore are not considered further.


68. See UNCLOS, art. 280.

69. UNCLOS art. 279–281.


71. UNCLOS, art. 281(1).

72. UNCLOS, art. 286.


75. See UNCLOS, art. 287(1)(c).

76. UNCLOS, art. 287(1)(d).

77. UNCLOS, art. 287(5).

78. UNCLOS, art. 288.

79. UNCLOS, art. 293(1).

80. UNCLOS, art. 296.

81. Such as expertise on climate change impacts and mitigation, which is expertise a standing tribunal like the ITLOS or the ICJ may not always possess to the same extent.


83. Pursuant to Kyoto Protocol (art. 19), the settlement procedures of the UNFCCC (Art. 14) are to apply.

84. *Southern Bluefin Tuna*, Provisional Measures, supra note 82.


88. Ibid., at para. 44–45.
89. Ibid., para. 51. This is an important finding in the context of this article. It suggests that parties to the Kyoto Protocol will not be able to absolve themselves of responsibilities to protect the marine environment from climate change on the basis that the Kyoto Protocol is a subsequent agreement. The Kyoto Protocol therefore cannot be used by parties to argue they are permitted to harm the marine environment through climate change so long as they comply with Protocol.

90. Ibid., at para. 55.

91. Ibid., at para. 62.

92. Arbitral Tribunal Ruling, supra note 82.

93. Ibid., at para. 37.

94. Ibid., at para. 52.

95. Ibid., at para. 52.

96. Ibid., at para. 55.

97. Ibid., at para. 59.

98. Ibid., at para. 57.

99. For a discussion of these implications of the ruling, see Shany, supra note 74, at 203, 235.

100. See UNCLOS, art. 118.


102. See Kwiatkowska, supra note 67, at 240.

103. There is no indication in the ITLOS ruling that Japan had either raised this specific point in its initial pleadings or raised the argument before the ITLOS.

104. For a detailed analysis of these and other possible conflicts between international tribunals, see Shany, supra note 74, at 203.

105. Kyoto Protocol, Article 19, and see supra note 83.

106. UNFCC, art. 19(2).

107. UNFCC, art. 19(5).

108. UNFCC, art. 19(6).
