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The Future of International Climate Change Litigation

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ABSTRACT

Small Island Developing States (SIDS) are increasingly seeking justice from international courts to address their significant climate change impacts, which are disproportionate to their minimal historical emissions. The Commission of Small Island States on Climate Change and International Law (COSIS), an internationally recognized legal body, has requested an advisory opinion on the obligations of all member states to protect and preserve the marine environment and prevent pollution related to climate change and its impacts. The present study aims to predict the future landscape of climate litigation if the International Tribunal for the Law of the Sea (ITLOS) specifies that states' obligations to protect and preserve the marine environment and prevent and control marine pollution includes climate relevant emissions, and further how the strength of the advisory opinion will impact future litigation. Specifically, this study seeks to determine which countries are most likely to initiate litigation based on a strong or a moderate advisory opinion regarding UNCLOS Part XII obligations expected May 21, 2024.

Utilizing realism as the theoretical framework, the study posits that states litigate in international courts to maximize their power and security. Variables serving as proxies for national interest and context were used to devise a predictive model indicating the likelihood of litigation. The hypothesis suggests that SIDS are most likely to support and bring litigation following a strong ITLOS advisory opinion, targeting high-emitting former colonial powers due to SIDS' vulnerability and economic dependence on the marine environment. The results indicate that COSIS, or individual states like Mauritius and Vanuatu, are the most probable litigants. The conclusion highlights a shift in the theoretical framework that best explains why states sue in international courts in the context of climate change from realism to liberalism. Through international climate litigation, SIDS aim to give international courts more power in the climate change movement, with the hopes that they will achieve some redress and gain more power as a coalition.

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LIST OF ACRONYMS

AOSIS → Alliance of Small Island States

COP → Conference of the Parties

COSIS → Commission of Small Island States

EEZ → Exclusive Economic Zone

EITs → Economies in Transition

EU → European Union

GHGs → Greenhouse gasses

HDI → Human Development Index

IACtR → Inter-American Court of Human Rights

ICJ → International Court of Justice

IPCC → Intergovernmental Panel on Climate Change

ITLOS → International Tribunal for the Law of the Sea

LDCs → Least Developed Countries

MPA → Marine Protected Area

NDCs → Nationally Determined Contributions

PVCs → Particularly Vulnerable Countries

SIDS → Small Island Developing States

UNCLOS → United Nations Convention on the Law of the Sea

UNFCCC → United Nations Framework Convention on Climate Change

INTRODUCTION

For decades, Small Island Developing States (SIDS) have been one of the most vocal groups in international climate change negotiations, advocating urgent action to combat climate change. SIDS is a political classification within the United Nations that includes 30 UN Member-States and 20 non-UN Members/Associate Members, all sharing common characteristics that make them highly vulnerable to the impacts of climate change (UNEP, 2024). SIDS are low-lying, small, isolated, ecologically fragile, and typically have large coastal populations economically reliant upon the natural environment. Due to their geographic location and relatively low capacity to adapt to climate shocks, SIDS are extremely vulnerable to tropical storms, which have been rising in intensity in recent years. Remoteness and isolation from international markets exacerbate their vulnerability and ability to recover from the significant amounts of loss and damage from climate change impacts they are already experiencing. Due to their disproportionate vulnerability and low adaptive capacity, as well as a history of colonial exploitation at the hands of Global North countries, the survivability of SIDS depends on global mitigation efforts. They require support and accountability from the Global North. Anthropogenic greenhouse gas emissions are among the most significant current threats to the global marine environment and coastal communities around the globe, contributing significantly to SIDS climate vulnerability. The sea is the world's largest sink for GHG emissions. Recent studies estimate that the world's oceans absorb approximately 75% of all anthropogenic GHG emissions, and their ability to sequester CO2 is critical in regulating the global climate (Friedlingstein et al., 2022; Roland Holst, 2022). According to the 2023 report from the Intergovernmental Panel on Climate Change (IPCC), human activities, primarily through the emission of greenhouse gasses, are the cause of a global increase in surface temperature of 1.1℃ in 2011-2020 above 1850-1900 levels, which has caused measurable degradation of the global marine environment through ocean acidification, sea-level rise, marine heatwaves, tropical storms, and deoxygenation of oceans, among other hazards (Alarcon et al., 2023; PCC, 2023; Tanaka, 2023). These effects have and will continue to cause cascading ecosystem impacts in the world's oceans, with disastrous consequences for coastal communities across the globe, and will likely have unforeseen effects on the global climate system. If global emissions continue

to rise, climate extremes will only continue to decimate vulnerable communities, especially in coastal and island states.

Through coalitions such as the Alliance of Small Island States (AOSIS), SIDS have created a significant presence in international climate change negotiations. During the negotiations of the 2015 Paris Agreement, AOSIS successfully negotiated the implementation of the 1.5℃ temperature limit, arguing that if global temperatures increase beyond 1.5℃ relative to 1990s levels, many vulnerable SIDS would be "overwhelmed by severe climate impacts" (Alliance of Small Island States, 2023). AOSIS successfully implemented this goal, which many countries have incorporated into their national policy for reducing greenhouse gas emissions (GHGs); however, mitigation efforts by the global community still lack the urgency that SIDS are imploring. The IPCC calculates that, by 2030, states must have cut their emissions by approximately 50% relative to 2019 levels if there is any hope of reaching the 2015 Paris Agreement goal of containing global temperature rise to 1.5℃ (IPCC, 2023). The Paris Agreement requires in Article 4, paragraph 2, that each Party must "prepare, communicate, and maintain successive nationally determined contributions" every five years to communicate GHG emissions and plans for mitigation and adaptation (Paris Agreement, Article 4, Paragraph 2). According to the United Nations Framework Convention on Climate Change (UNFCCC) secretariat's latest analysis of states' nationally determined contributions (NDCs), states are nowhere near meeting the goal of a 1.5°C limit and need to either significantly increase the ambition of NDCs between now and 2030 or significantly overachieve current NDC targets (Sharm el-Sheikh, 2022). SIDS have thus begun to turn to international law, specifically climate change litigation, to seek relief and establish that high-emitting states are responsible for mitigation due to their high historic GHG emissions.

The Commission of Small Island States on Climate Change and International Law (COSIS)

On October 2021, during the 26th Conference of the Parties of the UNFCCC in Edinburgh the Caribbean SIDS, Antigua and Barbuda, and a Pacific SIDS, Tuvalu established the Commission of Small Island States on Climate Change and International Law (COSIS) (Bodansky, 2023). COSIS is an international legal body whose mission is

"to take collective action to protect and preserve the climate system, including the marine environment, through the promotion, progressive development, and implementation of rules and principles of international law concerning climate change" (COSIS, 2023). COSIS's primary focus as an international coalition is assisting SIDS in shaping, advancing, and creating international law about climate change (Tigre & Silverman, 2023). The coalition makes clear in its founding agreement that a central aspect of its mandate is advocating for the continued implementation of international law, specifically concerning the obligations of states relating to the protection and preservation of the marine environment and state responsibility regarding injuries resulting from noncompliance with their legal obligations (COSIS Agreement, 2021). In pursuit of this mandate, the COSIS agreement expressly authorizes the coalition to request advisory opinions from ITLOS "on any legal question within the scope of UNCLOS" (Tigre & Silverman-Roati, 2023; Tanaka, 2023). The COSIS agreement is open for accession to all 39 members of the Alliance of Small Island States (AOSIS), an intergovernmental organization that advocates for the rights of small island states and particularly vulnerable countries (PVCs) in the UNFCCC (Roland Holst, 2022). Currently, the member-states of COSIS include Antigua and Barbuda, Tuvalu, Niue, Palau, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Vanuatu. This agreement asserts that 'climate change is the common concern of humanity' and that it poses an existential threat to the survival and existence of small island states, and thus, SIDS must seek relief via litigation and advisory opinions from international courts (Tanaka, 2022).

Advisory Opinions on Climate Change

Advisory opinions on climate change are a promising new tool for SIDS who seek climate relief via international law. In a span of four months, from December 2022 to March 2023, three requests for advisory opinions from international and regional courts and tribunals regarding climate change were submitted. In December 2022, COSIS requested an advisory opinion from the ITLOS addressing the obligations of UNCLOS to prevent, reduce, and control pollution of the marine environment and to protect and preserve it regarding climate impacts (Columbia Climate School, 2023). In January 2023, Chile and Columbia submitted a request for an advisory opinion from the Inter-American

Court of Human Rights (IACHR) to clarify states' obligations regarding climate change and shared responsibilities within the context of human rights (Columbia Climate School, 2023). In March 2023, after an initial spearhead by Vanuatu, the United Nations General Assembly adopted a resolution posing questions to the ICJ on states' responsibilities regarding climate change (Bodansky, 2023; Columbia Climate School, 2023). Requesting advisory opinions from international courts on the issue of climate change is a new phenomenon, perhaps spurred by the slow pace of negotiations under the UN climate change regime combined with the increasing consensus that urgent action is needed to prevent the devastating effects of climate change. Historically, most advisory opinions from international courts have been from the ICJ and have not involved climate change. Since 1964, the ICJ has given 24 advisory opinions on matters ranging from UN membership status, the territorial status of several African countries, the status of UN human rights rapporteurs, and the legality of threatening to use nuclear weapons (Suter, 2004). These issues are largely discrete and singular, not requiring cooperation on a global scale comparable to that needed to curb climate change.

What is an Advisory Opinion in International courts?

An advisory opinion in International Courts is a non-binding clarification or interpretation of a treaty text by the judicial body that presides over that specific area of international law (Bodansky, 2023; Suter, 2004; Tigre et al., 2023). While advisory opinions are non-binding, they can significantly influence the development of international law, carrying "legal weight and moral authority" (ICJ, 2024). They do not have final, binding power like decisions in contentious cases in international courts such as ITLOS and the ICJ; however, advisory opinions can help de-escalate international conflict and contribute to the development of international law, especially by providing a standard for interpretation of treaties that can be incorporated at the national level (Bodansky, 2023; ICJ, 2024). It is entirely within the rights of party states to a particular treaty on which an advisory opinion is given to ignore the advisory opinion and maintain a different legal position (Bodansky, 2023).

Bodansky (2023) argues that advisory opinions on their own do not serve as legal precedent (Bodansky, 2023). This point, however, is not settled in the literature. ITLOS,

for example, gives a higher legal weight to advisory opinions than other international courts. ITLOS, in a case concerning Mauritius and the Maldives, offered a novel interpretation of the legal effects of ICJ advisory opinions, treating them with the legal weight of precedent (Lanzoni, 2022). This is a point of contention in international law. Usually, precedents are measured by how they influence other court decisions and the development of international law (Lanzoni, 2022). ITLOS, however, in its Mauritius/Maldives decision, rejected two of the Maldives' objections, citing a 2019 ICJ advisory opinion as having settled the matter (Lanzoni, 2022). This implies that the ICJ advisory opinion had the legal power of *res judicata*, meaning that the matter has been adjudicated and can be pursued no further (Lanzoni, 2022). ITLOS has set a new standard for advisory opinions, which can produce decisions analogous to contentious disputes and lead to binding decisions.

It is up to each independent judicial body to decide whether specific requests for advisory opinions fall within the scope of their advisory jurisdictions (Mayer et al., 2023). Even if the question falls within its jurisdiction, the court or tribunal can decline the request for an advisory opinion if they see a compelling reason to do so, such as the risk of entanglement in political processes or if the question at issue is overly obscure (Mayer et al., 2023). The tribunal also has the power to rephrase the question and proceed with the advisory opinion (Mayer et al., 2023). The question put forward to the court or tribunal must be legal and concern the body of law within the adjudicatory body's jurisdiction (Tigre et al., 2023). All states party to the convention at issue, as well as intergovernmental organizations related to the topic of the legal question, are invited to submit written and oral statements in ITLOS advisory proceedings (Roland Holst, 2022). These statements can help advise the tribunal's action in accepting or rejecting the proposal and can provide justification for the tribunal's position.

COSIS Request for an Advisory Opinion from UNCLOS

This study will focus on the first advisory opinion request to an international tribunal on states' obligations regarding climate change and international law. On December 12, 2022, COSIS requested an advisory opinion from ITLOS, asking the tribunal to clarify State Party's specific obligations under UNCLOS to prevent marine

pollution and protect and preserve the marine environment. A key part of COSIS's argument is that land and ocean-based anthropogenic CO2 emissions should be specified as constituting marine pollution, per UNCLOS's definition of marine pollution. If ITLOS releases an advisory opinion specifying that GHG emissions are legally considered marine pollution under UNCLOS, the constitution of the oceans, this could join the UN climate change regime and the UN Law of the Sea regime. This could result in climate change litigation between UNCLOS State Parties in ITLOS specifically related to preventing CO2 emissions as marine pollution. The benefit of setting a precedent of climate change cases being heard in ITLOS is that it would set a precedent that ITLOS can preside over climate litigation cases, opening up a new international court to climate litigation cases specifically relating to the deleterious effects of climate change on the marine environment. If ITLOS specifies what state obligations are to protect/not pollute the marine environment concerning CO2 emissions, this could significantly change the future landscape of international climate change litigation, with countries able to sue each other using ITLOS as a dispute settlement mechanism for climate-change-related law of the sea cases.

COSIS' Legal Questions

On August 26, 2022, COSIS reached a consensus to submit a request, submitted on December 12, 2022, for an advisory opinion from ITLOS, in accordance with Article 2, paragraph 2 of the Agreement for the Establishment of COSIS (Order 2022/4). COSIS has also been authorized to submit a written statement to the ICJ for its upcoming advisory opinion on climate change that was requested by the UN General Assembly. The resolution for the advisory opinion request from the ICJ on climate change was adopted, in large part due to the efforts of the Republic of Vanuatu and other SIDS. The request for an advisory opinion from the ICJ is separate from the opinion being requested from ITLOS, but also complementary, as it addresses climate change under general international law. COSIS will also submit a written statement for the advisory proceedings before the Inter-American Court of Human Rights on corporate accountability and the climate crisis. Of these advisory opinion requests on climate

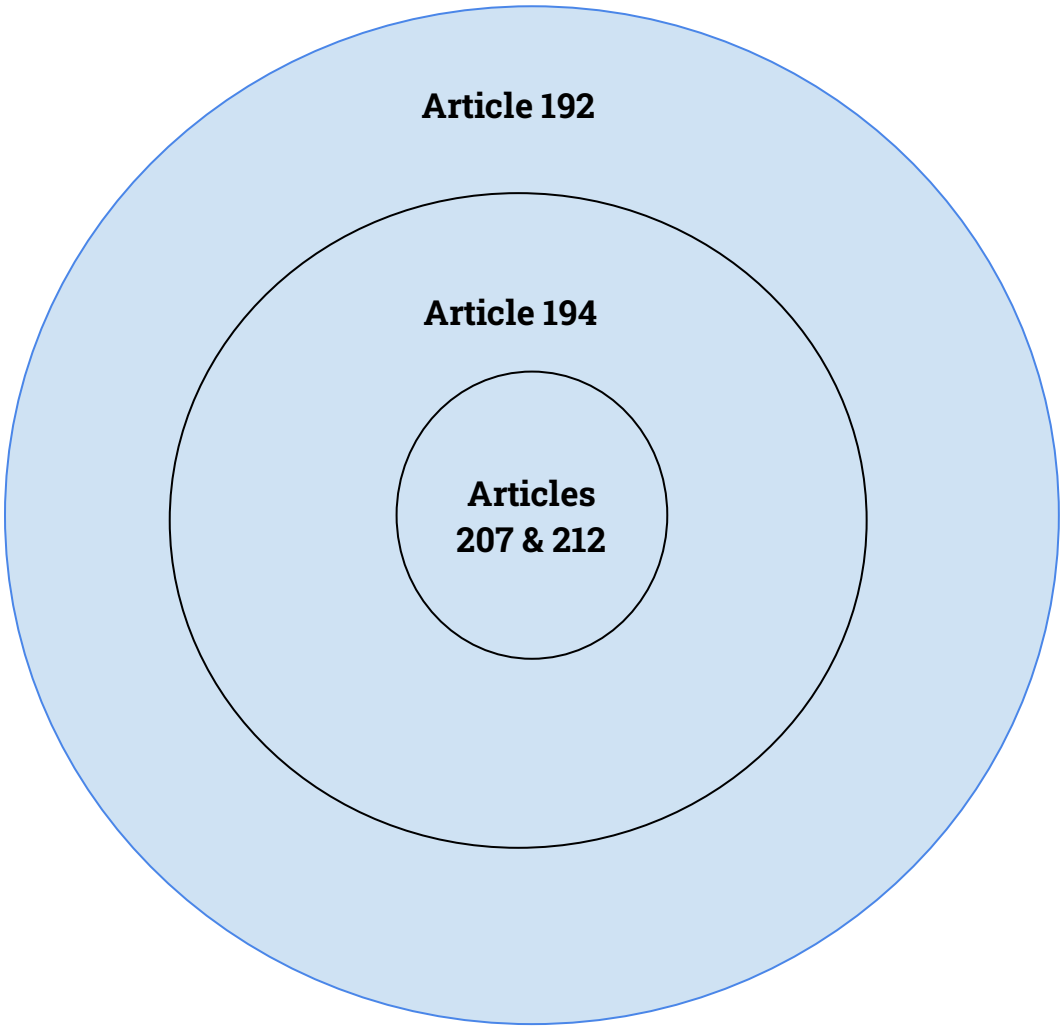
change to international courts, the opinion from ITLOS is set to be released first, and thus will set the precedent for the strength of advisory opinions to come.

The COSIS request to ITLOS asked the Tribunal to address State obligations to prevent, reduce, and control pollution of the marine environment and to protect and preserve the marine environment in the context of climate change (Tigre & Silverman-Roati, 2023). These obligations are codified in Articles 192 and 194 of UNCLOS. A significant clarification was requested as to whether GHG emissions can be classified as marine pollution under UNCLOS. Article 1(4) is relevant to this case, as it defines pollution as 'the introduction by man, directly or indirectly, of substances 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… ' (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). COSIS is requesting that ITLOS's advisory opinion clarify these obligations and create specific targets within the framework requests of UNCLOS.

Both of these questions in COSIS's advisory opinion request concern Part XII of UNCLOS, which addresses protecting and preserving the marine environment. Part XII includes Article 192, which codifies the obligation of State Parties to "prevent, reduce, and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming, sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere" (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). Part XII includes State Parties' obligation to control marine pollution not only from ocean-based sources but also from land-based sources. The land-based obligations are codified in Articles 194, 207, and 213 of UNCLOS (Tigre & Silverman-Roati, 2023). Figure 1. Illustrates the relationship between Articles 192, 194 and 207 and 212. In New Zealand's oral statement to the Tribunal, the relationships between the UNCLOS articles at issue were visualized as a series of concentric circles. Article 192 states that all State Parties to UNCLOS have a general obligation to protect and preserve the marine environment. Within this general obligation there is an obligation laid out in Article 194 which obliges countries to prevent, reduce, and control pollution of the marine environment. Within this obligation to curb marine pollution, Articles 207 and 212

specify the sources of pollution: from land-based sources, and from or through the atmosphere, respectively (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.).

Figure 1. *The Relationship Between Articles 192, 194, 207 and 212 (NZ oral statement, 2023).*



The questions asked by COSIS's advisory opinion request are broad in scope and address issues, such as ocean acidification, sea level rise, and ocean warming, that were not addressed in the initial drafting of UNCLOS (Tigre & Silverman-Roati, 2023). The issue at hand for ITLOS is whether State Parties to UNCLOS have *specific* obligations under the convention to protect and preserve the marine environment and to prevent, control, and reduce marine pollution from both land-based and ocean-based sources. The Tribunal is also faced with clarifying whether these obligations extend to protecting the marine environment from climate change impacts and whether GHG emissions constitute

marine pollution (Tigre & Silverman-Roati, 2023). COSIS's request for an advisory opinion from ITLOS marks the first time that the issues of climate change and sea level rise within the context of the law of the sea have been addressed by an international tribunal (Tigre & Silverman-Roati, 2023). The advisory opinion from ITLOS will significantly impact the coming years of international climate change law and global governance. It could present opportunities for state-state litigation concerning GHG emissions.

ITLOS accepted the COSIS advisory opinion request and set a deadline of June 16, 2023, for the submission of briefs and statements from State Parties to the convention and international organizations. ITLOS Statute article 31(1) invites entities with "an interest of a legal nature which may be affected by the decision in the dispute" to submit briefs (Tigre and Silverman-Roati, 2023), and 34 states and nine intergovernmental organizations submitted allowable written and/or oral statements per ITLOS rules. (See Table 1.)

On September 11, 2023, ITLOS began hearings, where State Parties to UNCLOS, COSIS, and intergovernmental organizations were given the opportunity to make oral statements. The general arguments in the written and oral statements concern (i) ITLOS's jurisdiction to give advisory opinions on UNCLOS, (ii) whether GHG emissions can be considered a source of marine pollution under UNCLOS, and (iii) what are state obligations under UNCLOS to protect and preserve the marine environment and to prevent, control, and reduce marine pollution

Table 1. *All States Parties to UNCLOS, Intergovernmental Organizations, and NGOs that Submitted Statements During the Proceedings to Determine Whether ITLOS Should Grant COSIS's Request for an Advisory Opinion.*

States Parties to UNCLOS	Intergovernmental Organizations	Statements not Part of Case File
Antigua and Barbuda	African Union	Advisory Committee on Protection of the Sea (ACOPS)
Argentina	COSIS	Center for International Environmental Law (CIEL)
Australia	European Union	ClientEarth
Bangladesh	Food and Agriculture Organization of the UN (FAO)	Greenpeace International
Belize	International Maritime Organization (IMO)	High Seas Alliance
Brazil	International Seabed Authority (ISA)	Observatory for Marine and Coastal Governance
Canada	International Union for the Conservation of Nature (IUCN)	One Ocean Hub
Chile	Pacific Community (SPC)	Opportunity Green
China	United Nations	Our Children's Trust
China	United Nations Environment Programme (UNEP)	Oxfam International
Comoros		UN Special Rapporteurs on Human Rights and Climate Change
Congo, Dem. Rep.		UN Special Rapporteurs on Human Rights and the Environment
Djibouti		UN Special Rapporteurs Toxics and Human Rights
Egypt		World Wide Fund for Nature (WWF)
France		
Germany		
Guatemala		
India		
Indonesia		
Italy		
Italy		
Japan		
Korea, Rep.		
Latvia		
Mauritius		
Micronesia, Fed. Sts.		
Mozambique		
Nauru		
New Zealand		
Niue		
Norway		
Palau		
Philippines		
Poland		
Portugal		
Rwanda		
Saudi Arabia		
Sierra Leone		
Singapore		
St. Kitts and Nevis		
St. Lucia		
St. Vincent and the Grenadines		
The Netherlands		
Timor-Leste		
Tuvalu		
United Kingdom		
Vanuatu		
Viet nam		

What Constitutes a Strong Advisory Opinion in this Case?

This study will employ Bodansky's framework to distinguish between a "strong," "moderate," and "weak" advisory opinion from ITLOS (Bodansky, 2023). Bodansky (2023) examines how national and international courts have become more involved in developing climate change law in recent years, perhaps due to the slow progress of negotiated law under the UN climate change regime. The recent surge in requests for advisory opinions from international courts reflects this trend of efforts to expand climate change law through judicially clarified "adjudicated law" (Bodansky, 2023). If ITLOS were to respond to COSIS's requests for clarification with a strong and specific advisory opinion, it could determine that land-based CO2 emissions constitute marine pollution and could set binding quantitative global emissions reduction targets. It could define a burden-sharing formula to allocate emissions reduction responsibilities equitably. It could specify how loss and damage funds are to be calculated and assigned based on historical responsibility (Bodansky, 2023). In his view, this is the "nuclear option" that will likely elicit no change in behavior from the states that most need to reduce their emissions because powerful states will simply disregard the opinion (Bodansky, 2023).

A weak advisory opinion would likely reject the notion that international law needs to be clarified and would likely elicit no change in behavior from the states that most need to reduce their emissions. Applying Bodansky's framework for a weak AO, ITLOS could determine that international law does not place specific obligations on states beyond those of the UN climate change regime and that customary international law does not oblige states to pay loss and damage reparations (Bodansky, 2023). A moderate advisory opinion, which leading legal scholars consider to be the most likely outcome, would elaborate on the general obligations of states under Articles 192 and 194 of UNCLOS without going into specifics. For example, ITLOS may find that CO2 emissions cause marine pollution within the meaning of UNCLOS by adding energy into the ocean, resulting in ocean acidification; therefore, states would be obligated to prevent and control marine pollution from this source (Bodansky, 2023). This could lead to climate litigation targeting land-based sources of CO2 emissions for contributing to marine pollution. A middle-ground ITLOS AO might also find that The Paris Agreement sets the international legal standards for Articles 207 and 212 of UNCLOS, covering

marine pollution from land-based sources (Bodansky, 2023). According to Bodansky, ITLOS and the IACtHR have been more activist in their jurisprudence than the ICJ, so ITLOS's advisory opinion could potentially be on the strong side (Bodansky, 2023).

Climate Change Litigation

One way in which clarifying states' obligations to protect the marine environment has the potential to influence environmental law and governance is through international climate change litigation. Climate change litigation is broadly defined as any case that is brought before judicial courts and specialized administrative tribunals that (i) raises climate change as a central issue, (ii) raises climate change as a peripheral issue, or (iii) does not explicitly raise climate change but has ramification for climate change mitigation or adaptation efforts (ADB, 2020). Some databases, such as the Climate Change Litigation database at the Sabin Center for Climate Change Law at Columbia University Law School, use a narrow definition. The Sabin Center includes all cases before judicial and quasi-judicial bodies in which material climate change science, policy, or law issues are central (Setzer & Higham, 2023). For this study, the narrow definition of climate change litigation used by the Sabin Center will be applied.

While most climate change litigation has been filed in national courts due to higher level of specific legal climate protection at the domestic level, at least 50 cases or complaints have been filed before international courts and tribunals (Setzer & Higham, 2023). Approximately 20 climate change cases have been filed before human rights bodies, while 12 have been filed before Investor-State Dispute Settlement (ISDS) bodies (Setzer & Higham, 2023). Ten of the remaining cases were complaints under the non-compliance procedure of the Kyoto Protocol, one of the climate change conventions under the UNFCCC (Setzer & Higham, 2023).

Over the last several years, overall rates of climate change litigation have increased, with a slight dip in acceleration in 2023 (Setzer and Higham, 2023). Of the total 2,341 climate change litigation cases captured in the Sabin Center's database, two-thirds of the cases have been filed in the years since 2015 and 190 were filed from June 2022 to May 2023 (Setzer and Higham, 2023). One reason for this accelerated pace of international climate change litigation is the increased "depth" and clarity of international

environmental law (Stephens, 2014). This strongly suggests that an advisory opinion from ITLOS, classifying CO2 as a marine pollutant and providing clarity on state party obligations to protect and preserve the marine environment and prevent marine pollution, could lead to an increase in international climate litigation within the context of the law of the sea.

Climate Change Litigation Impacts on Climate Governance

A significant uncertainty surrounding the increase in international climate change litigation is its potential impact on governance. Compliance with the decisions of international courts and tribunals requires the cooperation of participating states. Even when climate change litigation has been unsuccessful, it has impacted climate change governance; in an assessment of direct judicial outcomes in 549 climate change cases, half of the decisions were favorable to climate action and led directly to new policy implementation, but when decisions were not in favor of climate action, they still shaped narratives, educated the legal community, and elicited decision-makers at all levels to change their approach to climate governance (Setzer & Higham, 2023).

RESEARCH QUESTION

This study aims to predict the landscape of climate litigation if ITLOS specifies States' obligations to protect and preserve the marine environment and to prevent and control marine pollution, and how the strength of the advisory opinion will impact the outcomes. There is a range of strength for this advisory opinion because COSIS is asking for ITLOS to specify states' obligations in two areas: general obligation to protect and preserve the marine environment, and obligations to prevent and control marine pollution. A strong advisory from ITLOS will not only specify that GHGs are marine pollution, it will include content that specifies states' obligations, potentially including quantified emissions limits for States Parties. A moderate advisory opinion will specify that GHG emissions constitute marine pollution but will not make any assertions as to elaborating what is required of States Parties in terms of conduct to be considered in compliance with UNCLOS. A weak advisory opinion will say that this issue is already

governed by the UN Climate Change regime, and thus ITLOS does not need to interpret states' obligations with respect to climate change under UNCLOS, because climate change is not explicitly referred to by the Convention, so it is not within its advisory jurisdiction.

An advisory opinion is expected from ITLOS on May 21, 2024. In this project, we examine which State Parties to UNCLOS are most likely to sue another party over these obligations if the tribunal produces either a strong or moderate advisory opinion.

The aim of this project is to determine (1) If ITLOS releases a strong advisory opinion, which countries are most likely to sue on Part XII obligations? (2) If ITLOS releases a moderate advisory opinion, which countries are most likely to sue on Part XII obligations?

To address these aims, a comprehensive literature review identified predictor characteristics associated with such international litigation. These variables were compiled in a model using dummy variables to create a scoring system, wherein the highest-scoring countries are predicted to be the most likely to initiate litigation under a strong or moderate ITLOS advisory opinion to protect and preserve the marine environment or to prevent and control marine pollution.

LITERATURE REVIEW

Before delving into the literature on factors that increase a country's likelihood of suing another country in international court, the written and oral statements were read through. Some common objections were raised by countries such as Saudi Arabia, Brazil, and India on whether ITLOS had advisory jurisdiction, or if COSIS had the right to request an advisory opinion. The following section will address the advisory capability of ITLOS and states' response to the request for the advisory opinion.

Advisory Capability of ITLOS and States' Response to COSIS' Request

Advisory Capability of ITLOS

The advisory capability of ITLOS has been invoked on two occasions prior to COSIS's request. First, it granted an opinion in 2013 concerning the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, 2013). This advisory opinion concerned article 191 of UNCLOS. The second advisory opinion was given in 2015, where ITLOS, as a full court, gave an advisory opinion in accordance with article 138 of the rules of the Tribunal, at the request of the Sub Regional Fisheries Commission (SRFC) about the flag state's responsibility in combating illegal, unreported, and unregulated fishing practices (Roland Holst, 2022; Tanaka, 2023). According to Roland Holst (2022), the SRFC advisory opinion case set the precedent that ITLOS has advisory jurisdiction, outside the Seabed Authority, over a legal question if an international agreement related to the purpose of UNCLOS provides for such a request (Roland Holst, 2022). This was a controversial precedent, as no specific language in UNCLOS gives the whole court advisory jurisdiction (Roland Holst, 2022; Tanaka, 2023). In the SRFC case, Germany, Japan, Micronesia, New Zealand, and Somalia supported ITLOS's advisory jurisdiction, while Argentina, Australia, China, France, Ireland, Portugal, Spain, Thailand, the U.K., and the U.S. argued in written statements that ITLOS did not have jurisdiction to give an advisory opinion (Tanaka, 2023). This provides some relevant context for understanding how some of the State Parties to UNCLOS have responded to COSIS's request for an advisory opinion.

Opposition to ITLOS Advisory Jurisdiction

While ITLOS has agreed to give an advisory opinion in response to COSIS's request, it is not clear from prior actions whether this advisory opinion will have strong language along the lines of COSIS's interpretation of State Party obligations to protect and preserve the marine environment and to prevent and control marine pollution (Barnes, 2022; Roland Holst, 2022; Tanaka, 2023). According to Roland Holst (2022), some states that are not COSIS members and have not consented to the complete advisory jurisdiction of ITLOS, as it is not explicitly stated in UNCLOS, have taken issue with the proposed broad advisory jurisdiction of ITLOS and, therefore may choose not to comply with ITLOS's interpretation of Articles 192 and 194 of UNCLOS (Roland Holst,

2022). Additionally, powerful states may refuse to acknowledge the legitimacy of an advisory opinion, whether strongly worded or not.

The questions posed by COSIS to ITLOS raise broad, significant issues about the interaction between the international law of the sea regime and the UN legal regime on climate change (Alarcon et al., 2023). Since they involve potential clarifications of emission limits under UNCLOS, further legal questions about the interaction between the law of the sea regime and the international climate change regime may be necessary if decisions about obligations under one regime limit the state's actions under the other regime. Baars 2023 discusses how this advisory opinion will likely contribute to future negotiations on the topic, lead to global objectives for lowering the ocean's pH level, and alter social norms and values on marine pollution and GHG emissions mitigation. Most importantly, a strong advisory opinion could prove useful for climate litigation as international courts incorporate decisions from other courts in their own rationales (Baars, 2023). This advisory opinion from ITLOS on the specificity of the State Party's responsibilities with respect to Articles 192 and 194 could ignite a new era of climate change litigation within the context of the law of the sea.

States' Response to COSIS Request for ITLOS Advisory Opinion

Columbia University's Sabin Center released a report in October 2023, summarizing the briefs and written statements submitted to ITLOS by State Parties to UNCLOS and invited intergovernmental organizations. For each state that submitted a statement, the report notes the date of the written and/or oral statement given during the hearings for whether or not ITLOS should give an advisory opinion following COSIS's request. The report then summarizes the main points of the statements. Heavily featured points included state opinions on climate change and the role of science, ITLOS's advisory jurisdiction issues, and interpretations of states' obligations under articles 192 and 194 of UNCLOS. For the purpose of this study, the Sabin Center report provides a useful consolidation of the position and primary stated rationale from participating member states. The Sabin Center's report outlines state position and main arguments; it does not attempt to explore the underpinning factors that influence state participation,

position in support or opposition of the AO, and the rationale behind their specific arguments.

Predictions on the Next Developments in International Climate Litigation from the Literature

Setzer and Higham (2023) have identified five areas of focus where they predict increasing litigation in the coming years. Two of these points align with the focus of this study. They predict that, based on ITLOS's pending advisory opinion, there will be increased litigation addressing the duties of governments and corporations to protect the ocean from further climate impacts. This aligns with Karim (2014) finding that states increasingly tend to resort to litigation for the settlement of law of the sea disputes as opposed to other forms of dispute settlement. The second prediction of relevance to this study is a rise in international litigation between states, particularly regarding disputes over fossil fuel production and use (Setzer & Higham, 2023). With a projected increase in international state-state litigation, the motivators for such litigation have become a critical area of focus (Karim, 2014). This study aims to predict who will sue, contingent upon a strong or moderate ITLOS advisory opinion. The following sections will examine the literature on the factors that motivate a state to initiate litigation against another state in international courts.

Critical Review of the Literature on International Litigation and Consideration of Variables for a Predictive Model

Theoretical Framework

In examining what motivates countries to sue each other in international court, I apply a realist theoretical framework. There is a consensus in the literature that States initiate international litigation based on several factors, but national interest is the primary predictor across all areas of international law examined in this review (Abebe, 2007; Karim, 2014; Stephens, 2014). National interest is a broad term encompassing many factors, but in essence, it is determined situationally by examining the roles of power and self-interest (Abebe, 2007). Thus, we examine state-state litigation through the lens of realpolitik, that in compliance with/application of international law, states take a

pragmatic approach in the pursuit of national interest (Emery, 1915). According to this theory, the global balance of power and the pursuit of military and economic strength are the underlying mechanisms that explain international relations (Abebe, 2007). A few key assumptions of realism as a theoretical framework are important to note. Firstly, realism assumes that states operate in an international system without a central government or law-enforcement capabilities. Secondly, national security is the states' primary goal; thirdly, states are rational actors whose actions are influenced little by domestic factors, international institutions, or NGOs (Abebe, 2007). Through the lens of realism, state cooperation and compliance with international law is "a function of national self-interest" (Abebe, 2007). Predicting what the coming years of climate litigation will look like, considering a strong ITLOS AO, requires the examination of the specifics of states' national interests.

While the consensus among scholars is that, in deciding whether or not to litigate in international courts, states behavior is best predicted using a realist approach, the rise of non-state actors as significant players in international climate change litigation cannot be ignored. The influence of non-state actors, particularly as litigants, is best described by a liberal international relations ground theory. Climate litigation, in particular, has been driven by NGOs and individuals filing suits. Since June 2022, 90% of climate litigation cases filed outside of the United States have been brought by NGOs, individuals, or both acting together (Setzer and Higham, 2023). This is indicative of a rise over time in strategic climate litigation cases, where traditionally excluded groups, like SIDS, use litigation as a tool to influence negotiations and global climate policy (Setzer and Higham, 2023). COSIS' request for an advisory opinion from ITLOS is an example of strategic litigation. While international climate change litigation has been heavily influenced by cases brought by NGOs, there is little published literature on motivations of national governments initiating litigation. Thus, based on the literature on states' motivations for litigating in international courts, the appropriate theoretical framework to understand state behavior in response to COSIS's request for an advisory opinion and to predict which are most likely to sue, if any, is realism.

While, from a realist perspective, States will act in their best interest in the international arena, predicting these interests is situationally variable and context specific.

In deciding whether or not to pursue litigation on a global scale, a state balances factors that oftentimes overlap or are in tension with one another (Stephens, 2014). National interest is not homogenous across the globe, varying significantly with geography, politics, economies, etc. Broadly speaking, a country's current circumstances and its ambitions for its future circumstances determine a state's conduct in its international relations (O'Brien, 2013). From a realist perspective, a states' priorities are maximizing security, skewing the global balance of power in its favor, and, and maximizing economic and military strength (Abebe, 2007).

Within the issue of international dispute settlement in environmental and climate-related cases, national interest takes many forms and will be different based on national contexts and specifics. The following section will examine several factors often attributed to influencing a state's likelihood to initiate state-state dispute settlement in international dispute settlement forums. As the climate change law regime is complex and involves many other realms of international law, multiple forums must be examined in order to glean trends in international litigation, including the ITLOS, the ICJ, the Court of Justice for the European Union (ECJ), the Dispute Settlement Body of the World Trade Organization (WTO), and United States National Courts (Stephens, 2014).

This section will first examine national contexts and specifics contributing to a state's interest in initiating international dispute settlement. These factors include a state's geography, wealth, institutional power, political realities of the region, domestic legal system, international litigation history, and political regime (Abebe, 2007; Adam et al., 2020; Baier, 2006; Baker & Young, 2001; Bown and Hoekman, 2005; Davis and Bermeo, 2009; Karim, 2014; Lijphart, 1999; Ryan, 2011; Young et al., 2019). The section will then delve into predictors of international litigation that fall under the category of national interests. Self-interest, in the context of international dispute settlement, is defined broadly (Karim, 2014). State-interest motivations for instigating international dispute settlement include accumulation of power, security interest, material gains, and political interest (Abebe, 2007; Adam et al., 2020; Karim, 2014; Stephens, 2014). It must be noted that these groupings, national contexts and specifics, and national interests, are not mutually exclusive.

Table 2. *Direct factors of national interest and national contexts and specifics that influence national interest*

National Interest	National Contexts and Specifics
Accumulation of power	Geography and geopolitics
Material gains	Institutional power
Political interest	Legal history
Security interest	Wealth and national resources

National Contexts and Specifics

Several domestic characteristics and values that shape national interest in international relations are identified in the literature. Realities such as a state's geographic location, relationship to neighboring states, and national resources set its position in the global arena and shape its ambitions. Regarding international dispute settlement, regional political realities and national political dynamics can impede diplomatic relations and create a need for a third-party dispute settlement forum. Especially when maritime border disputes and conflicts over natural resources arise, international tribunals such as ITLOS have historically been relied upon and generally complied with (Karim, 2014). First, we examine states' legal system, litigiousness, and past success rates in international courts.

Legal Factors

Likelihood of Winning

One of the primary factors influencing whether a state initiates international litigation against another state is the likelihood that the litigating state will win the suit (Karim, 2014; Stephens, 2014). In the context of ITLOS, the probability of the litigating state winning is highly dependent upon jurisdictional certainty (Karim, 2014). If there is any uncertainty as to whether the case will pass preliminary objections to ITLOS jurisdiction, a state may be reluctant to initiate litigation (Karim, 2014). Jurisdictional

challenges are common when a dispute is submitted to the UNCLOS dispute settlement system without the consent of one of the parties. However, regarding cases arising from the language of the ITLOS advisory opinion, the jurisdiction of ITLOS will likely be clear.

While the argument can be made that even unsuccessful climate litigation can shape narratives around climate action and impact governance, states typically will not voluntarily enter into these legal battles unless they think they will win (Karim, 2014; Setzer & Higham, 2023). State analysis of the likelihood of winning is often directly linked to the character of the dispute and then the legal and political implications that would follow from winning or losing (Stephens, 2014). Sometimes, public pressure can overcome the assumption that states will not engage in litigation and that they are unlikely to win, as was seen in the Nuclear Tests case (Stephens, 2014). However, for the most part, states are more likely to initiate litigation if the likelihood of winning is high.

Litigiousness/Past Success Rates

One of the best predictors of a state initiating litigation against another state in an international court is previous international litigation. Prior success in international courts is also a good indicator of future litigation (Powell & Mitchell, 2022). Sometimes, factors such as geography, wealth, and institutional power will have a significant impact on international litigation history. Latin American states are a prime example, with a lengthy history of international litigation relative to other regions, development levels, and wealth (Young et al., 2019). Because the field of international climate change law and litigation is relatively new, it is likely worthwhile to examine a state's level of engagement in domestic climate litigation and in other international courts and tribunals. In particular, past success rates in the ICJ are a good proxy for assessing the likelihood of litigation in ITLOS since they serve a similar purpose in the UNCLOS dispute settlement mechanism.

Domestic Legal Systems

Domestic legal norms and structures can influence a state's preference for international forums when it engages in international dispute settlement. In UNCLOS dispute settlement, State Parties have a procedural choice of dispute settlement

mechanism. A 2022 study found that a state's domestic legal system "has a strong influence" on which dispute settlement procedure a state will choose under Article 287 of UNCLOS to instigate litigation concerning the law of the sea (Powell and Mitchell, 2022). This study argues that states engage in "forum shopping," selecting the dispute settlement system that best serves their foreign policy interests (Powell and Mitchell, 2022). In electing between ITLOS, the ICJ, or Annex VII/VIII of UNCLOS, Powell and Mitchell (2022) found that common law countries are receptive to each dispute settlement procedure, civil law countries prefer the ICJ but are "amenable" to selecting ITLOS as a top preference, and Islamic law states defer to Annex VII/VIII as a forum for dispute settlement. This finding is based on analyzing the State Party's decision to sign, ratify, and make an optional declaration under Article 287 to specify their preferred dispute settlement forum and the nature of their participation in UNCLOS negotiations (Powell & Mitchell, 2022). This study argues that similarities between domestic legal systems and the structure of international courts will make certain states more likely to work through binding forums due to the predictability of outcomes (Powell & Mitchell, 2022). This is the case with civil law countries and the ICJ. These findings have significant implications for predicting which states will support international institutions, such as ITLOS, and how certain countries can be expected to react to a strong advisory opinion. It must be noted that the State's legal system is often directly tied to the type of government, colonial history, regime type, and culture.

Economic and Financial Factors

Country Wealth

Country wealth is a national characteristic that can act as a barrier to initiating litigation in international dispute settlement systems. For example, in World Trade Organization (WTO) cases, according to the World Bank income categories, the highest-income countries have initiated 239 out of 276 total complaints, with the United States and the European Union leading as litigants (Davis & Bermeo, 2009). and the lowest-income member states almost universally fail to engage as either complainants or interested third parties in dispute settlement cases, even when directly related to their

market interests, suggesting significant institutional barriers prevent these countries from participating (Bown & Hoekman, 2005). However, as developing countries increase in both number and activity levels, their share of overall adjudication has also steadily increased. Some developing country members of the WTO are more frequent filers in the dispute settlement system than others, suggesting that material resources are not the only determinant (Davis & Bermeo, 2009).

Economic Interest

There is consensus among scholars of various areas of international law that a principal component of self-interest influencing litigation initiation is the maximization of economic benefit (Adam et al., 2020; Karim, 2014; Stephens, 2014). In annulment lawsuits in EU Court, for example, Adam et al. (2020) find that the primary motivation in state-state litigation is maximizing financial resources. Litigation is chosen as a dispute settlement mechanism when winning the suit significantly improves the litigant's monetary resources by avoiding substantial expenses or maximizing revenue (Adam et al., 2020). In environmental or climate change lawsuits, a country's value on its natural environment is a crucial indicator of whether the state will sue another government to protect its interests.

In UNCLOS dispute settlement cases, maximizing economic benefit is one of the two main factors influencing the initiation of litigation (Karim, 2014). For example, the two most common types of cases that ITLOS has presided over are maritime boundary disputes and prompt release cases, which are inherently tied to the state's material resources. These material resources include a ship and crew, contested fishing grounds, rights to drill into a seabed, etc. If a State has seized a ship and crew, it is in the material interest of the owning State to get its property back. For maritime boundary disputes, both parties involved in a dispute are incentivized to participate in litigation due to the necessity of settled maritime boundaries to explore and exploit natural resources peacefully (Karim, 2014). This is shown in the maritime boundary case between Bangladesh and Myanmar, where the foreign minister from Bangladesh stated that the peaceful definition of maritime boundaries in an equitable manner "provides an opportunity for us to realize our full potential" (Karim, 2014). In ITLOS prompt release

cases, countries initiate litigation to retrieve their apprehended vessels and nationals or to enforce the fishing rights within their EEZs, both economic concerns (Karim, 2014).

Social, Geographic, and Political Factors

Geography and Geopolitics

In recent years, the literature on state-state dispute settlement in international law has noted regional trends in litigation. For example, the typical litigants in the ICJ are from Western States, the top three being the United States, the United Kingdom, and France (Young et al., 2019). Regional trends are indicative of trends in legal system type, wealth, and regime type, which must be considered together. State relations and the normalcy of litigating in international courts influence participation in international courts on a regional level (Stephens, 2014).

Geography determines many national contexts and specifics that influence a state's litigiousness in international courts. For example, geography determines many barriers to entry into international litigation. For example, language barriers are a significant barrier to many Global South States who may not have access to information in English (Young et al., 2019). This issue has been slowly improving; however, until recently, language and financial barriers have kept Global South countries excluded from participation.

A state's geographic location regarding the region's political realities has been shown to impact litigation. In ITLOS cases, Karim (2014) points out that dispute settlement that would benefit both parties may not be feasible via bilateral agreements due to tensions between neighboring states and resulting internal political pressures. In UNCLOS disputes, third-party dispute settlement bodies are often helpful in diffusing geopolitical tension. They are relied upon, especially in maritime boundary disputes when States are unable to come to a peaceful resolution bilaterally (Powell & Mitchell, 2022). Many political scientists have demonstrated that when governments face strong domestic political opposition to cooperation with a neighboring state, national governments are more likely to seek the settlement of international disputes through

international legal mechanisms instead of concessions in bilateral negotiations (Karim, 2014).

Political System and Culture

A state's political system and culture significantly influence foreign policy and engagement with international courts. Domestic politics and public opinion have a "flow-on" effect with regard to international litigation, with democracies generally showing a trend of higher rates of litigation than authoritarian governments (Stephens, 2014). Liberal theorists see positive engagement with international law as a function of internal politics (Stephens, 2014). Representative democracies, in particular, are sensitive to societal pressures in crafting foreign policy, including engagement with international courts. States of all regime types must cooperate with each other to some extent in international relations, but democratic states must also answer to societal actors in the domestic sphere (Stephens, 2014). As democratic leaders are elected by their constituencies, scholars agree that domestic factors hold a higher level of importance in determining a democratic state's actions on the global stage (Abebe, 2007; Stephens, 2014). Stephens (2014) cites the case of domestic opposition in Australia and New Zealand to French nuclear tests in the Pacific, influencing Australia to initiate litigation against France in the ICJ (Stephens, 2014). The nature of a state's domestic political system and its culture is an important cultivator of national interest in foreign policy.

The literature points to regime type, specifically, a state's identity as liberal or non-liberal, as a determinant of whether a State will comply with international law (Abebe, 2007; Stephens, 2014). Within liberal states, the ideology and commitment to liberal world order, human rights, separation of powers, and representative government acts as a unifier, facilitating cooperation (Abebe, 2007). These institutional attributes predispose liberal states to comply with international law and use it to spread liberal ideology. Initiating international litigation is an opportunity for a state to defend its ideology and political interests internationally via norm entrepreneurship and domestically as a signal of responsiveness and trustworthiness to the litigating state's constituency (Abebe, 2007; Stephens, 2014). Abebe (2007) also noted this phenomenon in examining the motivations of the United States in international human rights litigation,

characterizing U.S. incorporation of customary international human rights law as a function of American foreign policy. If initiating international litigation will further a state's foreign policy goals or will gain the regime in power favor in domestic politics, they have a higher likelihood of pursuing this path.

Power Considerations

One contextual variable that predicts the likelihood of a state initiating litigation is its institutional power. If winning a case will increase a state's relative power in the international system, that state will be more likely to initiate litigation in international courts. Within the European Court of Justice (ECJ), Adam et al. (2020) noted institutional power as a predictor of initiating lawsuits; specifically, litigation is pursued when the Court's interpretation of legal concepts may significantly improve the litigant's institutional and decision-making capability.

When a powerful state delegates some of its power to an international institution, it bears sovereignty costs, where this delegation of power restricts the state's autonomy to a certain degree. From a realist perspective, states are unlikely to make decisions that reduce their autonomy. Thus, when international litigation, or the delegation of dispute-settlement power to an international court, threatens the global status quo in terms of threatening a state's institutional power, they are more likely to resist cooperation (Adam et al., 2020).

The United States is a prime example of this phenomenon, as it is notably not a party to UNCLOS and thus had no participation in the ITLOS advisory proceedings. The United States' relationship with international law is primarily based on power, influence, and strategic goals in international politics (Abebe, 2007). The United States is the most prominent example of powerful states complying with international law when it suits them but ignoring it when it could limit their power or autonomy. Some scholars argue that sovereignty costs for the United States and other Global North countries are associated with complying with international law (Abebe, 2007). By this argument, these states would ignore international institutions altogether. This, however, is not the case. States with more power in the international arena are often less inclined to delegate power to international institutions unless they have significant influence within these

institutions (Abebe, 2007). However, if a country has considerable influence over an international institution, it is in that country's power interests to utilize this forum in its foreign policy endeavors.

On the other hand, the reality of the distribution of power in the international arena can prevent certain countries from participating in the legal system. While international law theoretically gives states equal opportunity to litigate and pursue their interests, some states may lack the capacity to enforce their rights via international law (Davis & Bermeo, 2009). Some scholars argue that international law is inherently political and enforces existing international power dynamics, thus providing little benefit to weaker states (Davis & Bermeo, 2009). While this has historically been reflected in many areas of international law, emphasis is now changing, showing an increase in lawsuits brought by developing countries. In WTO dispute settlement cases, developing countries make up the majority of repeat filers (Davis & Bermeo, 2009). This shows states can overcome material constraints in litigation if the national interest is high enough.

Reputation

A significant consideration for states in instigating international litigation is reputation. If a state suffers reputational costs if it does not win a case, it may be less likely to provoke international litigation. This ties in directly to a state pursuing litigation only if it believes victory is expected. In deciding whether to litigate, states consider the reputational costs if they were to lose (Stephens, 2014). Karim (2014) cites prompt release cases under ITLOS as a prime example of reputational costs associated with state-state litigation. In prompt release cases, the litigating state is generally the one filing an application for the release of a vessel and/or crew that another state has detained. In these cases, even if monetary national interest is not significant, the reputation of the litigating state would take a hit if they were to decide not to litigate or if they were to lose (Karim, 2014). Citing the *Volga* prompt release proceedings, where the Russian Federation initiated litigation against Australia via ITLOS, Karim (2014) notes that reputational costs, not monetary interests, were the motivating factor for initiating litigation. In this case, the Russian-flagged vessel, manned by an Indonesian crew and owned by a non-

resident of Russia, had been fishing illegally in Australia's EEZ. Russia's motivations in litigation were to save face. The vessel, seemingly bearing a Russian flag of convenience, was fishing illegally in a zone protected by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), an international body of which Russia is a member state (Karim, 2014). In its arguments, Russia initiated proceedings against Australia for violating Article 111 of UNCLOS, stating that a ship is entitled to compensation if it has been stopped or arrested in circumstances that do not constitute "hot pursuit" (Karim, 2014). Russia's arguments avoided the topic of illegal fishing altogether. If the unlawful activities of the ship were widely circulated, it would bear reputational costs for the Russian Federation. Australia made convincing arguments that brought to light Russia's lack of control over the vessel and warned them of the reputational costs that would be associated with increased litigation over this issue, essentially saying that dragging out the problem would result in wide circulation of Russia's violation of its obligations under CCAMLR. Karim (2014) postulates that the threat of higher reputational costs in this case was the main reason Russia decided not to pursue further litigation in the *Volga* case. While economic interest generally supersedes reputational costs in determining whether or not to litigate, this is not a universal occurrence.

Environmental Factors

Vulnerability to Climate Change

According to a realist interpretation of foreign relations, if international litigation benefits will increase the state's security, they will be more likely to sue. In terms of global climate litigation, the issue of security is critical and is highly dependent upon geography and climate. As has been established earlier in this review, the effects of climate change are not experienced evenly across the globe. Specifically, SIDS are identified as being at exceptionally high risk of the effects of climate change due to common traits such as narrow resource bases, high economic reliance on their natural environment, limited industry, physical remoteness, and limited economies of scale (Thomas et al., 2020). SIDS's National interest in international climate litigation is

survivability, perhaps making them likely to initiate litigation to combat anthropogenic climate change and increase their security.

In the context of the ITLOS advisory opinion requested by COSIS, the first advisory opinion that has been sought on the specific issues of sea-level rise and climate change, states that are highly vulnerable to rising sea levels have a vested security interest in ameliorating this threat (Setzer & Higham, 2023). In this case, it is clear that COSIS states see an imminent threat to their security, so they have asked ITLOS to specify what states' obligations are under Part XII of UNCLOS to protect and preserve the marine environment and to prevent and control marine pollution.

Domestic Climate Legislation and Litigation

The existence of climate change-specific domestic legislation and a history of domestic climate litigation cases is likely to increase the likelihood of a country initiating international climate change litigation. Domestic legal protection of the natural environment has been identified as being "of critical importance" in the advancement of climate litigation cases on the domestic level (Setzer and Higham, 2023). Countries such as New Zealand, Ecuador, Canada, India, the United States, Colombia, and the United Kingdom have passed laws that give the natural environment legal rights (Van Zeebroeck, 2022). These countries are some of the leaders in domestic climate change litigation cases according to the Sabin Center for Climate Change Law database, meaning that they have established legal infrastructure, precedent, and normative standards that would be conducive to initiating international climate change litigation. According to Setzer and Higham (2023), the existence and level of ambition of climate-specific legislation in a country are very likely to shape legal arguments put forward by litigants in climate litigation cases. Similarly, it is expected that if a state's domestic legal system is familiar with climate change legislation and litigation, it would be more likely to make arguments in international cases that reflect these norms. For example, Setzer and Higham (2023) identify an increasing trend in Global South climate litigation that uses arguments relying on the human right to a healthy environment or that depend on addressing failure in enforcing existing environmental protection legislation.

HYPOTHESIS AND PREDICTIONS

Hypothesis

Based on the literature, I hypothesize that the country that is most likely to sue another UNCLOS State Party will be the country with the highest national interest associated with winning, and the least to lose if the suit is unsuccessful.

Predictions

COSIS member-states and SIDS are the most likely to sue because they have the highest national interest associated with a successful suit and the least to lose in climate litigation cases.

METHODOLOGY

Introduction to Methodology

This study uses thematic analysis to create a model to predict which country is most likely to initiate litigation against another country concerning obligations in Part XII of UNCLOS if ITLOS releases a "strong" or "moderate" advisory opinion. The predictive framework was developed using data on State Party support of a "strong" or "moderate" advisory opinion from written and oral statements, using the definition of strength from Bodansky (2023), and from the literature on what motivates countries to sue in international courts. Once the framework was developed and the countries most likely to sue if a moderate or strong advisory opinion were to be released by ITLOS were identified, we employed an exploratory case study approach to predict what the hypothetical lawsuits could be about and who they would likely be against.

This study's primary method of inquiry consisted of researching available online data. These data sources broadly include the written and oral statements made during the advisory proceedings following COSIS's request for an advisory opinion from ITLOS and published literature on what motivates a country to sue another country in international courts. This approach of researching available data was chosen due to the

efficiency of utilizing existing data and the high quality and quantity of published literature.

Once the available literature was read and data consolidated, it was analyzed using thematic analysis. Qualitative data was collected first from oral testimonies and written statements of party states to UNCLOS that were submitted to the tribunal. These stances and predictors identified by the literature, such as domestic legal infrastructure and past success rates in international courts, were considered for each country that supported a strong or moderate-strength advisory opinion from ITLOS.

Data Collection

Firstly, using the current World Bank list of countries, countries participating in the advisory proceedings and those not participating were separated into two different Excel spreadsheets. For countries that did participate in the advisory proceedings, it was noted whether they submitted a written statement, an oral statement, or both. A higher level of involvement in the advisory proceedings was determined to be an indicator of greater interest in the outcome of the AO and, thus, an indicator of a higher likelihood of suing another state party over Part XII obligations.

The summaries of State Parties' oral and written submissions outlined by the Sabin Center Report were carefully read, and countries in support of the AO were grouped together in an Excel spreadsheet, as well as countries opposed to the AO. Countries were identified as opposed to the AO if they stated that ITLOS did not have advisory jurisdiction in this case or if they opined that the tribunal should not specify state obligations under Part XII of UNCLOS. The countries that supported ITLOS advisory jurisdiction were then grouped by whether they supported a “strong,” “moderate," or “weak” advisory opinion from ITLOS. A strong advisory opinion was defined, using Bodansky’s (2023) definition of advisory opinion strength as a reference point, as one that defines anthropogenic GHG emissions as marine pollution and sets quantified emissions limits for ocean and land-based emissions. It could also define a burden-sharing program or specify a system for loss and damage payment calculation and allocation based on historic emissions (Bodansky, 2023). Per this definition, countries that stated that CO2 emissions constitute marine pollution and additionally laid out

specific obligations that ITLOS should include in its advisory opinion were considered to be in support of a strong ITLOS AO. Bodansky (2023) postulated that a moderate AO could affirm that CO2 emissions constitute marine pollution but decline to delineate specific state obligations under Part XII. Countries who, in their written and/or oral statements, affirmed that CO2 emissions are considered marine pollution by UNCLOS's definition but did not lay out any specific obligations that ITLOS should include in its AO were determined to be in support of a moderate ITLOS AO. Bodansky (2023) indicated that a weak AO could reject the notion that international law needs to be clarified or could defer to the UN climate change regime to govern climate change. Thus, a country that rejected the idea that Part XII required clarification or opined that this subject should be left to the climate change regime to govern was grouped as supporting a weak AO.

This study aims to predict which country is most likely to sue another country based on Part XII obligations once the AO is released. Countries that did not support ITLOS advisory jurisdiction or that supported a weak AO were not used in the predictive model. Countries that were identified as supporting a moderate and a strong AO were grouped together in separate Excel spreadsheets, and they were scored against each predictor variable determined by the literature as increasing a country's likelihood of suing another country in international courts.

Variable Selection

In order to glean some insight into preliminary trends in country characteristics and potential motivations behind participation in the advisory proceedings and potential to sue, several variables that the literature identified as predictors of suing in an international court were considered. As outlined in the literature review, national interest was recognized as the primary motivator for countries to instigate international litigation. As this is a relatively abstract and context-specific variable, several sub-variables were chosen to represent areas where states have vested interests related to the natural environment. These variables were split into four categories: legal, economic, and financial; social, geographic, and political; and environmental.

Table 3. *Relationship between proxy variable categories and type of national interest they represent*

Accumulation of Power	**Material Gains**	**Political Interest**	**Security Interest**
Legal Factors	Economic and Financial	Social, Geographic and Political	Environmental

Table 4. *Proxy variables for national interest and national context and specifics used in predictive model*

Legal	**Economic and Financial**	**Social, Geographic, and Political**	**Environmental**
1. ITLOS dispute history 2. Sued in the ICJ 3. Civil/common law system 4. Submission of written statement 5. Submission of oral statement	1. Income (GNI) 2. Value of the Marine Environment (% of EEZ in an MPA)	1. Coastal State 2. Development Level (HDI) 3. Geographic Region 4. Type of National Government	1. Level of Historic Emissions 2. Level of Exposure to Climate Change 3. Level of Sensitivity to the Impacts of Climate Change 4. Adaptive Capacity in Response to Climate Change 5. Ecosystem Services 6. Rights of Nature

The legal category of variables serves as a proxy for power interests. From a realist perspective, states use international courts as a foreign policy tool, where strong states will use litigation to increase their individual power within the international system and weaker states will litigate to increase the power of instittuions, hoping to gain more

representation and skew the balance of power in their favor (Mitchel and Powell, 2022). Within the legal category, the variables include ITLOS dispute history, petitioner history in the ICJ, history of domestic climate litigation, whether the country has a civil/common law system, submission of a written statement to ITLOS in the advisory proceedings, and submission of an oral statement to ITLOS in the advisory proceedings in this case. Whether or not a country has previously used ITLOS as its UNCLOS dispute settlement forum is a valid indicator of whether they are likely to do so again. This is especially relevant as Mitchell and Powell (2022) recognize that countries select a UNCLOS dispute settlement forum that best fits their foreign policy interests. If a state has previously specified ITLOS as its preferred forum for UNCLOS dispute settlement and has appeared before the court, it is more likely to bring suit in ITLOS again. As ITLOS is a relatively new court and has only heard 32 cases, it is also relevant to consider whether or not a state has initiated litigation in the ICJ to assess whether or not a country has the legal capacity to litigate in international courts (Mitchell & Powell, 2023). Additionally, since a majority of ITLOS cases have been prompt release or maritime boundary limitations, including ICJ contentious cases in the dataset gives a more holistic picture of a country's capacity to initiate litigation. Additionally, this study considered whether a state has a history of domestic climate litigation cases, as the literature has identified domestic climate litigation as a potential predictor of international climate change litigation (Setzer & Higham, 2023).

The economic and financial category serves a proxy for material national interests. Within the economic and financial category of national interest, the variables were determined to be income, the percentage of a country's exclusive economic zone (EEZ) that has been put into a marine protected area (MPA). This metric was selected as a proxy for the value of the marine environment based on Yale University's Environmental Performance Index (EPI, 2024). A country's gross national income was selected as a variable because there is a consensus in the literature and across past litigation in international courts that the majority of cases have been brought by wealthier countries to maximize economic benefit (Bown & Hoekman, 2005; Davis and Bermeo, 2009). The percentage of a country's EEZ that has been put into an MPA was selected as a variable to act as a proxy for the value a nation places on its marine environment. As

Adam et al. (2020) note, countries are more likely to choose litigation as a means of dispute resolution when victory would increase the litigant's monetary resources either by avoiding costs or maximizing revenue. If a state places a high value on its marine environment, it will be more likely to sue another country over Part XII obligations than a country that places a lower value on its aquatic environment.

The social, geographical, and political category serves as a proxy for political interest, where a states' geography, geopolitics, and political system influence their foreign policy actions and relative gains in the international system (Setzer and Higham, 2023). The social, geographical, and political variables are coastal, human-development index (HDI), geographic region (Global North or Global South), and whether the country is considered a liberal democracy. Whether or not the state is coastal was chosen because it is expected to see higher participation in countries with a significant interest in protecting the oceans, specifically tied to the county's natural marine resources. Coastal countries are at the forefront of dealing with rising sea levels, ocean acidification, and marine heatwaves that harm coastal states' aquatic ecosystems and resources. The Human Development Index (HDI) was chosen as a criterion because countries with a lower HDI generally have a lower history of participation in international litigation. Costa et al. (2011) have also shown that there is a positive, time-dependent correlation between HDI and per capita CO2 emissions from fossil fuel combustion. Since higher emitting countries have less incentive to comply with potential limits on their emissions, this is an important criterion to assess. HDI also adds to this analysis's social dimension of climate change. The geographic region was chosen as a criterion in order to analyze regional trends in support and participation, especially Global North vs. Global South discrepancies. In terms of power balances in the international system, Global North countries hold a disproportionate amount of power and influence. While, theoretically, initiating climate change litigation in ITLOS could limit the power of some Global North Countries, the majority of climate litigation cases have been undertaken in the Global North, so for the purposes of this study, we identify Global North countries as more likely to sue in international court (Setzer & Higham, 2023).

The environmental category serves as a proxy for security interest. From a realist perspective, vulnerability to climate change presents acute risk in terms of survivability

and sovereignty. Especially for SIDS, high vulnerability to climate change impacts presents an existential threat that has the potential to threaten the survival and sovereignty of nations. The variables within the environmental category were determined to be historic emissions, exposure, sensitivity, adaptive capacity, ecosystem services, and rights of nature. High historic emissions were selected as a predictor variable because high emitters are most likely to be targeted by climate change litigation lawsuits and are least likely to be plaintiffs. High emitters have a higher vested interest in the status quo and are less likely to initiate litigation that could disrupt the system from which they benefit (Adam et al., 2020). Exposure, sensitivity, adaptive capacity, and ecosystem services were selected as variables because they help to conceptualize a state's vulnerability to climate change impacts. If a state is highly vulnerable to climate change impacts, it creates a national security risk that could increase a state's likelihood of suing if winning the suit would increase security (Setzer & Higham, 2023). Indicators of vulnerability were collected from the University of Notre Dame Global Adaptation Initiatives' country ranking. Exposure is defined as "the nature and degree to which a system is exposed to significant climate change" (University of Notre Dame Global Adaptation Initiative, 2024). Sensitivity is defined as "the extent to which a country is dependent upon a sector negatively affected by a climate hazard, or the proportion of the population particularly susceptible to a climate change hazard" (University of Notre Dame Global Adaptation Initiative, 2024). Adaptive capacity is defined as "the availability of social resources for sector-specific adaptation. In some cases, these capacities reflect sustainable adaptation solutions. In other cases, they reflect capacities to implement newer, more sustainable adaptations (University of Notre Dame Global Adaptation Initiative, 2024). Ecosystem services "capture the vulnerability of natural capital to climate change" (University of Notre Dame Global Adaptation Initiative, 2024). Notre Dame's Global Adaptation Initiative updates its rankings yearly. Rights of nature were chosen as a variable because Setzer and Higham (2023) argue that domestic legal protections for the natural environment carry significant weight in cases brought up against other governments. Rights of nature is defined as a country recognizing inherent legal rights held by ecosystems and species, similar to the concept of fundamental human rights.

Dummy Variables and the Predictive Model

In order to form a predictive model with the variables described above, we introduced dummy variables to encode each variable as likely or unlikely to initiate litigation on Part XII obligations in the wake of a strong or moderate AO. In this study, dummy variables represented a yes/no property where yes (likely to sue) was encoded as a 1, and no (unlikely to sue) was encoded as 0 (Dua & Graff, 2019). For each variable, the following thresholds were decided for the dummy variables.

ITLOS Dispute History

If the state has been in front of ITLOS as either a plaintiff or a defendant, it received a 1. If it has no ITLOS dispute history, it received a 0.

Plaintiff in ICJ

If the state has been a plaintiff in a case before the ICJ, it receives a 1. If it has not served as a plaintiff, it received a 0[1].

Victory in International Court

If the state has had a case decided in its favor in ITLOS or the ICJ, it receives a 1. If it has not been victorious, it received a 0.

Domestic Climate Litigation

If the state has a history of climate change litigation cases within its national jurisdiction, according to Columbia University's Sabin Center Climate Litigation Database, it receives a 1. If the Sabin Center's database has no recorded cases of domestic climate litigation, it receives a 0.

Written Statement

[1] Note that for ICJ dispute history, the threshold is plaintiff status whereas for ITLOS dispute history the threshold is dispute settlement history period. This is because there have been 192 cases before the ICJ, and only 34 before ITLOS.

If the state submitted a written statement to ITLOS as part of the advisory proceedings following COSIS's request for an AO, it receives a 1. If the state did not submit a written statement, it receives a 0.

Oral Statement

If the state gave an oral statement during the hearings portion of the ITLOS advisory proceedings following COSIS's request for an AO, it receives a 1. If the state did not submit a written statement, it receives a 0.

Civil/Common Law Country

If the state's domestic legal system follows a civil or common law structure, it receives a 1. If the state has a mixed or Islamic legal system, it receives a 0.

Income (GNI)

If the state's gross national income (GNI) is classified as upper middle or high, it receives a 1. If it is classified as lower middle or low, it receives a 0.

Value of Marine Environment

If a marine protected area (MPA) protects at least 10% of a state's exclusive economic zone (EEZ), the state receives a 1. If less than 10% of the EEZ is protected, the state receives a 0.[2]

Coastal

If a state is coastal, it receives a 1. If a state is landlocked, it receives a 0.

Human Development Index (HDI)

[2] Yale University's Environmental Protection Index: Marine Protected Areas gives a score of 100 to countries who have protected at least 10% of their EEZs in a MPA, corresponding to Aichi Target 11 of the Convention on Biological Diversity (EPI, 2024).

If a state is classified as developed, it receives a 1. If a state is classified as developing, an economy in transition (EIT), a least developed country (LDC), or a small island developing state (SIDS), it receives a 0.

Geographic Region

If a state is in the Global North, it receives a 1. If a state is in the Global South, it receives a 0.

Government Type

If a state is classified as a full democracy by the World Population Review's democracy index, it receives a 1. If a state is classified as a flawed democracy, a hybrid regime, or an authoritarian regime, it receives a 0.

Historic Emissions

If a state was not among the 15 highest cumulative emitters of CO2 from fossil fuel combustion from 1750-2022, it receives a 1 (Tiseo, 2023). If it is one of the 15 highest cumulative emitters of CO2, it receives a 0.

Exposure

If Notre Dame ranked a country as being in the top third of those most exposed to climate change, it received a 1. If a country fell in the lower two-thirds of exposure, it received a 0.

Sensitivity

If Notre Dame ranked a country as being in the top third of those most sensitive to the impacts of climate change, it received a 1. If a country fell in the lower two-thirds of sensitivity, it received a 0.

Adaptive Capacity

If Notre Dame ranked a country as being in the lowest third of adaptive capacity, it received a 1. If a country fell in the upper two-thirds of adaptive capacity, it received a 0.

Ecosystem Services

If Notre Dame ranked a country as being in the highest third of natural capital vulnerability to climate change, it received a 1. If a country fell in the lower two-thirds, it received a 0.

Rights of Nature

If a country has passed a constitutional amendment giving nature legal rights, it receives a 1. If a country has passed no domestic rights of nature, it receives a 0.

Case Studies

Here, the results of the predictive model were analyzed using a case study approach. The explanatory case study method, laid out by Yin (2014), was used, identifying, and analyzing causal factors to explain the nuances of the state's participation in the advisory proceedings and position on the legal questions brought by COSIS within the context of the predictor variables from the literature. The predictive model served the role of a funnel, or a process of elimination, to help identify the States most likely to sue another State Party to UNCLOS if ITLOS releases a strong or moderate advisory opinion. We determined that a more detailed, individual analysis was required, beyond identifying the country with the model, to accurately predict the likelihood of a single state pursuing climate litigation and utilizing a strong or moderate ITLOS advisory opinion (Priya, 2020). So, once the model identified the countries most likely to sue, we analyzed each country's circumstances and potential cases that they could bring.

Data collection for the case studies began with the written and oral statements in the advisory proceedings and then followed a deductive approach to determine which characteristics would most likely influence the states' likelihood of suing another UNCLOS state party on its Part XII obligations. The case study method allows for the analysis of multiple aspects that define a functional unit, in this case, a party state's role

within the context of the overarching study. Documentary analysis was deemed sufficient for the case studies due to its reliability, although interview data was considered (Priya, 2020). Some potential drawbacks of this method include issues of external validity via replication (Priya, 2020). A way to counter that in this study was to consider a more comprehensive selection of data for the case studies, such as examining the participation of these intergovernmental organizations in similar advisory proceedings in the past.

Thematic Analysis of Qualitative Data

For this study, the method of thematic analysis, specifically narrative analysis, was chosen due to its flexibility and capacity to provide a detail-rich and complex account of the themes across the country data (Braun et al., 2006). Narrative analysis using a deductive approach was conducted at the societal level or using the constructionist method to examine the way that states' positions and interests operate within the context of the international system and, with an underlying assumption that these themes can reveal some truth about the likelihood of compliance with the decision of an advisory opinion and use of the decision in future litigation (Braun et al.; Boyatzis, 1998; Murray, 2003). A theme in this context is defined as a patterned response or meaning, so a pattern in similar levels of participation in the advisory proceedings in SIDS would be an example, with the analysis examining the underlying micro-positions that shape the pattern in the data (Braun et al., 2006). Data was collected and coded, and then themes were identified across the dataset and reviewed; these themes were defined and named and then analyzed and structured into a final report (Braun et al., 2006).

Some shortcomings of thematic analysis are that it is less well-defined than many other methods of qualitative analysis, so it may be viewed as less rigorous. Additionally, Braun et al. (2006) identified several shortcomings in thematic analysis that stem from a lack of firmly defined structure within the analysis method, including but not limited to failure to actually analyze themes, forming a weak analysis that misinterprets the data, or an unfounded analysis (Braun et al., 2006). These shortcomings were taken into consideration throughout the study. Despite potential pitfalls, thematic analysis was determined to be the appropriate method for this study due to its flexibility, accessibility,

and potential to generate unanticipated insights that may underlie themes across the data (Braun et al., 2006).

RESULTS

An analysis of state participation and positions on the legal questions posed by COSIS in their request for an advisory opinion produced the results shown in Table 1. Countries in the weak AO column did not submit both a written and oral statement in the advisory proceedings, stating that ITLOS should not specify the State Party's obligations under UNCLOS to protect and preserve the marine environment and to prevent and control marine pollution or make statements that aligned with Bodansky's (2023) definition of a weak AO. Countries in the moderate AO category submitted either a written or oral statement and contended in their answer to question 1 that CO2 emissions constitute marine pollution but did not communicate in their answer to question 2 any specific Part XII obligations that should be included in the report. Countries in the Strong AO category affirmed in their answer to question 1 that CO2 emissions constitute marine pollution, and in their answer to question 2, they not only supported ITLOS specifying Part XII obligations but gave specific recommendations as to what those specifications should be.

The results of the explanatory model are shown in Tables 2 and 3. These tables compile each explanatory variable and give each country a dummy variable score of 0 or 1 for likelihood of bringing litigation. Table 2 shows that based on the scoring system, Antigua and Barbuda, the Democratic Republic of the Congo, Mauritius, and Vanuatu are most likely to sue if ITLOS releases a strong AO. Each country supportive of a strong AO received a score of 10. Table 3 shows that The Netherlands and New Zealand, with scores of 15, were tied for most likely countries to sue if ITLOS releases a moderate-strength AO.

Table 1. *Countries and Coalitions in Support of a Weak, Moderate, and Strong Advisory Opinion from ITLOS on UNCLOS Part XII Obligations.*

Weak AO		Moderate AO		Strong AO	
Countries	Coalitions	Countries	Coalitions	Countries	Coalitions
Argentina	None	Belize	African Union	Bangladesh	COSIS
Australia		Canada	European Union	Comoros	Pacific Community
Brazil		Chile		Congo, Dem. Rep.	
China		France		Mauritius	
Djibouti		Germany		Mozambique	
Egypt		Guatemala		Nauru	
India		Korea, Rep.		Sierra Leone	
Indonesia		Latvia			
Italy		Micronesia, Fed. Sts.			
Japan		Netherlands			
Norway		New Zealand			
Poland		Philippines			
Saudi Arabia		Portugal			
		Rwanda			
		Singapore			
		Timor-Leste			
		United Kingdom			
		Vietnam			

Table 2. *Prediction of Which Countries are Most Likely to Initiate Litigation Against Another Country Regarding its UNCLOS Part XII Obligations if ITLOS Releases a* ***Strong*** *AO. See Methods for Dummy Variable Scoring.* [3]

States Supporting a Strong AO	Legal						Economic and Financial		Social, Geographic, and Political				Environmental						LTS Score
	ITLOS Dispute History	Sued in ICJ	Domestic Climate Litigation	Written Statement	Oral Statement	Civil/ Common law	Income (GNI)	Value of Marine Environ	Coastal	HDI	Geographic Region	Government Type	Historic Emissions	Exposure	Sensitivity	Adaptive Capacity	Ecosystem Services	Rights of Nature	
Antigua and Barbuda	0	0	0	1	1	1	1	0	1	0	0	0	1	1	1	1	1	0	10
Bangladesh	1	0	0	1	1	0	0	0	1	0	0	0	1	1	1	1	0	1	9
Comoros	0	0	0	0	1	0	0	0	1	0	0	0	1	0	1	1	0	0	5
Congo, Dem. Rep.	0	1	0	1	1	1	0	0	1	0	0	0	1	1	1	1	1	0	10
Mauritius	1	0	0	1	1	1	1	0	1	0	0	1	1	1	0	0	1	0	10
Mozambique	0	0	0	1	1	0	0	0	1	0	0	0	1	0	1	1		0	6
Niue	0	0	0	1	1	1	1	1	1	0	0	1	1	n/a	n/a	n/a	n/a	0	8
Nauru	0	1	0	1	1	0	1	0	1	0	0	1	1	1	n/a	n/a	n/a	0	8
Palau	0	0	0	1	1	1	1	1	1	0	0	1	1	1	n/a	n/a	n/a	0	9
St. Kitts and Nevis	0	0	0	1	1	1	1	n/a	1	0	0	0	1	0	0	n/a	n/a	0	6
St. Lucia	0	0	0	1	1	1	1	0	1	0	0	0	1	0	0	n/a	0	0	6
St. Vincent and the Grenadines	1	0	0	1	1	1	1	0	1	0	0	0	1	0	0	n/a	n/a	0	7
Sierra Leone	0	0	0	1	1	0	0	0	1	0	0	0	1	1	1	1	1	0	8
Tuvalu	0	0	0	1	1	1	1	n/a	1	0	0	0	1	1	n/a	n/a	n/a	0	7
Vanuatu	0	0	0	1	1	1	0	0	1	0	0	1	1	1	1	1	1	0	10

[3] For Tables 2-4, all cells containing n/a indicate that the datasets used for the variable in question was missing information for that country.

Table 3. *Prediction of which countries are most likely to initiate litigation against another country regarding its UNCLOS Part XII Obligations if ITLOS releases a* ***moderate*** *AO. See methods for dummy variable scoring.*

States Supporting a Moderate AO	Legal						Economic and Financial		Social, Geographic, and Political				Environmental						LTS Score
	ITLOS dispute history	Sued in ICJ	Domestic climate litigation	Written Statement	Oral Statement	Civil/ Common law	Income (GNI)	Value of Marine Environ	Coastal	HDI	Geographic Region	Government Type	Historic Emissions	Exposure	Sensitivity	Adaptive Capacity	Ecosystem Services	Rights of Nature	
Belize	1	0	0	1	1	1	0	1	1	0	0	1	1	0	1	1	1	0	11
Canada	0	1	1	1	0	1	1	0	1	1	1	1	0	0	0	0	0	1	10
Chile	1	1	1	1	1	1	1	1	1	0	0	0	1	0	0	0	0	0	10
France	1	1	1	1	1	1	1	1	1	1	1	1	n/a	0	0	0	0	0	12
Germany	0	1	1	1	1	1	n/a	1	1	1	1	1	0	0	0	0	0	0	10
Guatemala	0	0	0	1	1	1	0	0	1	0	0	0	1	1	0	0	1	0	7
Korea, Rep.	0	0	1	1	1	0	1	0	1	0	0	1	1	1	0	0	1	0	9
Latvia	0	0	0	1	1	1	1	1	1	1	1	0	1	0	0	0	0	0	9
Micronesia, Fed. Sts.	0	0	0	1	1	0	0	0	1	0	0	0	1	1	n/a	1	0	0	6
Netherlands	1	1	1	1	1	1	1	1	1	1	1	1	1	0	1	0	0	0	14
New Zealand	1	1	1	1	1	1	1	1	1	1	1	1	1	0	0	0	0	1	14
Philippines	0	0	1	0	1	0	0	0	1	0	0	0	1	1	0	1	0	0	6
Portugal	0	1	1	1	1	1	1	0	1	1	1	0	1	0	0	0	0	0	10
Rwanda	0	0	0	1	0	0	0	0	0	0	0	0	1	1	1	1	1	0	6
Singapore	0	0	0	1	1	1	1	0	1	0	0	0	1	1	0	0	0	0	7
Timor-Leste	0	1	0	0	1	1	0	0	1	0	0	0	1	1	1	1	1	0	9
United Kingdom	1	1	1	1	1	1	1	1	1	1	1	1	0	0	0	0	0	0	12
Vietnam	0	0	0	1	1	1	0	0	1	0	0	0	1	1	1	1	1	0	9

Table 4. *Values for quantitative variables from the predictive model. Values are included for the countries with the highest LTS score in the strong advisory opinion Category (Antigua and Barbuda, Dem. Rep. of Congo, Mauritius, and Vanuatu) and for countries with the highest LTS score in the Moderate advisory opinion category (the Netherlands and New Zealand)*

Countries	Antigua and Barbuda	Congo, Dem. Rep.	Mauritius	Netherlands	New Zealand	Vanuatu
# ITLOS Cases	0	0	1	1	1	0
# ICJ Cases	0	6	1	3	2	0
# DCL Cases	0	0	0	12	32	0
Income (GNI)	High	Low	Upper Middle	High	High	Lower Middle
Percentage of EEZ in MPA	0%	0%	0%	26%	30%	0%
Human Development Index	SIDS	LDC	SIDS	Developed	Developed	SIDS
Cumulative CO2 Emissions (tonnes)	25,439,908.00	223,094,300.00	124,012,330.00	12,020,520,000.00	1,949,171,000.00	5,232,685.00
Exposure	126	149	136	61	113	139
Sensitivity	100	135	90	171	16	172
Adaptive Capacity	120	175	79	3	4	121
Ecosystem Services	139	126	129	10	55	117

DISCUSSION

Among countries that demonstrated support for a strong advisory opinion from ITLOS, the model shows that, with tied scores of 10, Antigua and Barbuda, the Democratic Republic of the Congo, Mauritius, and Vanuatu are most likely to sue. Among countries that support a moderate advisory opinion, New Zealand and the Netherlands are most likely to sue with tied scores of 14. Since there are tied scores,

qualitative data is necessary to determine which of these countries is most likely to initiate litigation.

Limitations

Limitations of the Model: International Relations Theoretical Basis

The predictive model is based on the assumption that states operate in the international system as unitary, rational actors that prioritize their national security, gaining more power in the international system, and act in their own national interest. The first limitation of note with this assumption is that national interest is not uniform across the globe. Wealthier countries in the Global North, for example, whose existence is not eminently threatened by climate change likely have a different set of priorities than a SIDS that is facing submersion within the next few decades.

Additionally, while the literature on motivation for states to litigate in international court generally takes a realist perspective on state behavior, many of the written and oral statements reflect states' desire to cooperate to combat climate change. So, this could present an argument for viewing international climate change governance through a lens of liberalism. Liberalism assumes that states are not the only decision-makers, that individuals, NGOs, activist networks, and social groups have significant influence over state policy and world order, and that states' ultimately want to cooperate (Moravcsik, 2012). Currently, the international climate change regime is based on a system of cooperation and negotiation, rather than litigation, where states set their own emissions targets and report them in their NDCs. States that support a moderate advisory opinion overwhelmingly advocate for a continuation of this model of negotiation and cooperation to combat climate change. While this could be interpreted through the lens of liberalism, it could also demonstrate self-interest on the part of Global North states that do not support a strong advisory opinion. If ITLOS were to release a strong advisory opinion, it could result in quantified emissions reduction targets that would disproportionately impact wealthier states, and litigation for those that fail to comply.

On the Assumptions of the Model and Gaps in the Data

A qualitative analysis of the outcomes of the predictive model is necessary, not only to address tied scores, but to explain the assumptions of the model in the context of each country and address gaps and potential flaws. The model in this study relies on data collected from different sources, produced using different methodologies. This can produce inconsistencies and inaccuracies in trends that impact the results of analysis. As there is no ground truth to test the assumptions of the model, some potential flaws will be addressed in this section.

For certain variables, particularly in the vulnerability index from Notre Dame's Global Adaptation Initiative, data for specific countries is missing. In table 2, data on exposure, sensitivity, adaptive capacity, and ecosystem services data is missing for Niue. Sensitivity, adaptive capacity, and ecosystem services scores are missing for Nauru, Palau, and Tuvalu. Adaptive capacity scores are missing for St. Kitts and Nevis and St. Vincent and the Grenadines; and St. Lucia is missing a score for adaptive capacity. These missing values are due to a lack of any/sufficient reported data by these countries. Notre Dame's vulnerability index calculation includes twelve components, and if a country does not report enough of these components, then Notre Dame cannot produce an accurate estimation of vulnerability (Notre Dame Global Adaptation Initiative, 2024). The lack of data assessing vulnerability is a potential flaw of this model, as high vulnerability scores for each of these variables alone would change the results of the model, with Niue, Nauru, Palau, and Tuvalu reaching similar scores to Antigua and Barbuda, the DRC, Mauritius, and Vanuatu. Niue, Nauru, St. Kitts and Nevis, St. Vincent and the Grenadines, St. Lucia Palau, and Tuvalu are all SIDS that all face an existential threat posed by climate change and their true vulnerability is likely much higher than this model reflects (United Nations, 2024).

Another assumption of the model that requires further examination is quantifying the value that a coastal state places on its marine environment as the percentage of a state's EEZ that has been put into an MPA. Ideally, value of the marine environment for each country should entail a full economic valuation of a country's marine resources, but for the purpose of this study MPAs were chosen as the indicator for how much a country values its marine resources from a conservation perspective. The Yale Environmental Performance Index's ranking of country's MPAs uses data from the world database on

protected areas. This data only covers the total amount of area that is designated as an MPA, it does not reflect the area that has management and effectiveness evaluations. MPAs have been hailed by the scientific community as a way to maintain and restore marine biodiversity, however, recent research has shown that MPAs must be effectively managed and include enforced no-take-zones in order to be effective (Pendleton et al., 2017). The Yale Environmental Performance Index for MPAs shows total protected area in their ranking and examining the data from the world database on protected areas shows that the area of MPAs that are effectively managed is much lower. While percentage of a state's EEZ protected by an MPA is by no means a perfect metric for assessing a state's value of its marine environment, it meets the needs of this study.

Examining COSIS States as individuals

In the model, the member states of COSIS are examined not as a coalition but as individual states. The eight member states: Antigua and Barbuda, Niue, Palau, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Tuvalu, and Vanuatu were included because, as they brought the request for an advisory opinion and collectively expressed their support for a strong advisory opinion, they have a high likelihood of suing non-compliers if ITLOS fulfills their request of a strong advisory opinion. For this reason, individual COSIS states were included in the predictive model, and all individual member states of the European Union, the African Union, and the Pacific Community were not included. If COSIS as a coalition is able to sue as a legal entity, it likely will do so as COSIS. However, jurisdictional hurdles may prevent this from occurring, so it is also possible that an individual COSIS member state could bring a suit before ITLOS in this case. Article 20 of the ITLOS statute states that access to the tribunal shall be open to State Parties and to "entities other than State Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all parties to that case" (ITLOS Statute, 1982). This leaves the door open for international legal entities such as COSIS to potentially bring suit before ITLOS. In its establishing document, COSIS states that it has the authority to "represent the interests of the Parties in international fora" (COSIS Agreement, 2021). While there would likely be jurisdictional pushback from other parties involved, there is a

definite legal foundation for COSIS to bring a case before ITLOS. However, given likely pushback, individual COSIS states may decide to litigate on their own. Thus, we examine the individual motivators and characteristics of each COSIS member state in this model.

Overall Trends

The predictive model produced several interesting trends that are worth discussing before looking at the countries with the highest scores in case studies. Firstly, the average likelihood score for countries supporting a strong advisory opinion is 8, whereas for countries supporting a moderate advisory opinion, the average likelihood score is 9.5. This indicates that countries that support a moderate advisory opinion are, on average, more likely to initiate climate change litigation than countries that support a strong advisory opinion. This is not a surprising outcome, as most countries supporting a moderate advisory opinion are Global North countries that are generally wealthier, more developed, and have a more extensive history of involvement in international courts. Typically, these countries have had more time to develop and, therefore, have more resources that can reasonably be allocated to climate litigation. T

Countries in support of a moderate advisory opinion, primarily located in the Global North, are potentially less likely to support a strong advisory opinion for fear of severely shifting existing power dynamics. Currently, the status quo in terms of accountability for emissions is non-binding NDCs that states are encouraged to abide by, but face no tangible repercussions if they do not meet them. Powerful states that emit far more than SIDS and LDCs benefit from this status quo[4]. Although rhetoric around mitigation and adaptation has been increasing in Global North countries, follow-through has lagged. While countries such as the United Kingdom, Canada, and Germany have a vested interest in protecting the marine environment, they are also high historic emitting countries that could potentially be sued for loss and damage claims under UNCLOS if ITLOS were to specify a loss and damage payment mechanism in its advisory opinion.

Another interesting trend is that all countries that support a strong advisory opinion are either Least Developed Countries (LDCs) or Small Island Developing States (SIDS). These countries are highly vulnerable to climate change relative to countries

[4] See Table 4 for quantified historic emissions of highest LTS Global North Countries

supporting a moderate advisory opinion. Rising sea levels and the damages associated with increased tropical storms pose a disproportionate threat to these developing coastal countries, mainly due to high reliance on natural resources and limited adaptive capacity (Dasgupta et al., 2008). Also of note is that none of the countries that support a strong advisory opinion have any history of domestic climate change litigation cases, according to the Sabin Center for Climate Change Law database. None of the countries that support a strong advisory opinion are Global North Countries. In terms of the balance of power in the international system, Bangladesh, Comoros, the DRC, Mauritius, Mozambique, Nauru, COSIS states, and Sierra Leone do not hold significant weight. While development status, wealth, and history of participation in the international legal arena may pose hurdles for these countries to sue, their vulnerability to climate change may be the national interest that takes precedence in such a decision.

Most Likely to Sue if Strong Advisory Opinion

According to the predictive model, if ITLOS were to release a strong advisory opinion, the states most likely to bring claims under UNCLOS using the language of a strong advisory opinion are Antigua and Barbuda, the Democratic Republic of Congo, Mauritius, and Vanuatu. The following sections will examine each country as a case study, assessing the variables and assumptions of the predictive model to determine with more precision the likelihood of litigation if ITLOS releases a strong advisory opinion.

CASE STUDIES

Antigua and Barbuda

(Britannica, 2024)

Implications of Statements Made to ITLOS

Antigua and Barbuda, a COSIS member state, joined the rest of the coalition in its written statement, supporting the legal questions posed concerning ITLOS's interpretation of the obligations under Articles 192 and 194. Mr. Gaston Browne, Prime Minister of Antigua and Barbuda and the Co-Chair of COSIS delivered the written statement before the public hearing on September 11, 2023 in Hamburg. In the oral statement, Prime Minister Browne makes it explicitly clear that the climate crisis has arisen because of "the failure of major polluters to mitigate greenhouse gas emissions" (COSIS oral statement 1, 2023). There is no vagueness in this language, no mention, as was seen in New Zealand's oral statement, of accumulation of global emissions and that responsibility cannot be acutely assigned to historically high emitting countries. Antigua and Barbuda's statement was a plea for the international community to see the existential threat that COSIS member-states face due to a problem that they did not create. Prime Minister Browne stated that SIDS have been pleading with the international community to take decisive action for decades "at international gatherings, including at successive COPs to the UNFCCC" (COSIS oral statement 1, 2023). In its request for an advisory opinion from ITLOS, Antigua and Barbuda seeks an answer based on science, not on

vague principles of customary international law that have produced insufficient progress in mitigating the effects of climate change on SIDS.

Implications of Legal Factors

As a COSIS state, Antigua and Barbuda is part of a pioneering effort to establish international climate change litigation as a tool for SIDS to seek relief via the international legal system. As one of the founders of COSIS, the prime minister of Antigua and Barbuda stated at COP26 in Glasgow that, "beyond the moral obligation to compensate, [high-emitting countries] also have a legal obligation to compensate" SIDS for loss and damage due to climate change (Saberi, 2021). There is clear intent on the part of Antigua and Barbuda to sue countries who have historically emitted the most GHGs for the damage that their emissions have caused to the global climate system and specifically to small island nations.

While Antigua and Barbuda does not have any cases of domestic climate change litigation logged in the Sabin Center database, there have been several recent cases of residents launching legal battles against wealthy developers seeking to turn protected wetlands into luxury residences and golf courses (Coto, 2024). Barbudan residents, in these cases, are supported by the Global Legal Action Network, a non-governmental organization (NGO) that provides legal support to communities in cases involving human rights violations and systemic injustice (Global Legal Action Network, 2024). As these cases are fairly recent, they may not yet be included in the Sabin Center database.

Antigua and Barbuda has not litigated before ITLOS or the ICJ, theoretically making it less likely to sue in this case than a state like New Zealand who has a robust history of litigation before international courts. However, since it has significant history in international climate change negotiations and, as a member of COSIS, it has demonstrated a commitment to seeking relief for SIDS via international law. Based on stated preference, we conclude that national interest in terms of seeking relief from climate change impacts overrides procedural history in international courts when determining whether a state is likely to sue high-emitting states regarding compliance with Part XII obligations.

Implications of Economic and Financial Factors

Antigua and Barbuda is a high-income country, making it easier for the SIDS to fund legal battles to seek relief for climate change impacts. Historically, wealthier nations have been more likely to litigate in international courts, so this places Antigua and Barbuda at a higher likelihood to sue than some of the other lower-income nations that support a strong advisory opinion. Antigua and Barbuda has very little of its EEZ protected by an MPA, with about 3% of its waters covered. While this number is low, it is likely not an accurate representation of Antigua and Barbuda's value of its marine environment, as the SIDS' economy is heavily reliant upon marine tourism. It is likely that economic and financial factors such as wealth and value of the marine environment play less of a role in determining whether or not to sue that environmental and legal factors, since, for SIDS, environmental factors are more closely tied to survivability and legal factors determine the logistical capability to seek redress for climate change loss and damages via international law.

Implications of Social, Geographic, and Political Factors

Antigua and Barbuda is a sovereign island nation in the Lesser Antilles in the eastern Caribbean Sea. It is considered a SIDS and became a founding member of COSIS in October 2021. Once reliant upon agriculture, Antigua and Barbuda's economy has, in recent years, become centered around tourism, making up 60% of GDP (Niddrie et al., 2024; COSIS oral statement, 2023). This makes the small island state's economy highly reliant upon its pristine coastline and coral reefs, among its other natural resources. Ocean acidification and warming threaten to cause coral bleaching and degrade mangroves and seagrasses, causing significant threat to coastal resilience to storm surge. Both survivability and economy are directly tied to its marine environment.

Implications of Environmental Factors

Antigua and Barbuda is classified as highly vulnerable to the impacts of climate change. Despite negligible GHG emissions, Antigua and Barbuda has suffered a disproportionate amount of loss and damage associated with climate change impacts.

According to Notre Dame's index, Antigua and Barbuda is ranked 126/192 in terms of exposure, 100/180 in terms of sensitivity, 120/176 in terms of adaptive capacity, and 139/180 in terms of vulnerability of natural capital to climate change impacts. Across each of the variables, Antigua and Barbuda is highly vulnerable to the deleterious effects of climate change on its natural environment and on its economy. Of note, Antigua and Barbuda on average ranks lower than Vanuatu in terms of vulnerability.

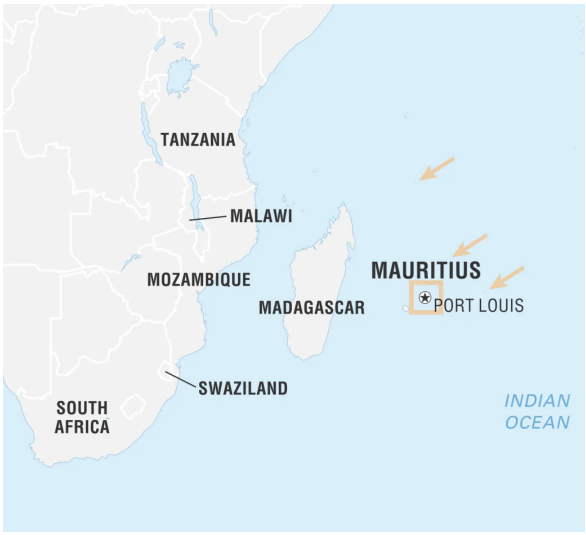
In terms of national interest, Antigua and Barbuda makes it clear in their oral statement that their very existence is at stake due to the worsening of the climate crisis. Antigua and Barbuda's oral statement served as a testament to the SIDS' extreme vulnerability to climate change, and the devastating impacts it has already experienced due to climate hazards. In 2017, Antigua and Barbuda was hit with three major hurricanes - Irma, Harvey, and Maria - damaging 90% of properties on Barbuda and requiring an evacuation of all residents of Barbuda to Antigua for three years until Barbuda could be rebuilt (COSIS oral statement 1, 2023). If not for the sister island, citizens of Barbuda would have become climate refugees. The recovery from Hurricane Irma took an economic toll of approximately one sixth of the entire GDP of Antigua and Barbuda. Sea-level rise threatens to salinate all freshwater resources and agricultural lands on the islands, dramatically reducing food and water security.

Potential Lawsuits

As Antigua and Barbuda is a co-founder of COSIS, it is likely that it would look to sue high-emitting states as the COSIS body itself, not as an individual state. If Antigua and Barbuda decide that a COSIS suit would be feasible despite potential jurisdictional hurdles, which it likely will be since COSIS' request for an advisory opinion was granted, they will sue as a coalition. Antigua and Barbuda could potentially sue former colonial powers for loss and damage related to climate change impacts, leveraging historical responsibilities and significant contributions to greenhouse gas emissions. This legal approach would aim to hold these powers accountable for their long-term environmental impacts and the resulting harm to SIDS. This could lead Antigua and Barbuda to sue the United Kingdom, with the rationale that as the former colonial power over Antigua and Barbuda until 1981, the UK has a historical responsibility due to its early industrialization

and substantial cumulative carbon emissions. While Antigua and Barbuda were specifically under British rule, the broader historical responsibility for climate change also involves other major European industrial powers like France and the Netherlands, given their substantial historical emissions and colonial histories in other regions.

Mauritius



(Britannica, 2024)

Implications of Statements Made to ITLOS

The Republic of Mauritius submitted both written and oral statements to ITLOS in support of COSIS's request for an advisory opinion on Article 192 and 194 obligations.

In its statement to the Tribunal, the Republic of Mauritius stated that its participation in the proceedings was due to its acute vulnerability to climate change-induced events such as sea-level rise, coastal degradation, and coral bleaching. It pointed to the centrality of science to UNCLOS and framed the IPCC's sixth assessment report as the facts in this case. It called for harmonious application of UNCLOS, the UNFCCC, and the Paris Agreement, saying that they all ultimately govern the same issue with regard to protection of the marine environment, and that ITLOS should solidify the relationship between UNCLOS, and the climate change regime based on "systemic integration" (Mauritius oral statement, 2023). At length, Mauritius delves into the scientific evidence presented by the IPCC and 2019 UNEP Report and finds that there is no ambiguity in the reports that, "to have any chance of limiting warming to 1.5℃, global CO_2 emissions must decrease by at least 48% from 2019 levels and then must reach net zero by 2050" (Mauritius oral statement, 2023).

Mauritius views the request for an ITLOS advisory opinion as a mandate for an authoritative statement from the Tribunal on the legal obligations that states have under UNCLOS Part XII. This is a distinction from the states supporting a moderate advisory opinion, who do not call for the same legal weight to be given to ITLOS's interpretation of UNCLOS. It specifically highlights that the Tribunal's determinations in the advisory opinion will have legal effects for States Parties to UNCLOS and to the broader international community. Mauritius cited ITLOS's interpretation of the legal weight of advisory opinions from the *Dispute concerning delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean,* where ITLOS ruled that "judicial determinations made in advisory opinions carry no less weight and authority than those in judgements because they are made with the same rigor and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law'" (Mauritius oral statement, 2023). This is the most promising language of any state thus far that a strong, or even a moderate advisory opinion, will be treated as legal precedent. This makes Mauritius the most likely to utilize ITLOS's interpretation of Articles 192 and 194 to sue non-complying states, based on legal hurdles alone.

In response to the questions posed by COSIS, Mauritius argues that the law must reflect the clarity of the science, and that ITLOS's advisory opinion must include

quantified indications of the emissions reduction that is necessary, as dictated by scientific evidence. With regard to the interpretation of Article 194, Mauritius argues that GHGs must be expressly recognized by the Tribunal as pollution of the marine environment and further asks the Tribunal to "confirm the relationship between the Convention and the international climate regime based on a coherent and harmonized approach." (Mauritius oral statement, 2023).

Implications of Legal Factors

Mauritius has been an avid participant in international climate change negotiations for decades and a vocal proponent of international law, especially after the ICJ affirmed Mauritius's control of the Chagos Archipelago. In 2017, the ICJ opined that the process of decolonization of Mauritius by the United Kingdom was conducted unlawfully, as the UK had continued to occupy the Chagos Archipelago after Mauritius had declared independence (International Court of Justice, 2017). In a statement made on October 22, 2020, in regard to UN Agenda item 86: The rule of law at the national and international levels, Mauritius referred to this ICJ advisory opinion as an "authoritative legal ruling" (United Nations, 2020). This demonstrates that Mauritius recognizes an advisory opinion from an international court as having significant legal weight, making it more likely to treat the language of an ITLOS advisory opinion as a legal precedent. In addition to supporting the ICJ as the highest court, Mauritius has used ITLOS to settle disputes concerning the law of the sea. Mauritius has an ITLOS dispute history, using the tribunal to resolve a maritime boundary dispute with the Maldives in 2021. While this case does not center around the environmental obligations of party states to UNCLOS, it demonstrates that Mauritius is willing to use ITLOS as a dispute settlement mechanism under UNCLOS. Additionally, in its oral statement, Mauritius attributed its participation in the advisory proceedings to the "unwavering faith it has in [ITLOS] and in the international rule of law to make a tangible difference" (Mauritius oral statement, 2023). Mauritius's deference to international law and international courts makes it a likely candidate to use these mechanisms to hold larger, higher-emitting countries responsible for their emissions and for their contribution to marine pollution.

In terms of domestic climate litigation, there are no recorded cases within Mauritius's national jurisdiction, according to the Sabin Center's records. According to the model, this makes Mauritius less likely to initiate international climate change litigation, as it is theoretically not a highly established and normatively accepted area of domestic law. One of the reasons for this lack of domestic climate litigation cases is that the legal infrastructure is currently under construction. This is an instance where the model may not capture the specifics within an individual country.

Implications of Economic and Financial Factors

Mauritius is a relatively wealthy SIDS, with income classified as upper-middle. Mauritius has shown robust economic performance over the past few decades. It has transitioned from a low-income, agriculture-based economy to a diversified one with strong sectors in tourism, textiles, sugar, and financial services (Lui, 2023). While it does not have any recorded MPAs, Mauritius is highly dependent on its marine environment for its tourism sector, so this metric may not be the most accurate representation of Mauritius' value on its marine environment. Mauritius's classification as an upper-middle-income SIDS reflects its economic success and resilience despite the inherent challenges of being a small island state and makes it more likely than lower-income SIDS to sue because it has the capacity to overcome the financial barrier to entry to seek redress via international courts.

Implications of Social, Geographic, and Political Factors

Mauritius is an Indian Ocean archipelago nation located off the coast of East Africa. The small island developing state covers a total of 2,040 sq km and, until 1992, was an independent state in the British Commonwealth. In the 32 years since Mauritius gained complete independence, it has put in place a hybrid legal system, incorporating elements of both civil and common law practices drawn from the French Napoleonic Code and English Common Law (Mauritius et al. Centre, 2021). This legal system is very similar to the international court system, giving the SIDS a good legal capacity foundation to utilize international courts like ITLOS to seek redress for climate change impacts it has faced.

Implications of Environmental Factors

Mauritius is situated in an active tropical cyclone basin, leaving the small island developing state exposed to significant climate disasters (United Nations Environment Programme, 2024). According to Mauritius' Minister of the Environment, Solid Waste Management, and Climate Change, the most pressing environmental issues faced by Mauritius are "climate change and disasters, environmental pollution - including waste disposal and transboundary plastic waste - and coastal degradation" (United Nations Environment Programme, 2024). These issues are specific to COSIS's request for an advisory opinion from ITLOS, and the ability to hold other states accountable for their contribution to marine pollution, Ocean acidification, sea-level rise, etc., is in line with Mauritius's national interest of security and self-preservation. In its oral statement to the Tribunal, Mauritius emphasized its vulnerability to sea-level rise, which has increased to almost 12 millimeters per year from 5 millimeters in the last decade, a rate higher than any other country in the Indian Ocean (Mauritius oral statement, 2023). Sea-level rise is projected to reach 49 cm by the end of the century as a direct result of anthropogenic GHG emissions "for which Mauritius bears but a miniscule responsibility, if any at all" (Mauritius oral statement, 2023).

Potential Lawsuits

Mauritius has a potential legal pathway to sue the United Kingdom in ITLOS under UNCLOS for failing to protect and preserve the marine environment from climate change impacts. This would involve leveraging the provisions of UNCLOS, gathering substantial scientific evidence, and navigating complex legal and diplomatic landscapes. Such a case could not only seek redress for Mauritius but also contribute to the evolving jurisprudence on state responsibilities in the context of climate change. Mauritius, as a former British colony, could argue that historical emissions from the United Kingdom and other industrialized nations have contributed significantly to current climate change impacts. The argument would be that the UK, as a former colonial power and a significant historical emitter of greenhouse gasses, has contributed disproportionately to climate change, thereby failing in its duty to protect the marine environment, which

affects countries like Mauritius (Shriver, 2023). Proving a direct causal link between the UK's emissions and specific environmental damages in Mauritius could be complex. Climate change is a global issue with multiple contributing factors and sources (Rocha, 2023). While a successful case could set a significant precedent for climate justice and accountability, it would also require strong international legal arguments and possibly the support of other nations and international legal organizations such as COSIS.

Democratic Republic of the Congo

(Britannica, 2024)

Implications of Statements Made to ITLOS

In its statements to the tribunal, the DRC emphasized the importance of clarifying the legal obligations of states under UNCLOS to protect and preserve the marine environment from the impacts of climate change. They argued that this clarity is crucial for ensuring that states take the necessary actions to mitigate and adapt to these impacts. The DRC stressed the severe and disproportionate impacts of climate change on SIDS and coastal countries, which are particularly vulnerable to rising sea levels, ocean acidification, and extreme weather events. They underscored the need for stronger

international cooperation and financial support to address these challenges. The DRC underscored the principle of common but differentiated responsibilities, urging ITLOS to consider the historical and ongoing contributions of different states to climate change. They called for high-emitting countries to be held accountable for their greater share of responsibility in causing environmental harm.

Implication of Legal Factors

While the DRC has a significant history of litigation in international court, it is unlikely that its participation translates to furthering its likelihood to litigate against high-emitting states following an ITLOS advisory opinion. Some clarifications are warranted in terms of the DRC's history with international law and how it was scored in the model. While, in its ratification declaration to UNCLOS, the DRC specified ITLOS as its preferred method of dispute resolution, it has not brought any cases before ITLOS in the 42 years that the court has been operational (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). Additionally, while the DRC has the capacity to utilize international courts and views them as legitimate, its ICJ litigation history is primarily related to armed conflict in the territory of the Congo between the DRC and Rwanda. While these cases show a dispute history in international courts, it is dubious Whether or not these cases can be used as predictors of the likelihood of suing other nations for failing to meet UNCLOS Part XII obligations. Following this trend, as the DRC has been locked in humanitarian conflict for decades, they have no records of domestic climate change litigation.

Implication of Economic and Financial Factors

The Democratic Republic of Congo (DRC) is unlikely to sue in international court regarding climate change obligations for several reasons, primarily revolving around its ongoing conflict and war-related issues. The Democratic Republic of Congo is a low-income country with a small coastline with no MPAs. International legal proceedings are expensive. They involve significant costs related to legal fees, expert witnesses, research, documentation, and travel. For a country with a low GNI, allocating sufficient funds for such an endeavor is challenging without diverting resources from other critical areas like

healthcare, education, and infrastructure. The government's resources are predominantly directed towards maintaining security, providing humanitarian aid, and stabilizing the country. This leaves limited financial and administrative capacity to pursue international litigation.

Implication of Social, Geographic, and Political Factors

Of the countries in the strong advisory opinion category, scoring 10, The Democratic Republic of the Congo is the least likely to sue under ITLOS in this case. The DRC is the largest country in sub-Saharan Africa, with 37 km of coastline, and is among the five poorest nations in the world (The World Bank, 2024). The DRC has been plagued with conflict, political upheaval, and an ongoing humanitarian crisis since 1996, when the first Congo war broke out in the wake of the 1994 Rwandan Genocide (Center on Foreign Relations, 2024). Since 1996, two wars have broken out in that region, with a consistent presence of UN peacekeepers between 2002 and 2003 (Center on Foreign Relations, 2024). These tensions have been ongoing and have produced a constant pattern of violence in the DRC's resource-rich eastern provinces (Center on Foreign Relations, 2024). In light of this more immediately pressing threat to the DRC's national security, we predict that the DRC will not be the most likely of the countries supporting a strong advisory opinion to litigate.

Implications of Environmental Factors

The DRC is characterized as highly vulnerable to climate change, with a high exposure to climate impacts, low adaptive capacity, high sensitivity, and a high reliance on natural capital. All of these factors would theoretically make the DRC more likely to litigate regarding states' obligations concerning climate change, however its low-development status, low wealth, and engagement in conflict make it highly unlikely that the DRC will engage in climate litigation if ITLOS releases a strong AO. The DRC scoring the same as Antigua and Barbuda, Mauritius, and Vanuatu in the model is an indicator that the variables and their weighting are fallible and that the in-depth case study analysis is the more important aspect of this analysis to understand the variables

that most influence the likelihood of a state bringing a climate litigation suit before ITLOS.

Vanuatu

(Britannica, 2024)

Implications of Statements Submitted to ITLOS

As a COSIS member-state, Vanuatu joined in the written statement submitted on behalf of the coalition. The Attorney General of Vanuatu, Arnold Kiel Loughman, delivered the oral statement on behalf of the Republic of Vanuatu. This statement was a description of the looming threat that SIDS face from climate change, and a plea for ITLOS to clarify the standard of conduct required to meet UNCLOS obligations to prevent marine pollution and generally to protect and preserve the marine environment. Where New Zealand emphasized cooperation and collective responsibility for the accumulation of GHGs that are causing the deleterious effects to the marine environment, Vanuatu clearly stated that the responsibility for the destruction of the ocean falls on major GHG emitters (COSIS oral statement 1, 2023). Cooperation has been attempted via decades of multilateral climate negotiations, where SIDS like Vanuatu have "participated vigorously

in deliberations of the UNFCCC and at each and every COP" to get major emitters to make the necessary changes to save these island nations that are "slowly but surely" approaching their demise due to climate change (COSIS oral statement 1, 2023). Vanuatu points to the failure of UN Climate change negotiations to take seriously the injustice that SIDS face, instead making "empty promises" that lead to a stagnation of progress (COSIS oral statement 1, 2023). Vanuatu looks to ITLOS to "render an advisory opinion that will persuade UNCLOS State Parties to transform their behavior, because continuing business as usual is no longer an option" (COSIS oral statement 1, 2023). States must urgently comply with their binding obligations, and Vanuatu asks the Tribunal to "say with specificity what those obligations are" (COSIS oral statement 1, 2023). Vanuatu calls for an advisory opinion that goes beyond abstract principles, is based on scientific knowledge, and includes specific content so that States have clarity as to when they are meeting their obligations and when they are not incompliance with Articles 192 and 194. This stance is indicative of support for a strong advisory opinion by Bodanksy's (2023) definition. The clear identification of major emitting countries as the responsible parties for the deleterious effects of climate change on the marine environment indicates that Vanuatu is likely to initiate litigation against one, or multiple of these countries. If COSIS is able to bring suit before ITLOS as a coalition, it is likely that they will do so, but if jurisdictional hurdles prevent this from happening, Vanuatu is a promising plaintiff.

Implications of Legal Factors

Vanuatu is a very interesting player in this model. While Vanuatu has not participated in any litigation before ITLOS or the ICJ, nor does it have any records of domestic climate litigation cases, it has recently made itself a major player in the international climate change legal regime. On March 29, 2023, Vanuatu won a historic vote at the United Nations General Assembly that called for the ICJ to give an advisory opinion on what State Parties' obligations are to address the climate crisis and what consequences could be for failure to comply (Birnbaum, 2023). This action was taken in solidarity with COSIS and other highly vulnerable states. This displays that Vanuatu is highly vulnerable to climate change and views the international legal system as the best forum to advocate for its national interests. Based on its pioneering efforts to get the ICJ

to specify states' obligations with regard to the climate crisis and its joint effort as a member of COSIS in this case, Vanuatu is highly likely to be involved in any lawsuits that result from an ITLOS advisory opinion with regard to UNCLOS Part XII obligations.

Implications of Economic and Financial Factors

Vanuatu is a low-income nation with very little of its marine and coastal area covered by an MPA, making it less likely to sue by the assumptions of our model. While being low-income puts it at a disadvantage in terms of funding litigation in international courts, likely part of the reason that Vanuatu has no dispute-settlement history in international courts, in this case the interest of survival will likely supersede this obstacle. According to the world database for protected areas, 0.01% of Vanuatu's marine and coastal area is under an MPA. As it does not have at least 10% of its waters protected, it received a 0 in the model for LTS for value it places on the marine environment. For SIDS in particular, percent of coastal and marine area that has been designated as an MPA may not be the best estimation of the value the state places on its marine environment.

Implications of Social, Geographic, and Political Factors

Of the states that support a strong advisory opinion, Vanuatu's prospects of suing another state on Part XII obligations are very promising. Vanuatu is a small island developing state located in the South Pacific Ocean. It is made up of ~80 small islands that stretch about 400 miles (Foster and Adams, 2024). Vanuatu achieved independence from France and the United Kingdom, which formerly had a claim to parts of the archipelago (Foster and Adams, 2024). Vanuatu's legal system reflects this colonial presence, as it is a mixture of English common law, French civil law, and indigenous customary law. This system makes Vanuatu's legal system compatible with international law and more likely to seek redress in international courts to settle disputes with other nations.

Implications of Environmental Factors

Vanuatu is one of the most vulnerable countries in the world to the onslaught of climate change-related threats and views international law as the best forum to advocate for their national security/interest. Vanuatu is one of the lowest in the world in terms of historic emissions (See Table 4). Notre Dame's vulnerability index ranks Vanuatu 139/192 in terms of high exposure, 172/180 in terms of high sensitivity, 121/176 in terms of low adaptive capacity, and 117/180 in terms of vulnerability of natural capital to climate change (See Table 4). Across each indicator of vulnerability, this ranking shows Vanuatu to be in peril due to the impacts of climate change.

In Vanuatu's oral statement to ITLOS, it explains in detail its vulnerability to climate change and the devastating impacts it has already endured. Vanuatu's economic base is subsistence agriculture and most of its population live along the coast, making it highly dependent on the natural environment and highly vulnerable to climate change. Already, climate change has severely affected "nearly every facet of Vanuatu life" (COSIS oral statement 1, 2023). Vanuatu, a low-lying archipelago, faces direct threat from sea-level rise which is roughly double the global average at 6 millimeters per year between 1990 and 2010 (COSIS oral statement 1, 2023). Sea-level rise poses a direct threat to Vanuatu's biodiversity, including its many endemic species. Encroaching oceans have led to the need to relocate entire communities and pose the impending likelihood of the displacement Vanuatu's population of 320,000. This is exacerbated by the fourfold increase of intense tropical cyclones in the South Pacific Region in recent years. Vanuatu has experienced the devastating effects of two category cyclones in the past eight years, killing 16 and damaging approximately 90% of infrastructure (COSIS oral statement 1, 2023). This has not only devastated the population but has stagnated sustainable development and "destroyed critical coastal infrastructure, costing an average estimated 6% of GDP per year" (COSIS oral statement 1, 2023).

Further, ocean acidification and rising ocean temperatures poses a significant threat to coral reefs, the home of critical fish stocks that "are a mainstay of Vanuatu's food supply" (COSIS oral statement 1, 2023). A majority of Vanuatu's population is engaged in subsistence fishing, so the collapse of reef fish stocks would cause widespread food insecurity. Additionally, climate impacts on Vanuatu's reef, pristine beaches, and rainforests threaten to tank its tourism industry, which makes up 65% of GDP. Vanuatu

demonstrated in its oral statement to the Tribunal that it is at the forefront of climate change impacts, and its dependence on the marine environment to feed its population and to provide income makes it extremely vulnerable. This high vulnerability to Vanuatu's national security will likely supersede all other indicators of national interest in terms of suing high-emitting states if ITLOS releases a moderate or strong advisory opinion.

Potential Lawsuits

In its oral statement to ITLOS, Vanuatu identifies high emitting states as the responsible parties for inducing deleterious effects of climate change on the marine environment. In addition to its stated intent to sue fossil fuel companies and countries for climate change loss and damages, this direct identification of the responsible parties in the ITLOS advisory proceedings indicates that Vanuatu is likely to sue high-emitting states and may use the outcome of this advisory opinion as its catalyst. Two targets for a hypothetical lawsuit from Vanuatu are the United Kingdom and France, two former colonial powers of the Pacific SIDS. Vanuatu has previously sued the United Kingdom for unlawful

Most Likely to Sue if Moderate Advisory Opinion

According to the predictive model, if ITLOS releases a moderate-strength advisory opinion, New Zealand and the Netherlands are the most likely to sue on Part XII obligations. Bodansky (2023) predicted that a moderate advisory opinion on states' Part XII obligations from ITLOS would be the most likely outcome. Thus, we will first examine the country's most likely to litigate if a moderate advisory opinion is released that specifies GHG emissions as constituting marine pollution under UNCLOS but does not state specific emissions limits or other obligations for UNCLOS party states in relation to Part XII. In the following section, qualitative data from both of these countries will be examined to determine which is *most* likely to initiate litigation if a moderate advisory opinion is released.

New Zealand

(Britannica, 2024)

Implications of Statements Made to ITLOS

If ITLOS releases a moderate advisory opinion that specifies GHG emissions as marine pollution, New Zealand is a promising candidate for initiating litigation against another UNCLOS member for failing to meet their obligations under Part XII. In its

statements to ITLOS on September 15, 2023, New Zealand highlighted the urgent need to address the impact of climate change on the ocean and the marine environment in order to effectively combat the climate crisis, specifically referencing the high vulnerability of its Pacific Island territory, Tokelau (New Zealand oral statement, 2023). In its oral statement, New Zealand expressed its view of UNCLOS as a "living treaty", able to adapt to new scientific realities and able to be applied in conjunction with the UN climate change treaties. UNCLOS should not be interpreted in a vacuum, other agreements that deal with overlapping issues should be consulted in the interpretation of its provisions. New Zealand, thus, views UNCLOS Part XII obligations as being informed by other international rules and standards, particularly customary international law and the UNFCCC. Several states presented the argument of *lex specialis* in this case, meaning that if two treaties govern the same area, the law governing the specific subject matter should override the law governing the general matter. New Zealand rejected this argument, stating that UNCLOS should be informed by customary international law, and cited the Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which supports an integrated approach to international law. New Zealand submits that "although the question posed in this request may require the Tribunal to consider regime interaction, the Tribunal should view this legal landscape as a coherent and integrated whole, rather than different regimes in conflict or having nothing to do with each other" (NZ oral statement, 2023).

With regard to the questions posed by COSIS, New Zealand views Articles 192, 194, 207 and 212 as intertwined, and visualizes the relationship between them as concentric circles (See Figure 1). With regard to part a) of COSIS's questions, concerning Article 194, New Zealand defers to the in-depth scientific analysis included in COSIS's written statement of the deleterious effects to the entire marine ecosystem posed by climate change. New Zealand affirms that anthropogenic GHG emissions and the damage to the marine environment that results from their accumulation constitute an introduction by humans directly *and* indirectly of substances *and* energy into the marine environment, thus satisfying the definition of marine pollution set out in Article 1, paragraph (4) of UNCLOS (NZ oral statement, 2023). One interesting statement of note in New Zealand's oral statement is that, in addressing the "inherently aggregate and

cumulate nature of the problem means that the emissions originating from the territory of one State in isolation may not meet the threshold of "deleterious effects" set out in the definition of "pollution of the marine environment" (NZ oral statement, 2023). New Zealand emphasizes the large-scale nature of the issue in terms of assigning responsibility and goes on to advocate for international cooperation in preventing and controlling marine pollution. This stance is a strong indicator that New Zealand may not be in favor of suing another party for causing deleterious effects to the marine environment via GHG emissions, as they assert that the accumulation is an issue of global responsibility. Additionally, while New Zealand firmly supports the specifying of GHG emissions as marine pollution and affirms the urgent need to reduce marine pollution, it would leave the specifics of operationalizing this situation up to the efforts of international cooperation (NZ oral statement, 2023). In terms of specific obligations of State Parties to prevent, reduce and control marine pollution, New Zealand sees articles 207 and 212 as sufficient specificity and, with supplemental guidance from the UNFCCC and the Paris Agreement, as enough to define the standard of conduct required to meet Article 194 obligations. This stance is supporting a moderate-strength advisory opinion by Bodansky's (2023) definition.

With regard to part b) of COSIS's request, pertaining to interpreting States' general obligations to protect and preserve the marine environment as stated in Article 192, New Zealand does not explicitly support ITLOS interpreting specific obligations in its advisory opinion. In its view, Article 192 refers to a general obligation to take active measures to protect the marine environment from future damage, preserve the environment in terms of "maintaining or improving its present condition", and includes the negative obligation of not degrading the marine environment (NZ oral statement, 2023). Again, New Zealand turns to global cooperation as the solution to devising standards of conduct that meet the requirements of Article 192 in the context of climate change and mitigation efforts, citing the UNFCCC and the Paris Agreement as effective examples of global cooperation. This focus on cooperation, and deference to the UN climate change conventions to provide context for the obligations in Article 192 indicate that New Zealand is not in favor of ITLOS providing specific obligations to set a standard that states must meet to be in compliance with Part XII of UNCLOS. This is

consistent with support of a moderate-strength advisory opinion. The emphasis on cooperation and global responsibility also indicates that New Zealand is not eager to initiate lawsuits to hold states accountable to hypothetical specific obligations that ITLOS may specify in an advisory opinion.

Implications of Legal Factors

One of the most significant indicators of New Zealand's likelihood to litigate if ITLOS releases a moderate advisory opinion is that NZ has previously brought environmental claims before ITLOS. In 1999, New Zealand and Australia instituted arbitral proceedings before ITLOS in a dispute against Japan regarding bluefin tuna. New Zealand and Australia claimed that Japan had failed to comply with its obligation to cooperate in the conservation of Southern bluefin tuna and had instead undertaken unilateral experimental fishing for bluefin tuna (Southern Bluefin Tuna Case, 1999). In this case, New Zealand and Australia claimed that Japan was breaching its obligations with regard to Articles 64 and 116-119 of UNCLOS.[5] In its 1999 decision, ITLOS found that Japan had violated its obligations under UNCLOS and had overfished southern bluefin tuna beyond its quota. Japan was ordered to cease its overfishing activities and was ordered to take measures to ensure compliance with the conservation and management measures adopted by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). This case was successful in getting Japan to adjust its fishing practices to comply with the ruling, although no financial compensation was required from Japan. New Zealand has made a successful claim before ITLOS against another party that failed to meet its obligations in the realm of marine environment protection. This is an indication that New Zealand has the capability and has had the motivation in the past to litigate another UNCLOS party state in ITLOS for violating obligations to protect the marine environment. If New Zealand's interest in an issue concerning its

[5] Article 64 calls for the conservation of highly migratory species listed in Annex I
Article 116 specifies rights to fish on the high seas
Article 117 states the duty of states to adopt with respect to their nationals measures for the conservation of the living resources of the high seas
Article 118 states that states have an obligation to cooperate in the conservation and management of the living resources of the high seas
Article 119 refers to specifics on the conservation obligations required for the living resources of the high seas

marine environment is high enough, this case shows that New Zealand will litigate in ITLOS.

Examining New Zealand's cases before the ICJ provides further evidence that it will litigate in international courts in cases concerning environmental protection. New Zealand has been involved in three contentious cases before the ICJ. Two of these cases concerned tests of France's nuclear weapons in the atmosphere of the South Pacific Region. In these cases, New Zealand and Australia asked the ICJ to issue provisional measures [6]to the effect that France should refrain from conducting any nuclear tests that would lead to radioactive fall-out in New Zealand or Australian territory. Bringing suit before the ICJ led France to release statements that they no longer planned on testing any nuclear weapons in areas that would have environmental impacts on New Zealand or Australian territory. As New Zealand and Australia's objectives were determined to be met by the court, the ICJ determined that the point was moot and it was therefore not called upon to give a decision (Nuclear Tests (New Zealand v. France, 1973)). Even though the court did not issue a formal decision in favor of New Zealand, this case produced a victory for both New Zealand and Australia. The other case in which New Zealand was involved before the ICJ concerned whaling in the Antarctic. In this case, Japan had granted itself special permits to kill, take, and treat whales in the Antarctic as a part of its whale research program, JARPA II. Australia brought a complaint before the ICJ, claiming that Japan was in direct violation of the "moratorium on commercial whaling and factory ships, and the prohibition on commercial whaling in the Southern Ocean Sanctuary" set by the International Convention for the Regulation of Whaling (ICRW), as well as its other international obligations for the preservation of marine mammals and the marine environment (Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening, 2014)). While UNCLOS's Part XII obligations are not explicitly mentioned as it is dealing explicitly with the ICRW, this case aligns with the obligation to protect and preserve the marine environment that are broadly codified in UNCLOS. New Zealand filed an intervention in this case in support of Australia, citing its direct interest in the proper interpretation of the ICRW (Declaration of Intervention by New Zealand, 2012). New Zealand supported Australia's claims that Japan was in

[6] Requests for provisional measures take precedent over any other case before the ICJ, due to their urgency

violation of the ICRW, and cited interests in conservation and protection of the delicate, unique Southern Ocean marine environment as a rationale for its intervention (Declaration of Intervention by New Zealand, 2012). New Zealand's dispute history in the ICJ shows a commitment to environmental protection through international courts dealing with both pollutions, in the form of radiation from nuclear tests, and the protection of marine mammals in the Antarctic whaling case.

New Zealand has a robust record of domestic legal protection of the environment and a history of environmental litigation in ITLOS, making it uniquely positioned to sue in this advisory opinion case. In March 2017, the government of New Zealand, in tandem with the indigenous Tūhoe people, granted legal personhood to the Te Urewera National Park and Whanganui River and its tributaries (Earth Law Center, 2016). The Te Urewera Act, after a legal battle between the New Zealand Government and the Māori tribe, recognized that a forest and the Whanganui River have the "rights, powers, duties, and liabilities of a legal person" and mandates that both the government and indigenous tribe are responsible for maintaining the health of the national park and river (Kramm, 2020). These two representatives, one from the government and one from the Whanganui tribe, are responsible for representing the river in court. This act has made it possible for those acting on the river's behalf to sue for its protection under the law. The Te Awa Tupua Act recognizes the river as a single living entity with rights and interests that stretches from the mountains to the sea (Rapid Transition Alliance, 2019). This phenomenon is relatively unique to New Zealand and shows a legal representation of how the Whanganui view nature.

While New Zealand has not passed a constitutional amendment giving all natural resources constitutional rights, the Te Urewera Act and the Whanganui River Claims Settlement have set a significant global precedent for giving nature legal personhood. This precedent has spurred other declarations of legal personhood. On March 28, 2024, Indigenous Leaders of New Zealand, Tahiti, Tonga, Hawaii, The Cook Islands, and Rapanui (Easter Island) signed a treaty that recognizes whales as legal persons (Eco Jurisprudence Monitor, 2024; Tumin, 2024). Conservationists see this as a significant step toward national governments specifying greater protections for marine mammals and the marine environment (Tumin, 2024). For New Zealand, this treaty shows a sustained

domestic movement applying pressure on the national government to provide more robust legal protection to the marine environment, and the Te Awa Tupua Act and Whanganui River Claims Settlement show that the government is willing to pursue such protections.

In addition to promising recognition of legal personhood for certain features of the natural environment, New Zealand is one of the leading countries in the world in terms of climate litigation cases. The Sabin Center for Climate Change Law has 32 cases entered in New Zealand's national jurisdiction. According to the database, New Zealand is 7th in the world in terms of the number of domestic cases and has had some recent notable advances in climate change litigation. In February 2024, the High Court of New Zealand released a much-anticipated decision in the case *Smith v. Fonterra & Ors. (2024).* This case is being hailed as "the biggest common law breakthrough" in climate change litigation against major corporate GHG emitters (Bookman, 2024). In this case, Michael Smith, a Māori leader, brought tort claims against New Zealand's seven largest GHG emitters, who are collectively responsible for one-third of New Zealand's emissions (Bookman, 2024). In addition to tort claims of public nuisance and negligence, Smith brought a novel claim of "climate duty," asserting that, as a Māori leader, he had an interest in customary land and that the defendant's actions harmed him by contributing to climate change-related phenomena such as sea level rise (Bookman, 2024). New Zealand's Supreme Court found enough case law foundation to allow the case to proceed to trial on all causes of action: negligence, public nuisance, and climate duty. In its rationale, the court relied heavily upon 19th-century pollution cases, a typical case law area in other national jurisdictions. This decision may allow judges in different jurisdictions to enable similar cases to proceed to trial (Bookman, 2024). This case is notable, as it demonstrates to corporations that there is a legal risk associated with failing to comply with emissions reduction targets (Bookman, 2024).

Implications of Economic and Financial Factors

New Zealand is a high-income country with one of the largest MPAs in the world by area, thus increasing its likelihood of litigating to protect the marine environment. High income countries are likely to litigate if it protects their material interests, and, for

the purpose of this study, a large MPAs show that a country places a high value on the biodiversity of its marine environment. As of 2024, 30.42% of New Zealand's 4,106,954km^2 of marine and coastal areas are covered by an MPA (Protected Planet, 2024). While this is a large area and gives New Zealand a perfect score in Yale's Environmental Performance Index, the score does not reflect how effectively New Zealand manages and enforces its MPAs. According to the world database on protected areas, only 0.36% of New Zealand's marine and coastal areas are protected "with management effectiveness evaluations)"[7] (UNEP-WCMC, 2024). However, according to the Marine Protection Atlas, 2% of New Zealand's total waters, including Tokelau, the Cook Islands, and Niue are "implemented and highly/fully protected" (Marine Conservation Institute, 2024). Data on MPAs is reliant on the information that countries release and is often unreliable and uses different metrics to evaluate effectiveness. When New Zealand's national government website is accessed, it says that MPA policy is under reform, so it is not made publicly available at this time. However, it does show a plan to implement a "comprehensive" network of MPAs (NZ Ministry for Primary Industries, 2024).

In this plan, the New Zealand government refers to MPAs as a "bank" of biological wealth "as an investment for future generations" (NZ Ministry for Primary Industries, 2024). Relative to the rest of the world, New Zealand has one of the largest systems of MPAs and is in the process of extending this system. It is difficult to assess management and enforcement, but, in terms of total area protected and the government's view that establishing MPAs is acting as an investment of biological diversity for future generations, the assumptions of the model that a larger area covered by MPAs is reflective of a country's value of its marine environment are valid for this case. As states litigate in international courts if it serves their material interests, a higher value on the marine environment indicates a higher likelihood of pursuing international litigation if the value is threatened due to pollution or other harm to the marine environment.

[7] Management effectiveness evaluations are a system devised by the IUCN to evaluate whether or not protected areas are being managed effectively and are contributing substantially to sustainability goals (Courrau et al., 2006).

Implications of Social, Geographic, and Political Factors

New Zealand's social, geographic, and political factors that were included in the model all increase its likelihood of suing another state over Part XII obligations. New Zealand is a wealthy, highly developed and populated island country in Oceania, comprised of two main islands, the North and the South Islands, and then many smaller islands. New Zealand has two non-independent territories: the South Pacific Island group of Tokelau and a portion of the Antarctic continent (Britannica, 2024). Aside from these territories, New Zealand is in free association with two SIDS in the South Pacific: Niue and the Cook Islands. Formerly colonies of New Zealand, the Cook Islands gained independence in 1965 and Niue in 1974 (McDonald, 2021). While New Zealand is remote, it has been an active member of the international community and the United Nations since the early 20th century after gaining independence from Britain (Britannica, 2024). New Zealand is a coastal, developed country that is considered part of the Global North. Coastal states inherently have a higher interest in matters concerning the law of the sea, as their territory is most directly impacted by phenomena such as sea-level rise, marine pollution, ocean acidification, etc. Having an expansive coastline and several small-island territories and associated states make issues concerning the marine environment a direct issue of national security for New Zealand. Historically, the majority of climate change litigation cases and general cases in front of international courts have been brought by developed, Global North countries (Abebe, 2007; Setzer and Higham, 2023). Based on the history of past cases, this increases the likelihood of New Zealand filing suit if ITLOS releases a moderate-strength advisory opinion. Additionally, New Zealand is classified as a liberal democracy, thus increasing the likelihood of responding to domestic pressures to take stronger action to prevent climate change. As was shown in the legal section, New Zealand has been facing sustained domestic pressure, particularly from its indigenous groups, to take stronger climate action. Its liberal democratic nature makes it more likely that the government of New Zealand will respond to this pressure and take international action.

Implications of Environmental Factors

Relative to countries supporting a strong advisory opinion, New Zealand has low vulnerability to climate change. According to Notre Dame's vulnerability index, New Zealand is 113 out of 192 in terms of high exposure to climate change. Exposure to climate change is assessed independent of socio-economic factors. In terms of sensitivity of New Zealand's economic sectors and population to climate hazards, ranks 16th of 180 countries. Relative to the rest of the world, New Zealand's population is not highly dependent on economic sectors that are being drastically impacted by climate change. New Zealand scores 4th out of 176 for adaptive capacity, meaning that it is highly and readily capable of responding to climate change impacts to food, water, health, ecosystem services, human habitat, and infrastructure (N-D Gain technical report, 2024). While New Zealand has significant exposure to climate change impacts, it is well-equipped to respond to these threats and mitigate them effectively.

While New Zealand itself may not be highly vulnerable according to Notre Dame's index, it is located in the Pacific region, where its small island neighbors are the most vulnerable to climate change impacts. In its oral statement, New Zealand speaks in support of its Pacific Island neighbors and highlights the high vulnerability of New Zealand's citizens in Tokelau, a small Pacific country comprised of three small coral atolls (New Zealand oral statement, 2023). New Zealand also spoke in support of its associated states, Niue and the Cook Islands.

Potential Lawsuits

New Zealand is highly unlikely to sue, based on its oral statement to ITLOS in the advisory proceedings. However, if ITLOS releases a moderate advisory opinion that specifies that GHG emissions are considered to be marine pollution, New Zealand could potentially sue Japan for transboundary marine pollution. Japan is 6th in the world in terms of highest historic emissions, and its proximity to New Zealand makes it a viable target for a lawsuit concerning the impacts of over-emitting on the Pacific marine environment. New Zealand has already sued Japan once via ITLOS in the Southern Bluefin Tuna cases, where Japan was overfishing Bluefin tuna stocks, and has joined in on Australia's ICJ suit against Japan for unlawful whaling in the Antarctic.

The Netherlands

(Britannica, 2024)

(Alamy, 2024)

Implications of Statements Submitted to the Tribunal

According to the predictive model, The Netherlands is equally likely to initiate litigation as New Zealand if ITLOS produces a moderate advisory opinion. The Netherlands submitted both a written and oral statement to ITLOs in support of the

tribunal giving an advisory opinion that specifies GHG emissions are considered marine pollution. In its oral statement, the Netherlands expressed its view of UNCLOS as a "living treaty" that should be updated, clarified, and amended to reflect the most recent science concerning the marine environment (Netherlands Oral statement, 2023). It is the view of the Netherlands that UNCLOS is not designed to be an isolated regime but is supposed to work in tandem with other rules and principles of international law, especially those regarding climate change. Thus, the presence of a separate international climate change legal regime does not hinder the ability of ITLOS to interpret the obligations of states regarding climate change and its impacts on the marine environment.

In terms of Article 192 of UNCLOS, that states have a general obligation to protect and preserve the marine environment, the Netherlands holds that this obligation applies to all marine areas, both within and beyond national jurisdiction. Further, the Netherlands asserts that Article 192 is substantiated by Article 194, which establishes the obligation for states to take measures to prevent, reduce, and control pollution of the marine environment. It is the view of the Netherlands that these are obligations of conduct, rather than result. This is an important distinction, because this indicates that the Netherlands is not in support of ITLOS interpreting that specific emission limits for states can be set under Articles 192 and 194. Instead, the Netherlands views these obligations as those of due diligence that "cannot be described in precise terms", but that must be exercised by every State Party (Netherlands oral statement, 2023). According to the Netherlands, the standard of due diligence should be informed by the precautionary principle, meaning that lack of full scientific certainty cannot be used as a valid reason for avoiding "cost-effective measures to prevent environmental degradation" (Netherlands oral statement, 2023). The Netherlands contends that the obligations of Articles 192 and 194 require mitigation and adaptation measures, as enshrined in the UNFCCC and relate instruments, and while ITLOS should not interpret any specific targets, states should take the approach of Common but differentiated responsibilities and respective capabilities (CBDR+RC), citing the system of NDCs as an example of this system (Netherlands oral statement, 2023). In this context, CBDR+RC refers to states reducing emissions on a timeline and at a capacity that fits their national capabilities and considers their contribution to historic emissions.

The Kingdom of the Netherlands expressed staunch support of the assertion that "the deleterious effects of climate change and ocean acidification, as well as the harm resulting from such effects" fall within the meaning of "pollution of the marine environment" as defined by article 1(4) of UNCLOS (Netherlands oral statement, 2023). Furthermore, the Netherlands noted that sources of pollution from both land-based and ocean-based that contribute to degradation of the marine environment via climate change must be considered under Article 194.

In response to the question of loss and damage resulting from climate change's effects on the marine environment, the Netherlands held that this issue is not expressly brought up in COSIS's legal question and is thus not at issue in this case. The issue of loss and damage is already being addressed by the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, and thus does not need to be addressed by ITLOS's advisory opinion.

Overall, the Netherlands has demonstrated support for a moderate-strength advisory opinion, as defined by Bodansky (2023), that interprets Article 194 as pertaining to the deleterious effects of climate change to the marine environment, but that does not specify obligations of states under Articles 192 and 194. It is the opinion of the Netherlands that Articles 192 and 194 codify obligations of due diligence, where states *must* take action to protect the marine environment and reduce marine pollution, but that these obligations are of action, not of result.

Implications of Legal Factors

The Netherlands has a significant dispute-settlement history in international courts, demonstrating a normative acceptance of international law and courts as a legitimate dispute-settlement mechanism. In addition to submitting both a written and oral statement to ITLOS in support of granting COSIS's request for an advisory opinion, the Netherlands has co-sponsored the request for an advisory opinion from the ICJ on climate change and international law.

The Netherlands has been a plaintiff in one case before ITLOS, which, according to the assumptions of the model, increases its likelihood of suing if ITLOS releases a moderate AO. While this is the assumption used by the model, examining the nature of

the case compared to New Zealand's ITLOS case is warranted to assess distinctions between the two countries qualitatively. In 2013, the Kingdom of the Netherlands initiated proceedings against the Russian Federation, arguing that Russia had unlawfully detained the Greenpeace ship "the Arctic Sunrise" and its crew. The Greenpeace vessel, which was a Dutch-flagged ship, had been detained trying to put up a protest flag on an oil rig within Russia's exclusive economic zone in the Pechora Sea (UNODC, 2013). Russia charged the activists with piracy and later hooliganism. According to the Netherlands, Russia had violated freedom of navigation and, in boarding and seizing the ship, violated the Netherlands' right to jurisdiction over the ship (Kingdom of the Netherlands v. The Russian Federation, 2013). While the merits of this case are related to environmental protection, as the Greenpeace activists aboard the Dutch-flagged Arctic Sunrise were protesting Russia's oil exploits, the legal nature of the case is prompt release. According to Karim (2014), prompt release cases are one of the most likely disputes that result in ITLOS dispute settlement because they directly involve a country's material interests, in this case, a ship and a crew. The prompt release procedure is designed to secure the immediate release of vessels and crews detained for alleged violations of a coastal state's law and regulations. As such, it is not the best predictor of whether a state will sue on more abstract legal grounds, such as state obligations to protect the marine environment specified by an ITLOS advisory opinion. Based on the variable of ITLOS dispute history, New Zealand has a higher likelihood of suing if ITLOS produces a moderate advisory opinion.

While the Netherlands has had several climate change litigation cases brought in its national jurisdiction, fewer cases have been seen in New Zealand's jurisdiction. According to the Sabin Center's Climate Change Litigation database, 12 climate change litigation cases have been in the Netherlands' national jurisdiction (Sabin Center for Climate Change Litigation, 2024). New Zealand has seen 32 climate litigation cases brought in its national jurisdiction. While there is a difference between the two countries in terms of domestic pressure to pursue climate change litigation, as New Zealand's national government faces significant and sustained pressure from its Indigenous communities to place legal protection on the natural environment, there is still substantial domestic pressure on the Netherlands' government to reduce its GHG emissions.

In 2015, a Dutch environmental group known as the Urgenda Foundation sued the Dutch government in a class action suit that included 900 Dutch citizens to require the government to do more to prevent global climate change (Sabin Center for Climate Change Law, 2024). The case made its way to the Hague Court of Appeals, which ruled in favor of Urgenda, concluding that the Dutch government's current pledge to reduce GHG emissions by 17% below 1990 levels by 2020 was insufficient to meet the UN's goal at the time of keeping global temperature increases within 2℃ of pre-industrial levels (Sabin Center for Climate Change Law, 2024). In its ruling, the Hague court cited "Article 21 of the Dutch Constitution; EU emissions reduction targets; principles under the European Convention on Human Rights; the "no harm" principle of international law; the doctrine of hazardous negligence; the principle of fairness, the precautionary principle, and the sustainability principle embodied in the UN Framework Convention on Climate Change; and the principle of a high protection level, the precautionary principle, and the prevention principle embodied in the European climate policy" (Sabin Center for Climate Change Law, 2024).

The result of this case, despite a long list of appeals by the Dutch Government, was that the Netherlands was required by the Dutch Supreme Court to cut emissions by 25% relative to 1990 levels. The Urgenda case is considered a landmark climate litigation case, finding that the Dutch government has a legal obligation to urgently and measurably reduce its greenhouse gas emissions. This shows that there is a definite domestic legal commitment in the Netherlands to reduce GHG emissions, and perhaps this momentum could push the Netherlands to bring suit under the law of the sea against countries that are over-emitting if ITLOS specifies that GHG emissions are considered marine pollution.

Another potential motivator for the Netherlands to sue another country based on obligations to protect the marine environment is acting in the interest of its small island territories or Antilles. While the mainland Netherlands is relatively low in terms of overall vulnerability, its associated island nations and territories are far more vulnerable (Notre Dame, 2024). These island states are located in the Caribbean and consist of Aruba, Curaçao, and Sint Maarten. The Netherlands also has three public bodies located in the Caribbean: Bonaire, Sint Eustatius, and Saba. These island states and bodies are highly susceptible to climate change impacts and have been vocal about needing more

support and climate action from the Netherlands. According to research produced by Vrije University in Amsterdam and commissioned by Greenpeace, sea-level rise is projected to partially submerge the island of Bonaire by 2050 (Kaminski, 2024). In addition to this looming threat, decreased rainfall and increasing temperature are already posing significant threats to the livelihood of farmers (Kaminski, 2024). This information has led eight citizens of Bonaire, in conjunction with Greenpeace, to file a "formal legal challenge" against the Dutch government in the Hague in January 2024, asking the district court to order the Dutch government to cut GHG emissions much more quickly and to help its most vulnerable territories adapt to climate change (Kaminski, 2024). In this lawsuit, the Dutch citizens want the Netherlands to reach net zero emissions by 2040, ten years earlier than its current target and solid plans for adaptation for Bonaire and the other municipalities. They argue that not doing so violates their human rights (Kaminski, 2024). This development has promising implications for the Netherlands' participation in international climate change litigation. If this case is successful and the Netherlands adjusts its net zero goal, it could make the Netherlands more likely to sue another country for failing to meet GHG obligations. It could cite the threat of sea-level rise, ocean acidification, and temperature rise to Bonaire. Similarly, to New Zealand, the Netherlands has substantial and sustained domestic pressure from its citizens and interest groups in the form of climate litigation cases. This is promising evidence that The Netherlands is highly likely to initiate litigation if a moderate advisory opinion is released.

Implications of Economic and Financial Factors

In terms of income and value of the marine environment, the Netherlands scored a 1 in each category, showing that they are a high-income country that places significant value on its marine environment. According to the World Database on Protected Areas, 26.86% of the Netherlands' total marine and coastal area is covered by an MPA (UNEP-WCMC, 2024). This same dataset reports that none of this area is considered to be managed effectively by the IUCN's standards (UNEP-WCMC, 2024). The Marine Conservation Institute also found that 0% of MPAs in the Netherlands can be designated "fully/highly protected", because they have not been publicly assessed. (Marine

Conservation Institute, 2024). This means that the Netherlands either does not conduct assessment of MPA effectiveness, or it does not release this data.

Relative to other EU states, the Netherlands has designated larger MPAs, 46% of which are larger than 1,000km^2 (European Environment Agency, 2023). Many of the Netherlands' MPAs are part of an EU-wide network of protected areas, known as Natura 2000 sites (European Environment Agency, 2023). This is the world's largest coordinated network of protected areas in the world. The EU is currently in the process of a comprehensive revamping of their policies on marine conservation, including new targets and standards for MPAs. The EU has a goal of legally protecting 30% of the EU's seas by 2030, with 10% "strictly protected" (European Environment Agency, 2023). Additionally, the EU is in the process of devising a standard/protocol for effective management so as to ensure that MPAs are working effectively to protect biodiversity. As a result of this new target for protecting marine biodiversity, the area of EU-waters covered by MPAs has increased by 12.1% between 2012 and 2021 (European Environment Agency, 2023). It is unclear from the available data if the area of the Netherlands' MPAs has increase significantly over this time. While the Netherlands has a significant percentage of their marine area covered by MPAs, it is unclear as to how these MPAs are managed, or whether they are at all effective. In this area, New Zealand has a higher area covered by MPAs and has a higher reported area that is effectively managed by IUCN standards.

Implication of Social, Geographic, and Political Factors

The Netherlands is a coastal, developed country, Global North country which benefits from EU membership and a liberal democratic political regime, all of which are factors that have historically made a country more likely to sue in international courts. As a coastal country, the Netherlands has a direct national security interest in preventing sea-level rise and preventing the degradation of its marine resources. While its overall vulnerability to climate change impacts may be relatively low due to its wealth and higher development status, it is still the Netherlands' prerogative to reduce national security risks posed by climate change. According to Abebe (2007), the majority of countries who have sued in international courts have been developed, Global North

countries, making the Netherlands more likely to sue based on the assumptions of the model. Generally, Global North countries have had much longer times to develop, accrue resources, form legal systems, and, in cases such as the Netherlands, have benefited significantly from an imperial past. In terms of human development index, this is a logical conclusion because, with a highly developed nation, the Netherlands is less concerned with food security, housing, healthcare, child-mortality, and other issues that the governments of LDCs and SIDS are primarily facing. These issues being less pressing allows for the Dutch government to allocate more resources to suits in international courts. The Netherlands is classified as a liberal democracy, making it more likely to respond to domestic pressures. Liberal democratic states are, to some extent, held accountable to their constituencies, so if the population of the Netherlands feel strongly about a certain issue, like the Dutch citizens of Bonaire pressing the Netherlands to take stronger climate action, there is a higher likelihood that the government will respond positively than a flawed democracy or an autocratic government.

Implication of Environmental Factors

Relative to states that support a stronger advisory opinion, the Netherlands scored lower in terms of the environmental variables used in the model, indicating that their national interest to sue based solely on environmental issues is lower. While the Netherlands is not a top-10 highest emitting country, their historic emissions are significantly higher than New Zealand's and every other country that is included in Table 4. While the Dutch government supports GHG emissions constituting marine pollution under UNCLOS, having higher historic emissions makes them less likely to initiate litigation that has the potential to place binding limits on its own emissions, or that could potentially require them to pay loss and damage reparations to countries who have faced the brunt of climate change and have emitted less.

The overall vulnerability of the Netherlands to climate change is higher than that of New Zealand. Notre Dame gives the Netherlands an overall vulnerability ranking of 39 out of 180, where New Zealand is ranked 9th. In terms of vulnerability index, the Netherlands scores 61/192 in terms of exposure, 171/180 in terms of sensitivity, and 3/176 in terms of adaptive capacity (Notre Dame, 2024). The vulnerability of natural

capital to climate change in the Netherlands was ranked 10/180. This demonstrates that the Netherlands is moderately exposed to the impacts of climate change, such as sea-level rise. The sensitivity score given by Notre Dame is of interest, as the Netherlands is listed as one of the most sensitive countries in the world, meaning that it is heavily reliant upon a sector that is negatively affected by a climate hazard, or that a high proportion of the population is susceptible to a climate hazard (Notre Dame, 2024).

Limitations of the Predictive Model: Would the Netherlands Actually Sue?

Between the states supporting a moderate-strength advisory opinion, this analysis concludes that the Netherlands is most likely to sue another UNCLOS party state for failing to meet the standard of obligations under Part XII if ITLOS releases a moderate-strength advisory opinion. But who would they sue? Both the Netherlands and New Zealand are wealthy, high-emitting states, although not the highest historical emitters, who face a less significant threat to climate change impacts relative to SIDS. One of the limitations of the predictive model is that it may place too much weight on national characteristics, such as wealth, power, and domestic political system that have historically made countries more likely to use international courts as a foreign policy tool. It is highly likely that both the Netherlands and New Zealand would opt to settle issues regarding marine pollution and obligations to protect and preserve the marine environment by negotiation, cooperation, and not litigation. New Zealand's history of intervening in ICJ cases indicates that there is a potential for states that support a moderate advisory opinion to intervene in potential ITLOS climate litigation cases if their territory or nationals are involved, but it is unlikely that states supporting a moderate advisory opinion will initiate litigation. Their threat is too low, their adaptive capacity is too high, and being a powerful Global North country may actually make them less likely to sue in this case. This is another limitation of the predictive model.

CONCLUSION

Liberalism and the Rise of Strategic Litigation

While the literature regarding inter-state litigation in international courts points to realism as the best theoretical framework to understand state behavior, the rise of strategic litigation by under-represented states and groups may signal a theoretical shift toward liberalism. The majority of non-U.S. climate change litigation cases have been filed by NGOs and individuals, and now SIDS are likely to begin filing strategic climate litigation cases (Setzer and Higham, 2023). The increase in climate litigation cases is being driven by state and non-state actors that want a seat at the table where global climate policy decisions are being made. In requesting an advisory opinion from ITLOS, COSIS has long-term strategic ambitions to enact major international climate policy change via litigation. In this sense, litigation becomes a tool, not of furthering one nation's explicit national interests, but in strengthening the capacity of international institutions, like ITLOS. COSIS states have acknowledged a vested trust in international law to settle disputes. As this study concluded, COSIS member-states and other SIDS are the most likely to sue if ITLOS produces a strong or moderate advisory opinion, thus it seems motivation for states to initiate international climate change litigation may better be understood through the lens of liberalism.

Looking Forward

COSIS's request for an advisory opinion from ITLOS has opened up the possibility of climate litigation cases centered in ITLOS concerning ocean-specific climate cases. Even if ITLOS does not release a strong or even moderate advisory opinion, COSIS SIDS are likely to continue on their path of strategic climate litigation. If the international climate change regime and the law of the sea are joined by this advisory opinion and lawsuits begin to be filed against states who are failing to meet their obligations to protect the marine environment, there will be a significant change in global climate governance. While it is unclear whether lawsuits brought by SIDS against high-emitting countries will result in change in conduct regarding protection of the marine

environment, Setzer and Higham (2023) argue that even unsuccessful cases impact governance.

ITLOS has specified in precedent that the purpose of advisory opinions is to deliver authoritative statements that are not legally binding but provide an interpretation of the law. In the 2021 dispute concerning the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean, ITLOS held that advisory opinions are 'authoritative statements of law,' which 'have legal effect' (Roland Holst, 2022). If ITLOS produces a strong advisory opinion, this definition could have broad implications for the development of global climate litigation. A strong advisory opinion would build on UNCLOS and ITLOS jurisprudence on states' obligation to protect the marine environment. This could entail explicitly defining GHG emissions as marine pollution and explicitly stating the legal utility of reports from the IPCC, increasing the relevance of scientific information in the application of UNCLOS. Critically, this type of advisory opinion could expand the scope of marine pollution covered by UNCLOS to include ocean acidification, which has previously fallen into a 'governance gap' where no single regime of international law addresses it (Roland Holst, 2022).

If ITLOS produces a weak AO, states may be inclined to seek redress in other international courts, such as the ICJ, for UNCLOS disputes. A strong advisory opinion on the obligation to protect the environment *vis a vis* climate change, on the other hand, could provide the necessary detailed language that states could use in legal arguments in lawsuits regarding UNCLOS via ITLOS. Articles 192 and 194 of UNCLOS have already been established to bear an obligation of due diligence, not result, so a strong advisory opinion could give states the grounds to sue other states for specific acts of noncompliance within the commitments to protect and preserve the marine environment (Roland Holst, 2022).

Final Thoughts

This analysis suggests that COSIS as an international legal body, individual COSIS states, and SIDS are the most likely entities to bring a climate litigation suit against a high-emitting state for failure to protect and preserve the marine environment from climate change impacts. The individual states that are most likely to sue are

Mauritius and Vanuatu, but likely COSIS will bring suit. There is potential for class-action suits with COSIS and other AOSIS SIDS as well.

Ultimately, this thesis demonstrates that traditional beliefs about which states engage with international courts and their motivations for doing so are evolving in the context of climate change. While historically, wealthy, powerful states have used international law as a way to uphold the status quo of power balances in the international system, SIDS have begun to gain traction in their strategy to empower a counterweight to the traditionally powerful countries of the global north in international institutions such as ITLOS and the ICJ. This signals that the theoretical framework for predicting which states will sue in international court should shift from realism toward liberalism, when considering SIDS and their growing preference for international law as a way to seek relief from the impacts of climate change.

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APPENDIX

A Note on UNCLOS Dispute Settlement and Climate Change Litigation

UNCLOS Dispute Settlement

UNCLOS is the primary legal body that establishes the governance rules of the world's oceans and their resources (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). UNCLOS opened for signatures in 1982 and entered into force on November 16, 1994. UNCLOS has been ratified by 168 states, with an additional 14 UN member states, such as Afghanistan and Colombia, who signed the convention but did not ratify it (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). Notable states that neither signed nor ratified UNCLOS include the United States, Israel, Turkey, and Venezuela. Among their most significant contributions, UNCLOS has defined the territorial seas, contiguous zones, exclusive economic zones, and maritime boundaries, established rights to marine resources, and assigned responsibilities for marine pollution for each state that has ratified the convention. (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.).

UNCLOS encourages parties to use non-binding means such as negotiation to settle disputes peacefully; however, when these measures fail, the Convention includes compulsory procedures with binding authority (Karim, 2014). When disputes concerning the definition or application of UNCLOS cannot be resolved bilaterally, as outlined in Article 282, the convention outlines several forums where disputes are to be settled. Article 287 lists the options for dispute settlement forums: the ITLOS, The International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein (UNCLOS Article 287). This "cafeteria approach," where state parties to UNCLOS can specify their forum of choice and rank the rest of the options, is unique in international law (Powell and Mitchell, 2022). In the negotiation process of UNCLOS in 1982, 29% of state parties specified their preferred dispute settlement forum as a contingency to signing and ratifying the treaty. Of the forums specified, ITLOS and the ICJ were the most popular (Powell & Mitchell, 2022).

If no specifications were made regarding the preferred form, the default mode of dispute settlement is arbitration under Annex VII.

The International Tribunal for the Law of the Sea

While states often prefer to settle international law disputes diplomatically, there has been a significant increase in the frequency of litigation as a mode of dispute settlement, particularly in international environmental law (Stephens, 2014). ITLOS is the international tribunal whose sole focus is settling disputes concerning UNCLOS. Annex VI of Article 21 of UNCLOS grants ITLOS jurisdiction over all disputes and all applications submitted to it in accordance with UNCLOS and all matters expressly provided for in any other agreement that confers jurisdiction on the Tribunal (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S). While the ICJ has general jurisdiction, ITLOS's jurisdiction is restricted to settling disputes between state parties to UNCLOS on issues specifically regarding the law of the sea. ITLOS is an independent judicial body located in Hamburg, Germany. Its panel of judges consists of 21 independent, elected members from a diverse selection of states and geographic regions who display expertise in the law of the sea (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). It has a considerably smaller caseload than the ICJ, as its sole purpose is to settle UNCLOS disputes and to provide clarification of UNCLOS provisions via advisory opinions.

Article 21 of Annex VI of UNCLOS is of great relevance to this case, as it grants ITLOS jurisdiction over applications submitted to it in accordance with UNCLOS and all matters expressly provided for in any other agreement which confers jurisdiction on the Tribunal (Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.). COSIS utilizes this provision in its request from the tribunal for an advisory opinion, citing the COSIS Agreement, which specifically grants the coalition the authority to request advisory opinions from ITLOS. While certain chambers of ITLOS were intended to serve as advisory bodies, such as the Seabed Disputes Chamber, which has been given clear advisory jurisdiction over issues concerning the seabed, UNCLOS does not explicitly give ITLOS as a judicial body advisory jurisdiction over the convention as a whole

(Lennan, 2021). The lack of specific language, which gives ITLOS complete advisory jurisdiction, leaves room for objections to ITLOS fulfilling COSIS's request in this case.