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COSIS Request for an Advisory Opinion: A Poisoned Apple for the ITLOS?

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Abstract

The request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (COSIS) to the International Tribunal for the Law of the Sea (ITLOS) is part of a larger movement of strategic litigation in relation to climate change, essentially led by civil society. However, the seisin and the questions submitted revive debates on the Tribunal's advisory jurisdiction. In the *Sub-Regional Fisheries Commission Advisory Opinion*, the ITLOS found that its advisory jurisdiction is based on the ITLOS Statute and on an external agreement with provisions for that purpose. However, the conditions for its exercise remain obscure. The COSIS request raises the thorny issue of the compatibility of the external agreement with the United Nations Convention on the Law of the Sea, in particular in light of Article 311. The authority of the Tribunal's opinion depends largely on its care in addressing these difficulties head on.

Keywords

climate change – strategic litigation – advisory jurisdiction – Article 311 United Nations Convention on the Law of the Sea (LOSC)

Introduction

At the beginning of the year, *The Guardian* predicted that ‘2023 will be a watershed year for climate litigation’,¹ as numerous climate-related cases were filed worldwide in 2020–2022² for which the judgement day is getting close. Most of these cases have been introduced, encouraged or backed up by non-governmental organisations (NGOs), activists (including lawyers) and other civil society groups.³ They are undoubtedly part of a movement of strategic litigation which has been developing in the past ten years in various areas of law relating to common values.⁴ In the field of climate change and the protection of the environment, the multiplication of these initiatives bears witness of a sense of urgency and public awareness around climate change-related risks and also of a form of self-empowerment of civil society in an attempt to overcome the tardiness of governmental action and the stalling tactics of corporations.

Expectedly, strategic climate-change litigation has taken priority in courts where private actors have *locus standi*: thus, domestic courts are at the forefront, while international courts have played only a marginal role so far.⁵ States,

1 The author wishes to thank Julien Hellio for his research and editorial assistance. I Kaminski, ‘Why 2023 will be a watershed year for climate litigation’ *The Guardian*, 4 January 2023; <https://www.theguardian.com/environment/2023/jan/04/why-2023-will-be-a-watershed-year-for-climate-litigation>. Internet sites were accessed on 5 March 2023, unless otherwise mentioned.

2 According to a study published by the Grantham Research Institute of Climate Change and the Environment of the London School of Economics, the number of cases has more than doubled since 2015, ‘bringing the total in the databases to 2,002. Roughly one-quarter of these were filed between 2020 and 2022’. J Setzer and C Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot* (Grantham Institute, LSE, London, 2022); <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>.

3 Thus, in 2022 nearly 90 per cent of cases were filed by activists. *Ibid.*, at p. 11.

4 Strategic litigation (or advocacy in the public interest) is commonly understood as the selection and introduction of emblematic court cases. It seeks less to vindicate and protect the individual rights of the claimants, but aims at bringing about normative, social and political changes. The authoritative statement by a court will thus be a tool to put public pressure on governments and corporations through the use of massive communication tools before, during and after the decision. Among an already rich literature on strategic litigation, see H Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (1st ed., Hart, Oxford, 2018), in particular the transversal analysis at pp. 3–82. Concerning climate change strategic litigation, see C Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (CUP, Cambridge, 2022).

5 Researchers account for 133 cases filed before universal and regional courts and quasi-judicial bodies. Setzer and Higham (n 2), at p. 9.

which are the privileged applicants on the international plane, have refrained from bringing contentious cases. The most affected States seem wary to antagonise the great powers, with whom they have to negotiate in international fora and on whose aid they sometimes depend. They also may be prudent about the outcome of such contentious proceedings in an area where legal rules and principles need further clarification and development. On the international plane, short of an *actio popularis* led by States, popular causes were brought by private actors before international human rights courts and bodies and climate change effects have been mainly argued through that prism.⁶ Much more than a fashionable phenomenon, these legal actions are part of a long-term effort of civil society to shape the development of climate change law.

The current initiatives to seek advisory opinions on climate change law from international courts and tribunals are part of this bigger picture. Unlike the other climate change cases, these are not contentious cases and they are not submitted by private actors, but by States (though sometimes with private actor's impulse). States' participation in the movement of climate change litigation is generally acclaimed, but the conditions of their submission also raise concern.

In 2017, the Inter-American Court of Human Rights delivered an advisory opinion upon request by Colombia regarding States' obligations to protect the marine environment and human habitat in coastal areas when they undertake the construction and operation of major new infrastructure projects.⁷ On 9 January 2023, Chile and Colombia introduced a joint request for an advisory opinion seeking to clarify State obligations in the face of the climate emergency.⁸

Also in 2023, the International Court of Justice (ICJ) will be seized by the United Nations General Assembly with a request for an advisory opinion on

6 For instance, three climate change applications are due to be heard in 2023 by the European Court of Human Rights: *Verein Klimasenioren Schweiz and Others v. Switzerland* (application no. 53600/20); *Carême v. France* (application no. 7189/21); and *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20).

7 *Request by the Republic of Colombia: The Environment and Human Rights*, Advisory Opinion, 15 November 2017, Inter-American Court of Human Rights OC-23/17.

8 Joint Statement of Chile and Colombia (9 January 2023), available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition-1.pdf; accessed 13 March 2023. See also J Auz and T Viveros-Uehara, 'Another advisory opinion on the climate emergency? The added value of the Inter-American Court of Human Rights' (*EJIL: Talk!*, 2 March 2023) <https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>. For a comprehensive study of the various requests for advisory opinions, see B Mayer, 'International advisory proceedings on climate change' (2023) 44 *Michigan Journal of International Law* 41–115.

the obligations of States in respect of climate change. Significantly, this initiative was put before the Pacific Island Forum in 2019 by an alliance of Pacific students,⁹ before being taken up by Vanuatu in 2021, which has since then led an all-terrain campaign at the United Nations to negotiate and seek support for the resolution.¹⁰ On 29 March 2023, the General Assembly adopted resolution A/RES/77/276 (Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change); this was adopted by consensus, which is a first for this kind of resolution.

The request submitted to the International Tribunal for the Law of the Sea (ITLOS) on 12 December 2022 (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law – the COSIS Request*) took a different course – a shortcut, one may say. At the opening in Glasgow of COP 26 of the Parties to the 1992 UN Framework Convention on Climate Change (UNFCCC), the prime ministers of Antigua and Barbuda and Tuvalu signed the Agreement Establishing the Commission of Small Island States on Climate Change and International Law (the COSIS Agreement of 31 October 2021), the sole purpose of which is to enable the COSIS to seek advisory opinions from ITLOS. The Agreement, which is open to accession by any other members of the Alliance of Small Island States, has so far been ratified only by Niue, Palau, St. Lucia and Vanuatu.

Once more, the initiative for an ITLOS advisory opinion comes from private persons. This move was indeed inspired and prepared by lawyers with a good knowledge of the liberal case law on advisory jurisdiction of the ITLOS,¹¹ resulting from the opinion rendered on 2 April 2015 at a *Request Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*. This mode of seisin will probably revive the discussions concerning the advisory jurisdiction of the ITLOS despite the unanimous conclusions in favour of it in the *SRFC Advisory Opinion*. One cannot ignore the critics brought to the Tribunal's open approach, on account that it 'might encourage States to enter into new agreements, the sole purpose of which is to request an advisory opinion from the full Tribunal over a matter under another agreement that does not confer such jurisdiction'.¹² The COSIS request has all the ingredients to fit within such a case scenario.

9 Pacific Islands Students Fighting Climate Change, available at <https://www.pisfcc.org/>.

10 See the official website of the project 'Vanuatu ICJ Initiative' available at <https://www.vanuatuicj.com/home>.

11 D Freestone, R Barnes and P Akhavan, 'Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law' (2022) 37(1) *International Journal of Marine and Coastal Law (IJMCL)* 175–178.

12 Y Tanaka, 'The role of an advisory opinion of ITLOS in addressing climate change: Some preliminary considerations on jurisdiction and admissibility' (2022) 31 *Review of*

Through the modalities of its submission and the questions asked, the COSIS request pushes the limits of the liberal interpretation of its advisory jurisdiction given by the Tribunal in its *SRFC Advisory Opinion*. In these circumstances, the Tribunal will have to engage with the objections to jurisdiction and inadmissibility more thoroughly than it did in 2015,¹³ if it wishes to convince the reluctant States of the legitimacy of its advisory function. This is a question of judicial policy in the long run, but also for the short term, since the 2022 Request is presumably only the first of a series to be deposited by COSIS (Article 1(3) of the COSIS Agreement refers to ‘advisory opinions’ in the plural). Even if the question of the basis of jurisdiction has been authoritatively settled, this request is nonetheless an occasion to develop jurisdictional aspects, in particular in light of the Tribunal’s advisory function, largely left aside in 2015. Furthermore, the nature and the interpretation of the ‘prerequisites’¹⁴ established by Article 138 of the ITLOS Rules require considerable clarification.

Don’t Take the Trouble to Put the Genie Back in the Bottle

The *SRFC Advisory Opinion* resolved the question of the advisory function of the full Tribunal,¹⁵ despite the absence in the United Nations Convention on

European, Comparative and International Environmental Law (RECIEL) 1–11; see also A Proelss, ‘Advisory opinion: International Tribunal for the Law of the Sea (ITLOS)’ (2019) *Max Planck Encyclopedias of International Law*. The same position was expressed by several States during the *SRFC* proceedings. *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, p. 4 [*SRFC Advisory Opinion*]. See written statements by: China, para 5; Ireland, paras 3.1–3.2; Australia, paras 38–39; Portugal, para 14; Argentine Republic, para 16; United Kingdom, para 35; Thailand, pp. 3–4; France, p. 3; Spain, para 15. See also Declaration of Judge Cot, para 9. Japan, otherwise a supporter of the advisory jurisdiction of the ITLOS, insisted that ‘[t]he MCA Convention is not an *ad hoc* agreement concluded solely for the purposes of resorting to the advisory procedure before the Tribunal, nor is the *SRFC* a mere group of States or an *ad hoc* inter-state commission established solely for requesting an advisory opinion of the Tribunal’ (Written statement of Japan, para 12).

13 Ruys and Soete rightly pointed out that ‘the brevity with which the Tribunal does away with the objections to its jurisdiction is regrettable’. T Ruys and A Soete, ‘“Creeping” advisory jurisdiction of international courts and tribunals? The case of the International Tribunal for the Law of the Sea’ (2016) 29(1) *Leiden Journal of International Law* 155–176, at p. 161. In the same vein, *SRFC Advisory Opinion* (n 12), Declaration of Judge Cot, para 9; Tanaka (n 12) 1–11, at pp. 3–4; RJ Roland Holst, ‘Taking the current when it serves: Prospects and challenges for an ITLOS advisory opinion on oceans and climate change’ (2022) *RECIEL* 1–9, at p. 8.

14 *SRFC Advisory Opinion* (n 12), paras 59–61.

15 The Seabed Disputes Chamber (SDC) has jurisdiction to give an advisory opinion at the request of the Assembly or the Council of the International Seabed Authority on legal

the Law of the Sea (LOS) of a provision to that effect. There are no reasons for the Tribunal to overturn that unanimous decision. On the contrary, the doctrinal critics, numerous as they may be, are not shared by States; moreover, the Tribunal's conclusions, based on a constructive interpretation of Article 21 of the ITLOS Statute, are justified from a systemic and teleological perspective.

ITLOS as an 'Autonomous Judicial Body'

Many arguments plead in favour of acknowledging that the ITLOS is an international organisation of its own,¹⁶ with its Statute being its constitution. With regard to extent of the legal personality of the Tribunal, there is no doubt that the Tribunal is recognised as an 'autonomous judicial body'.¹⁷ The European Court of Justice, in a case concerning representation of the European Union during the *SRFC* proceedings, qualified it as an 'international judicial body requested to give an advisory opinion, the adoption of which falls solely within the remit and responsibility of the members of that body, acting, to that end, wholly independently of the parties'.¹⁸

Several consequences flow from this premise. The first is that the Statute, as the constituent instrument of an international organisation, is a treaty of a particular kind. As the ICJ noted about this type of instruments in the *Nuclear Weapons (WHO) Advisory Opinion*, 'their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals'.¹⁹

The Tribunal was established as a permanent body, the only one having specialised competence over law of the sea issues. Since the Statute is its constitution, the Tribunal's *functions* are defined by it (or rather indirectly shaped,

questions arising within the scope of their activities. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 Article 159(10), 191 [LOS]; LOS, Annex VI: Statute of the International Tribunal of the Law of the Sea, Article 40 [ITLOS Statute]. On the conditions for the advisory jurisdiction of the SDC, see *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, paras 31–46.

16 In the same vein, PC Rao and P Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Elgar Publishing, Cheltenham, 2018) 34–35; E Lagrange, 'Les organisations à vocation universelle' in M Forteau and J-M Thouvenin (eds), *Traité de droit international de la mer* (Pedone, Paris, 2017) 255–277, at p. 265.

17 United Nations General Assembly (UNGA), Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea, UN Doc A/RES/52/251 (15 September 1998).

18 European Court of Justice, 6 October 2015, *Council v. Commission*, Judgment of the Court (Grand Chamber), Case C-73/14, para 66.

19 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 66, para 19 (emphasis added) [*Nuclear Weapons (WHO) Advisory Opinion*].

since the Statute does not contain any specific provision to that effect). Hence, the Tribunal was certainly right to consider that Article 21 of the Statute was not 'subordinate' to the jurisdictional provisions of the LOSC. However, the Statute's treaty value, upon which the Tribunal insisted,²⁰ is not in itself a source of autonomy from the Convention. This autonomy can be analysed from two perspectives. On the one hand, the institutional autonomy of the Tribunal as a judicial body²¹ is certain, and this implies a number of powers necessary to fulfil the missions entrusted to it, including the power to interpret its statutory provisions (cf. the principle of *kompetenz kompetenz*).²² On the other hand, one may be tempted to assert the normative autonomy of the Statute and its provisions, but this would be a dead end, as the two instruments are interconnected (see Article 318 of the Convention).²³ Their respective provisions must therefore be interpreted in a uniform manner, and this is what the Tribunal did in the *SRFC Advisory Opinion*.²⁴

Furthermore, systemic considerations come into play. In order to grasp them, it is useful to recall the distinction between the functions of the Tribunal, that is, the purposes for which it was created, and its jurisdiction, that is, the competence to act in a given case.²⁵ If the Statute creates the Tribunal as 'an international institution with a special purpose'²⁶ and therefore defines its *functions*, its *jurisdiction* may derive from the Convention, but also from other international agreements which contain jurisdictional provisions designating ITLOS as the competent body. The LOSC is thus an instrument which provides

20 *Ibid.*, para 52.

21 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, *ICJ Reports 1954*, p. 47, at pp. 52–53; International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, *Tadić*, IT-94-I-AR72, para 19.

22 See, *inter alia*, ICTY (n 21), paras 15–18.

23 See also Article 31(2) of the Vienna Convention on the Law of Treaties which identifies the annexes as elements of the context. Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) 1155 *UNTS* 331.

24 *SRFC Advisory Opinion* (n 12), paras 54–56.

25 For an analysis of the concept of 'function', see D Shelton, 'Form, function, and the powers of international courts' (2009) 9(2) *Chicago Journal of International Law* 537–571. As the ICTY's appeal chamber noted, 'a narrow concept of jurisdiction [may be] reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae* and *materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically – as is visible from the Latin origin of the word itself, *jurisdictio* – a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner'. ICTY (n 21), para 10.

26 *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, 8 December 1927, Permanent Court of International Justice (PCIJ) *Series B, No. 14*, p. 64.

for the jurisdiction of the Tribunal, but it does not enjoy a monopoly for that purpose. Pursuant to Article 288(2) of the LOSC and Articles 20 to 22 of the Statute, its jurisdiction can also be established by other international agreements related to the purposes of the Convention. Arguably, Article 288(2), by referring to ‘any dispute’, covers only the contentious jurisdiction of the Tribunal and not the advisory one. But what matters is that all these provisions confirm that the source of the jurisdiction of the ITLOS can be derived from another treaty.²⁷ The various law of the sea conventions are thus potentially linked to the system of dispute settlement established in 1982, which further confirms that the LOSC (and its annexes) are a ‘constitution’ for the ocean, not only from a normative, but also an institutional perspective.

Teleological arguments may also help justifying the advisory function of the ITLOS. The institutions and mechanisms established by the LOSC and under its umbrella are designed to ensure ‘the legal order of the oceans’ (LOSC Preamble). The coherence of the system as a whole – albeit a horizontal one – is ensured through the normative *renvois* to external conventions, but also by creating this institutional bridge through dispute settlement between the LOSC and the other law of the sea conventions. Though largely unexplored until now, this bridge is also a path towards harmonised interpretation of the law of the sea agreements and an antidote to the excessive normative and institutional fragmentation of the law of the sea. It is thus another manifestation of the consciousness that ‘the problems of ocean space are closely interrelated and need to be considered as a whole’ (LOSC Preamble).

Finally, as an autonomous judicial body, the Tribunal ‘has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it’.²⁸ This does not mean that the advisory function is inherent to the judicial nature of a body.²⁹ But the absence from the Statute of a specific mention of the advisory function must be read in light of the Tribunal’s purposes.³⁰ Beyond its potential for a harmonised and coherent interpretation

27 See also T Treves, ‘A system for law of the sea dispute settlement’ on D Freestone *et al.* (eds), *The Law of the Sea: Progress and Prospects* (OUP, Oxford, 2006) 417–432.

28 *Jurisdiction of the European Commission of the Danube* (n 26), at p. 64 quoted in *Nuclear Weapons (WHO) Advisory Opinion* (n 19), para 25.

29 See also H Thirlway, ‘Advisory opinions’ (2006) *Max Planck Encyclopedia of Public International Law* para 4.

30 The absence of an express provision does not constitute an absolute impediment. As noted by Laurence Boisson de Chazournes, ‘[w]hile the PCIJ Statute did not provide for advisory opinions until its inclusion in the 1929 revised Statute which came into force in 1936, there was nonetheless a practice of requesting opinions before that revision, premised on the Rules of Court’. L Boisson de Chazournes, ‘Advisory opinions and the furtherance of the common interest of humankind’ in L Boisson de Chazournes *et al.* (eds),

of the law of the sea, the advisory function indirectly participates to the dispute settlement function, being a form of ‘preventive diplomacy ... In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States.’³¹

Regrettably, the *SRFC Advisory Opinion* lacks this systemic perspective, but focuses instead on the literal interpretation of the Statute.

Some Observations on the Tribunal's Interpretation of Article 21 of the Statute

Article 21 of the Statute (Jurisdiction) provides:

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters* specifically provided for in any other agreement which confers jurisdiction on the Tribunal.³²

The Tribunal held that ‘[t]he words all “matters” should not be interpreted as covering only “disputes”, for, if that were to be the case, Article 21 of the Statute would simply have used the word “disputes”’,³³ but necessarily refers to something more than only disputes. According to the Tribunal, this ‘something more must include advisory opinions, if specifically provided for in “any other agreement which confers jurisdiction on the Tribunal”’.³⁴ The Tribunal’s argumentation is convincingly (though implicitly) based on the principle of the *effet utile*. Less convincing is the extreme reliance on the literal interpretation of that phrase³⁵ which, as Judge Cot observed, presupposes that ‘there is a plain meaning which can be ascribed to the article and that the term “matters”

International Organizations and International Dispute Settlement: Trends and Prospects (Transnational Publishers, Ardsley, NY, 2002) 105–118. It should nonetheless be added that Article 14 of the Covenant of the League of Nations granted to the Court advisory jurisdiction upon request by the Council and the Assembly.

31 ‘Advisory Jurisdiction’ (International Court of Justice) available at <https://www.icj-cij.org/advisory-jurisdiction>.

32 Emphasis added.

33 *SRFC Advisory Opinion* (n 12), para 56.

34 *Ibid.*

35 The same can be said about the excessively restrictive meaning given to the word ‘applications’ in Articles 21 and 23, as being synonym to ‘disputes’, although the two words are used (cumulatively and not alternatively) in the same provision. *Ibid.*, para 55.

is more precise than it actually is'.³⁶ At the same time, Judge Cot refers to the French version ('*toutes les fois que cela est expressément prévu dans tout autre accord*'),³⁷ but little can be drawn from it, since the French version is isolated in its circumstantial nuance. By contrast, both the Spanish³⁸ and the Russian³⁹ versions contain concepts equivalent to 'all matters' – yet the Tribunal did not inquire into the nuances of the different linguistic versions.

The Tribunal considers that Article 21 and the phrase 'all matters' provide for its advisory *jurisdiction*. One may also consider that this provision leaves it open to the Tribunal to exercise an advisory *function*, the basis of *jurisdiction* being only the 'other agreement'.⁴⁰ The Tribunal opted nonetheless for a cumulative legal basis: 'Article 21 and the "other agreement" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal'.⁴¹

The Tribunal's interpretation has been criticised as *petitio principii* or as an act *ultra vires* that should be undone through a formal amendment of the Statute.⁴² Authors with less extreme views do not do not go as far as seeking

36 *Ibid.*, Declaration of Judge Cot, para 3.

37 Emphasis added. The French version does not refer to "matters" and does not translate that term by "matières", which would have been the case had the Convention drafters intended to confer upon the term the special meaning encompassing a reference to advisory jurisdiction.' *Ibid.*

38 '[A] *todas las cuestiones* expresamente previstas en cualquier otro acuerdo que confiera competencia al Tribunal' (emphasis added).

39 '[U] *все вопросы*, специально указанные в любом другом соглашении, которое предусматри-вает компетенцию Трибунала' (emphasis added). See also the linguistic analysis made by A von Rebay and C Oberle, 'Booming Advisory Jurisdiction of the International Tribunal for the Law of the Sea?'; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380353, accessed: 3 April 2023.

40 Judge TM Ndiaye expressed a similar view: 'Il vaut mieux passer par la voie de l'accord pour aboutir à une juridiction consultative du Tribunal plutôt que de rechercher un fondement juridique inexistant dans la Convention ou le Statut'. 'Les avis consultatifs du Tribunal international du droit de la mer' in L Del Castillo (ed), *Liber Amicorum Judge Hugo Caminos* (Brill, Leiden, 2015) 622–653, at p. 645.

41 *SRFC Advisory Opinion* (n 12), para 58. Drawing the distinction between the basis of the advisory function and the basis of jurisdiction would also avoid confusing statements like the one in paragraph 56 of the *SRFC Advisory Opinion*: 'When the "other agreement" confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to "all matters" specifically provided for in the "other agreement"'.

42 M Lando and N Ridi, Submission to the House of Lords Inquiry, 'UNCLOS: Is It Fit for Purpose in the 21st Century?' (Submission UNCO041) available at <https://committees.parliament.uk/writtenevidence/40882/html>; M Lando, 'The advisory jurisdiction of the International Tribunal for the Law of the Sea: Comments on the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*' (2016) 29 *Leiden Journal of International Law* 441–461, at p. 456.

the means to reverse the Tribunal's conclusions, but consider nonetheless the Tribunal's reasoning to be too elliptic.⁴³ They note that the Tribunal overlooked the silences of the LOSC and the Statute, including the absence of any reference to the advisory function in the *travaux préparatoires*.⁴⁴ However, as shown above, there are prevailing arguments in favour of the existence of an advisory function: they are textual and contextual, they rely on the *effet utile*, and they are ultimately in line with the Tribunal's systemic role.

The Confirmatory Role of Institutional Practice

When it adopted its Rules back in 1997, ITLOS introduced an express reference to its advisory function and detailed the conditions for the exercise of its advisory jurisdiction in Article 138. As noted by Judge Cot, 'for two decades there has been no reaction at all from the States Parties to the language of article 138 of the Rules'.⁴⁵ Further, after the *SRFC Advisory Opinion* was given, few States challenged the Tribunal's conclusion. Contrary to what some commentators have suggested,⁴⁶ the reports from the meetings of the State Parties show that only one State squarely opposed that ITLOS had advisory jurisdiction, while many others agreed with the Tribunal.⁴⁷

Thus, it can be argued the Tribunal's conclusions were endorsed (expressly or tacitly) by most of the State Parties to the Statute. When it comes to the interpretation of constituent instruments of international organisations, such acknowledgment plays a significant role.⁴⁸ Finally, the inclusion in the Draft

43 Ruys and Soete (n 13), at p. 161; Proelss (n 12), para 32; Tanaka (n 12), at pp. 3–4.

44 S-I Lekkas and C Staker, 'Article 21' in A Proelss (ed), *United Nations Convention for the Law of the Sea: A Commentary* (Beck, Nomos and Hart, Munich, 2017) 2374–2382; M García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Brill, Leiden, 2015) 311; Tanaka (n 12), at pp. 3–4. There is certainly no duty to refer to the *travaux préparatoires* when the meaning of a provision was ascertained as sufficiently clear on the basis of the general rule of interpretation in light of Article 31 of the Vienna Convention on the Law of Treaties. See, *inter alia*, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*, Preliminary Objections, Order of 8 November 2019, *ICJ Reports 2019*, p. 677, para 112.

45 *SRFC Advisory Opinion* (n 12), Declaration of Judge Cot, para 4. See also, *SRFC Advisory Opinion* (n 12), Declaration of Judge Lucky, para 18. In the same vein, Judge Ndiaye noted that States had the occasion to express their opposition on several occasions prior to 2015, in particular when the ITLOS President refers to it in its speeches. Ndiaye (n 40), at pp. 645–647). See also ITLOS, Rules of the Tribunal (ITLOS/8, adopted 28 October 1997, most recent amendment 25 March 2021).

46 *Contra* Proelss (n 12), para 19; Tanaka (n 12), at pp. 4–5.

47 Report of the Twenty-Fifth Meeting of States Parties, UN Doc SPLOS/287 (13 July 2015), paras 22–23.

48 *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, *ICJ Reports 1962*, at pp. 157, 160, 165–181; *Nuclear Weapons (WHO) Advisory Opinion* (n 19), paras 18–19.

agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement) of a provision granting advisory jurisdiction to the Tribunal gives universal confirmation that overall the 2015 conclusions were welcome and that they cannot be undone. However, this provision⁴⁹ is carefully drafted and shows that States are not willing to give a blank cheque to the Tribunal to give an advisory opinion on any subject matter falling within the scope of the BBNJ Agreement or involving bilateral disputes and even less over the LOSC in general. As underlined by Richard Barnes, 'there is concern that the door has been opened to an advisory jurisdiction that is too wide',⁵⁰ and such concern can only be met by a more careful assessment of the conditions to the Tribunal's advisory jurisdiction.

Are the Conditions for the Tribunal's Advisory Jurisdiction Too Open-Ended?

Logically, the conditions for the Tribunal's advisory jurisdiction should result, on the one hand, from the Statute and the Rules, and on the other, from the external agreement granting advisory jurisdiction to the Tribunal in a specific case. The articulation between these sources is unclear and the conditions for jurisdiction remain, to a large extent, obscure.

The Tribunal stated that 'Article 138 of the Rules furnishes the *prerequisites* that need to be satisfied before the Tribunal can exercise its advisory jurisdiction'.⁵¹ The Tribunal is obviously uncomfortable with the conditions

49 'The Conference of the Parties may decide to request the International Tribunal for the Law of the Sea to give an advisory opinion on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence. A request for an advisory opinion shall not be sought on a matter within the competence of other global, regional, subregional or sectoral bodies, or on a matter that necessarily involves the concurrent consideration of any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto, or the legal status of an area as within national jurisdiction. The request shall indicate the scope of the legal question on which the advisory opinion is sought. The Conference of the Parties may request that such opinion be given as a matter of urgency'. UNGA, Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (4 March 2023), Article 48(6).

50 R Barnes, 'An advisory opinion on climate change obligations under international law: A realistic prospect?' (2022) 53(2-3) *Ocean Development & International Law* 180-213, at p. 213.

51 *SRFC Advisory Opinion* (n 12), paras 59-60 (emphasis added).

of its advisory jurisdiction established by the Rules, that is, by a legal instrument adopted by the Tribunal itself and which can be amended by it.⁵² This uneasiness is, however, hard to understand. The Tribunal has the inherent power to interpret, in its Rules, the conditions encompassed in Article 21 of the Statute.⁵³ In the case of advisory jurisdiction, such conditions are expressed in such an elliptic manner that their clarification seems all the more necessary to preserve the integrity of the Tribunal's functions and not to let States freely dispose of them in the external agreement providing for its jurisdiction.⁵⁴ It is desirable that, one day, Article 138 of the Rules shall be amended to reflect the concerns about the preservation of the integrity of the Tribunal's functions and the responses given by the Tribunal in its advisory practice.

Naturally, the external agreement, which constitutes a necessary basis for the advisory jurisdiction, can establish further conditions. The Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (MCA Convention) did so in a loose manner, by covering only the procedure for seizing the Tribunal,⁵⁵ but as the BBNJ Agreement shows,⁵⁶ States may wish to restrain the scope of advisory jurisdiction. When assessing the jurisdictional requirements, the Tribunal must deal both with the

52 The use of the phrase '*prerequisites to the exercise*' rather than '*conditions for jurisdiction*' is an attempt to linguistically downplay to procedural details the status of those requirements. This is even clearer in the French version of the Opinion in which '*prerequisites*' was translated either by '*conditions*' (*ibid.*, paras 59–60) or by '*conditions procédurales*' (*ibid.*, para 61).

53 The ICJ did the same as regards the conditions for intervention provided for in Articles 62 and 63 of the Statute. See A Miron and C Chinkin, 'Article 62' and 'Article 63' in A Zimmermann, CJ Tams, K Oellers-Frahm and C Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2019) 1700–1701, 1752.

54 As the ICJ held, '[a] special agreement allows the parties to define freely the limits of the jurisdiction, *stricto sensu*, which they intend to confer upon the Court. It cannot allow them to alter the limits of the Court's judicial function: those limits, because they are defined by the Statute, are not at the disposal of the parties, even by agreement between them, and are mandatory for the parties just as for the Court itself'. *Frontier Dispute (Burkina Faso/Niger)*, Judgment, 16 April 2013, *ICJ Reports* 2013, p. 44, para 46; see also *Free Zones of Upper Savoy and the District of Gex*, Order, 19 August 1929, PCIJ Series A, p. 12.

55 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (Dakar, 8 June 2012, in force 16 September 2012), Article 33 (Seizure of the International Tribunal for the Law of the Sea for advisory opinion) provides: 'The Conference of Ministers of the SRFC shall authorise the Permanent Secretary of the SRFC to seize the International Tribunal for the Law of the Sea on a specific legal matter for its advisory opinion.'

56 See above (n 49).

statutory conditions, as they are interpreted by Article 138 of the Rules, and with the conditions established by the treaty providing for its advisory jurisdiction. The conditions in the latter are obviously particular to each treaty, but Article 138 of the Rules contains common *ratione personae* and *ratione materiae* conditions.

Conditions Ratione Personae: Who Has Locus Standi?

Advisory proceedings help transcend the State-centred limits of the international judiciary, as they provide the opportunity ‘for particular international organizations to engage [international courts and tribunals] on a controversial legal question’.⁵⁷ The procedural rules of participation have been interpreted and applied to ensure better social inclusiveness. Alongside intergovernmental organisations, advisory proceedings have also been a way for civil society, or more exactly NGOs, to take part indirectly in the development of law through the advisory process.⁵⁸ But their involvement is governed by the rules of the intergovernmental organisation, and States remain in the end ‘the entities which vote ... in favour of a request for an advisory opinion’.⁵⁹

The condition *ratione personae* in Article 138(2) of the Rules of the Tribunal, which provides that ‘a request ... shall be transmitted ... by *whatever body* is authorized by or in accordance with the agreement’ (emphasis added), has been given different meanings. To simplify, there are two views: a narrow one arguing that the phrase ‘whatever body’ encompasses only organs of international organisations;⁶⁰ and a broad one suggesting that the term ‘refers to the competent organ of any entity, State or organisation, which is empowered under the agreement to submit the request’.⁶¹

Turning to the nature of COSIS, Article 1(2) of the Agreement, which provides that ‘[t]he Commission shall have international legal personality’, seems to be largely understood as conferring to it the nature of an international

57 R Wolfrum, ‘Advisory opinions: An alternative means to avoid the development of legal conflicts?’ in H Ruiz Fabri (ed), *International Law and Litigation: A Look into Procedure* (Nomos, Baden-Baden, 2019) 99–106, p. 101.

58 See above, Introduction. This was not always received favourably. See, for instance the critique by Judge Guillaume *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 226, Separate Opinion of Judge Guillaume, para 2.

59 Boisson de Chazournes (n 30), at p. 117.

60 TM Ndiaye, ‘The advisory function of the International Tribunal for the Law of the Sea’ (2010) 9(3) *Chinese Journal of International Law* 583; see also Ndiaye (n 40), at pp. 622, 647–648; Tanaka (n 12), at p. 7; Proelss (n 12), para 27.

61 Judge R Wolfrum, Statement Given on Agenda Item 75(a) at the Plenary of the Sixtieth Session of the UNGA Assembly (28 November 2005) 10, para 16; see also Wolfrum (n 57), at p. 104; Judge JL Jesus, ‘Article 138 of the Rules of the Tribunal: Commentary’ in PC Rao and P Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff Publishers, Leiden, 2006) 394.

organisation.⁶² This view can be challenged: just as a birth certificate is not enough to give life to a person, a stipulation of this sort is insufficient to create an international organisation. *A contrario*, the absence of a similar provision is not decisive for the nature of an intergovernmental institution. Overall, COSIS enjoys too few of the characteristics of an international organisation (it has no headquarters, no other bodies, no budget).⁶³ However, in the present proceedings, this will only matter if the Tribunal decides that it will be necessary to interpret the term 'body' and opt for the narrow interpretation mentioned above. But the Tribunal could also choose the pragmatic way of avoiding the question. As Judge Jesus suggested years ago, 'it seems to be of little relevance to dwell on the nature of [the requesting body]. Its legitimacy to transmit the request is derived from the authority given to it by the agreement and not by its nature or any other structural or institutional considerations'.⁶⁴

Whatever the interpretation retained of the term 'body', it is a fact that the advisory jurisdiction is *ratione personae* broader than before the Permanent Court of International Justice (PCIJ) or the ICJ,⁶⁵ inasmuch as the list of entities endowed with *locus standi* is not exhaustively defined by the Statute, but open to further developments by relevant external agreements. It is true also that, for the moment, only the MCA Convention, the COSIS Agreement and the BBNJ Agreement contain a clause providing advisory jurisdiction for the ITLOS. Yet, many commentators point to the fact that, if the questions addressed are drafted by organs with a narrow composition, the filter provided by the process of negotiations and vote within a universal body would become largely ineffective.⁶⁶

Importantly, participation to the written and oral phase of the advisory proceedings could, to some extent, compensate for the limited representativity of the body requesting the opinion. Indeed, States which did not participate

62 P Webb, 'EJIL: ThePodcast! Episode 18 – "Be Careful What You Ask For"' (*EJIL: Talk!*, 28 February 2023) available at <https://www.ejiltalk.org/ejilthe-podcast-episode-18-be-careful-what-you-ask-for/>.

63 According to the generally used definition crafted by Sir Gerald Fitzmaurice in his capacity as a special rapporteur of the International Law Commission, an international organization is a 'a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity'. G Fitzmaurice, 'Report on the law of treaties' (1956) 2 *Yearbook of the International Law Commission* 108. See also *mutatis mutandis*, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, *ICJ Reports 1949*, at pp. 178–179.

64 Jesus (n 61), at p. 394.

65 M Wood, 'Advisory jurisdiction: Lessons from recent practice' in HP Hestermeyer *et al.* (eds), *Liber Amicorum Rüdiger Wolfrum* (Brill, Leiden, 2011) 1833–1849.

66 In the *SRFC Advisory Opinion* (n 12), Judge Cot, para 8. See also Tanaka (n 12), at p. 8.

in the drafting process and had no say in the submission of the request may nonetheless present their views to the Tribunal on jurisdiction, admissibility and substance. The larger the procedural participation, the more informed the Tribunal will be. But the Tribunal can just encourage this participation. In general, in advisory proceedings, all courts have sought to ensure better inclusiveness and the representation of wider sections of international society by addressing invitations to States and international organisations,⁶⁷ and by accepting *amici curiae* submissions from NGOs.

Conditions Ratione Materiae: Double Link and No Chain

It stems from the *SRFC Advisory Opinion* that there is a double connection requirement which delimits the scope of jurisdiction *ratione materiae*.

On the one hand, Article 138 of the Rules stipulates that an ‘international agreement *related to the purposes of the Convention* specifically provides for the submission to the Tribunal of a request for an advisory opinion; ... and such an opinion may be given on “a legal question”’.⁶⁸ Article 138 thus deals with the inter-relation between the LOSC and the external agreement, the latter being ‘related to the purposes’ of the former.

On the other hand, the Tribunal added a question-related requirement, according to which it is necessary that ‘the questions posed ... constitute *matters which fall within the framework of the MCA Convention*’⁶⁹ or that they have ‘a “*sufficient connection*” ... with the *purposes and principles* of the MCA Convention’.⁷⁰ This question-related requirement is absent from the Rules and from the MCA convention,⁷¹ but is presumably derived from the Statute, since, in addressing the question ‘*to what matters* the advisory jurisdiction extends’,⁷² the Tribunal referred once more to the phrase ‘all matters specially provided for’ in Article 21. It is also inspired by the limitations concerning the advisory jurisdiction of the Seabed Disputes Chamber⁷³ or the specialised agencies

67 For the invitations addressed by the Tribunal for the COSIS proceedings, see *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Order, 16 December 2022.

68 *SRFC Advisory Opinion* (n 12), para 60 (emphasis added). The condition of a ‘legal question’ does not call for extensive analysis here as it has been covered in numerous writings and, in practice, it has never been an obstacle to the advisory jurisdiction.

69 *Ibid.*, para 67 (emphasis added).

70 *Ibid.*, para 68 (emphasis added).

71 See J Gao, ‘The ITLOS advisory opinion for the SRFC’ (2015) 14(4) *Chinese Journal of International Law* 735–755, at para 16.

72 *SRFC Advisory Opinion* (n 12), para 67.

73 Article 191 of the LOSC (n 15) provides that the Seabed Disputes Chamber ‘shall give advisory opinions at the request of the Assembly or the Council on legal questions *arising within the scope of their activities*’ (emphasis added).

authorised to seize the ICJ under Article 96(b) of the Charter. In any event, this requirement derives from the principle of speciality of international organisations,⁷⁴ but it is only applicable if the request was indeed submitted by an international organisation.

Several commentators have argued that the Tribunal's advisory jurisdiction should be limited to questions concerning the interpretation and application of the external agreements.⁷⁵ During the meetings of the Assembly of State Parties, several representatives have expressed concern that 'jurisdiction should not extend to general matters beyond the scope of those agreements'.⁷⁶ The Tribunal relied upon the second connection requirement to expand the scope of the questions asked beyond 'the interpretation or application of any specific provision of the MCA Convention'.⁷⁷ The position adopted by the ITLOS reflects that adopted by the ICJ in the *Nuclear Weapons (WHO) Advisory Opinion* which was centred on the scope of the activities of the requesting organisation.⁷⁸ But methodologically, the Tribunal departed from it considerably: whereas the ICJ dwelt at length with the functions and scope of the activities of the World Health Organization (WHO), in light of the principle of speciality, ITLOS made no similar analysis concerning the activities of the SRFC and the correlation between the questions asked and the scope of those activities.⁷⁹ Will the Tribunal engage more with that condition in relation to the COSIS, knowing that its practice so far seems to have focused on the preparation of the request only?

The Tribunal has the power, indeed the duty, to verify that the questions asked, as well as the modalities of its seisin, are compatible with the rules governing its jurisdiction, and fall within the competence of the international organisation(s) submitting the request. With no specific limitation *ratione materiae* as to the questions asked, the Tribunal's advisory jurisdiction risks becoming universal, at least as far as the law of the sea is concerned. This is the case of the COSIS, which provides that the question to be asked is 'any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea'.⁸⁰

74 *Nuclear Weapons (WHO) Advisory Opinion* (n 19), para 25.

75 Proelss (n 12), para 23; T Treves, 'Article 288' in Proelss (ed) (n 44), pp. 1857–1862, at para 8.

76 Report of the Twenty-Fifth Meeting of States Parties (n 47), para 23.

77 *SRFC Advisory Opinion* (n 12), para 68.

78 *Nuclear Weapons (WHO) Advisory Opinion* (n 19), paras 18–26, 28.

79 The Tribunal simply asserts that its opinion 'will assist the SRFC in the performance of its activities'. *SRFC Advisory Opinion* (n 12), para 77.

80 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (Edinburgh, 31 October 2021), Article 2(2) [COSIS Agreement].

Such open-ended agreements also raise questions concerning their compatibility with the LOSC. They can be analysed in light of the first connection requirement provided for in Article 138 of the Rules, according to which the external agreement must be 'related to the purposes of the Convention'. Judge Mensah had a broad view of this requirement, considering it fulfilled whenever 'this agreement affects an issue that is addressed by the Convention, irrespective of the degree of specificity'.⁸¹ Other authors argue that the external convention should be 'governing a substantive issue'⁸² within the scope of the LOSC rather than limiting itself to being the locus of advisory jurisdiction. This view could find some support in the Preamble of the LOSC, which defines its 'goals'⁸³ in substantive terms.⁸⁴ In the *SRFC Advisory Opinion*, the external agreement was held to be related to the purposes of the Convention insofar as its objective was to *implement* the substantive provisions of the LOSC in relation to fisheries.⁸⁵ In the COSIS proceedings, the Tribunal will have to determine what the purpose of the Agreement is (is it normative, as Article 1(3) tends to suggest?⁸⁶ or is it jurisdictional, as Article 2 implies when defining the scope of the activities of the Commission?).⁸⁷

In any case, the COSIS Agreement raises a more systemic question: what is the articulation between such an agreement and the Convention itself? This conundrum should not be analysed solely from the perspective of a risk of

81 Proelss (n 12), para 23; see also TA Mensah, 'The jurisdiction of the International Tribunal for the Law of the Sea' (1999) 63(2) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 330–341, at p. 336.

82 Proelss (n 12), para 23; Treves (n 75), para 8. *Contra*: Jesus (n 61), at p. 394; see also B McGarry and FC Aco, 'The competence of the International Tribunal for the Law of the Sea in its new advisory proceedings on climate change' (*EJIL:Talk!*, 16 December 2022) available at <https://www.ejiltalk.org/the-competence-of-the-international-tribunal-for-the-law-of-the-sea-in-its-new-advisory-proceedings-on-climate-change/>.

83 See LOSC (n 15), Preamble, para 5.

84 *Ibid.*, Preamble, paras 4, 6.

85 *SRFC Advisory Opinion* (n 12), para 63.

86 COSIS Agreement (n 80), Article 1(3): 'The mandate of the Commission shall be to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.'

87 This stems from the dispositive provisions of the Agreement which are included in Article 2. According to Article 2(1), the Commission shall assist its member States in the promotion and implementation of legal principles, 'including through the jurisprudence of international courts and tribunals'. Article 2(2) allows the Commission to submit a request for advisory opinion to the Tribunal.

abuse,⁸⁸ but also in light of, Article 311 (3) of the Convention, which seeks to preserve its integrity from the will of some parties to deviate from it:

Two or more States Parties may conclude agreements *modifying or suspending the operation of provisions* of this Convention, applicable solely to the relations between them, provided that ... the provisions of such agreements do not affect the enjoyment by *other States Parties of their rights or the performance of their obligations* under this Convention. (emphasis added)

Among the objectives of the LOSC there is undoubtedly the one 'of limiting exceptions to the Convention to the greatest extent'.⁸⁹ One may therefore wonder if an agreement, the purpose of which is to establish a new body and grant to it as its main if not exclusive mission to create the conditions for the development of jurisprudence, is compatible with Article 311(3)? Similarly, is an agreement, which intends to grant to the ITLOS advisory jurisdiction over questions 'within the scope of' the LOSC,⁹⁰ and knowing that the LOSC itself has no provision for that purpose, compatible with the Convention, in particular with the amendment procedures in Articles 312 and 313?

The question, which concerns the advisory jurisdiction, is different from the one of the applicable law.⁹¹ There is no doubt that, on merits, the Tribunal will have to interpret climate change instruments and that it has the power to do so.⁹²

The question of the jurisdiction *ratione materiae* is also distinct from the one of the effect of the advisory opinion. In the *SRFC Advisory Opinion*, the Tribunal insisted that the scope of the advisory opinion would be limited, *ratione personae*, to the organisation submitting the request and to its member States.⁹³ This sleight-of-hand trick is unconvincing in light of the great

88 This risk was identified by a number of States and scholars (see above (n 12)).

89 *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award, 12 July 2016, Permanent Court of Arbitration Case No. 2013-19, para 245.

90 COSIS Agreement (n 80), Article 1(2).

91 See, *inter alia*, *M/V 'Norstar' (Panama v. Italy)*, Judgment, 10 April 2019, *ITLOS Reports 2018–2019*, p. 10, para 136.

92 For instance, the Inter-American Court of Human Rights (IACHR) analysed principles going way beyond human rights law, such as the obligation to prevent and repair transboundary damage, including in relation to the marine environment; the principle of prevention; the standard of due diligence; and the obligation to undertake environmental impact assessments. IACHR (n 7), paras 130–145. It will have further occasion to develop upon principles specific to environmental law such as the common but differentiated responsibilities on the occasion of the joint request submitted by Chile and Colombia (n 8).

93 *SRFC Advisory Opinion* (n 12), para 69.

authority that the Tribunal may expect States and other stakeholders will attach to its advisory opinions. Furthermore, as a chamber of the Tribunal stated, 'judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny'.⁹⁴

Finally, the conditions of jurisdiction should not be mixed up and confused with those of admissibility. The argument of a possible abuse of the advisory jurisdiction, which is most often addressed among the compelling reasons for a court to use its discretion to decline to answer,⁹⁵ is a (hopeless) argument of inadmissibility, which has been systematically rejected.⁹⁶ Courts have sufficient tools and wisdom to avoid traps and preserve the integrity of their judicial function, including by reformulating the questions,⁹⁷ in order to deal with the questions really at issue.⁹⁸

Conclusion: Does the End Justify the Means?

In the COSIS proceedings, it is difficult, from a political and societal perspective, to qualify as an abuse the call made to the Tribunal to clarify and develop the

94 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment, 28 January 2021, ITLOS Case No. 28, para 203.

95 *Nuclear Weapons (WHO) Advisory Opinion* (n 19), para 16; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports 2010, p. 403, paras 29, 47 [*Unilateral Declaration of Independence Advisory Opinion*]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports 2019, p. 95, paras 69–74 [*Separation of the Chagos*].

96 See *Nuclear Weapons (WHO) Advisory Opinion* (n 19), paras 10–16; *Unilateral Declaration of Independence Advisory Opinion* (n 95), paras 27–35; *Separation of the Chagos* (n 95), paras 83–91.

97 To take the example of the 2017 advisory opinion of the IACHR, the request submitted by Colombia was not divorced from the proceedings opposing it to Nicaragua before the ICJ, in which Colombia was arguing that some of its actions in Nicaragua's EEZ were in execution of its obligations under the Cartagena Convention (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*), Judgment, 21 April 2022, ICJ General List No. 155, paras 96–98). Colombia was obviously hoping to obtain from the IACHR an interpretation of that convention which it could subsequently use before the ICJ. The San José court skilfully reformulated the question and avoided becoming a tool of advocacy in other proceedings. See IACHR (n 7), paras 1, 25, 32–38.

98 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports 1980, p. 73, paras 35–36; see also *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, 27 May 1987, ICJ Reports 1987, p. 18, para 43.

law on one, if not the most, pressing issues of universal concern, ‘the defining challenge of our generation.’⁹⁹ The questions asked, which are extremely broad in scope, call on the Tribunal to codify and progressively develop the rules on the protection of the marine environment in light of the rules on climate change. Should it consider that it has jurisdiction in answering those questions, the Tribunal will contribute to bridging the gap between the law of the sea and climate change law.¹⁰⁰ As the only permanent autonomous judicial body having specialised competence on law of the sea issues, its opinion will be further used by other international or domestic courts.¹⁰¹ If granted, the advisory opinion will participate in the global movement of climate-related litigation. The seisin of ITLOS has unsurprisingly been welcome as a way to ‘elevate those issues and not only give legal guidance but provide a degree of moral pressure on states to take these questions more seriously’.¹⁰²

Can this higher purpose overshadow the concerns about the way the COSIS was established, the scope of the advisory jurisdiction under the Agreement, and the lack of involvement of States in the drafting of the questions put to the Tribunal? What is certain is that this higher purpose requires the Tribunal to deal in depth with any objections to its jurisdiction in order to establish its legitimacy to give that opinion and therefore the authority of its conclusions on the merits. Maybe the COSIS request is indeed a poisoned apple ... but a princess needs a poisoned apple to become the one and only Snow White.

99 Freestone *et al.* (n 11), at p. 174.

100 Among the articles addressing substantive issues regarding the interaction between the law of the sea and climate change law, see A Boyle, ‘Litigating climate change under Part XII of the LOSC’ (2019) 34(3) *IJMC* 458–481; J Harrison, ‘Litigation under the United Nations Convention of the Law of the Sea: Opportunities to support and supplement the climate change regime’ in I Alogna *et al.* (eds), *Climate Change Litigation: Global Perspectives* (Brill, Leiden, 2021) 415–432; S Maljean-Dubois, ‘A quand un contentieux interétatique sur les changements climatiques?’ (2021) *Zoom-out* 85, *Questions of International Law* 17–28; C Voigt, ‘Oceans and climate change: Implications for UNCLOS and the UN climate regime’ in FM Platjouw and A Pozdnakova (eds), *The Environmental Rule of Law for Oceans: Designing Legal Solutions* (CUP, Cambridge, 2023) 17–30; M Lennan ‘Fisheries redistribution under climate change: Rethinking the law to address the “governance gap”?’ in Platjouw and Pozdnakova (eds), *ibid.*, 163–177.

101 CA Cruz Carillo, ‘The advisory jurisdiction of the ITLOS: From uncertainties to opportunities for ocean governance’ in Platjouw and Pozdnakova (eds) (n 100), at p. 238. For cross-references to the *SRFC Advisory Opinion* in the jurisprudence of other courts and tribunals, see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (n 97), para 95; IACHR (n 7), footnotes 171, 237, 140, 278, 335.

102 D Guilfoyle, ‘UNCLOS: Fit for Purpose in the 21st Century?’ (Submission to the UK House of Lords, 24 November 2021) available at <https://committees.parliament.uk/oralevidence/3126/html/>.