

**An Advisory Opinion on Climate Change Obligations Under International Law: A
Realistic Prospect?**

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Abstract

On 31 October 2021, an agreement was signed between Antigua and Barbuda and Tuvalu that established a Commission with the power to request an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS). Since ITLOS' advisory jurisdiction has been tested in only one case, I explain and evaluate the procedural obstacles facing the Commission, as well as the potential questions it might submit to ITLOS. The analysis draws upon the jurisprudence of the International Court of Justice to indicate how ITLOS could articulate and apply its jurisdiction in an advisory case. I conclude that although there appear to be few insurmountable obstacles to securing ITLOS' jurisdiction, care must be taken by the Commission to ensure that the questions presented to ITLOS are carefully drafted so that ITLOS has no concerns over the judicial propriety of giving an advisory opinion.

Keywords

Advisory opinion; climate change; law of the sea; ITLOS; ICJ; jurisdiction; Commission of Small Island States on Climate Change and International Law

An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?

Introduction

There are two initiatives underway to obtain an advisory opinion on climate change obligations under international law. The first concerns efforts to initiate proceedings before the International Court of Justice (ICJ) by way of reference from the United Nations General Assembly (UNGA). There were reports in the early 2000s that Tuvalu might pursue legal action against the US and other States for causing damage through climate induced sea-level rise.¹ In 2011, Palau announced its intention to seek an advisory opinion from the ICJ.² The International Union for the Conservation of Nature (IUCN) issued a resolution in 2016 calling upon the UNGA to seek an advisory opinion from the ICJ on the legal status and content of sustainable development, including threats from climate change. Since 2018, Vanuatu has been exploring the possibility of an advisory opinion. This initiative appears to be gaining ground. In 2019, the Leaders of the Pacific Islands Forum noted positively Vanuatu's proposal for a "UN General Assembly Resolution seeking an advisory opinion from the International Court of Justice on the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change".³ Vanuatu, in September 2021, raised the possibility of a question being submitted regarding the duties of States to protect the rights of present and future generations against the adverse effects of climate change.⁴ The same month it was reported that Vanuatu was leading a campaign to secure an

¹ See Rebecca E. Jacobs, "Comment, Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice" (2005) 14 *Pacific Rim Law and Policy Journal* 103.

² UN News, "Palau seeks UN World Court opinion on damage caused by greenhouse gases" at <https://news.un.org/en/story/2011/09/388202> (accessed 11 July 2022).

³ Forum Communique, Fiftieth Pacific Islands Forum, Funafuti, Tuvalu, 13-19 August 2019, PIF19(14), [16].

⁴ See speech by Bob Loughman, Prime Minister of Vanuatu in United Nations General Debate, 76th Session on 25 September 2021 at <https://www.youtube.com/watch?v=izucIT9V3NQ> (accessed 11 July 2022). See also Daily Post Digital Network, "Vanuatu hosts high-profile event on legal action for climate justice" at <https://www.dailypost.vu/news/vanuatu->

advisory opinion from the ICJ.⁵ In October 2021, Blue Ocean Law announced that they would be supporting Vanuatu's efforts⁶ and in May 2022, the Climate Action Network, representing 1500 civil society groups in 130 countries, backed Vanuatu's campaign.⁷

The second, initiative concerns a potential request for an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS). On 31 October 2021, an Agreement was signed between Antigua and Barbuda and Tuvalu that established a Commission with the power to make such a request.⁸ On 4 November 2021, Palau deposited an instrument of accession to the Agreement, and in February 2022, a group of legal and technical experts were appointed to map out the potential scope and content of any request to seek an advisory opinion.⁹ This potential advisory opinion has attracted less publicity than the ICJ proposal, but it may prove to be a more viable option given the low jurisdictional threshold that has been set for initiating advisory opinions at ITLOS.

These initiatives, and a long tradition of seeking advisory opinions, point to the value that States attach to non-contentious proceedings as means of clarifying significant questions of

[hosts-high-profile-event-on-legal-action-for-climate/article_4f58e312-e7f3-11e9-b713-2b437f0c7f2f.html](https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights) (accessed 11 July 2022).

⁵ The Guardian, "Vanuatu to seek international court opinion on climate change rights" at <https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights> (accessed 11 July 2022).

⁶ Blue Ocean Law, "Pacific firm to lead global legal team supporting Vanuatu's pursuit of advisory Opinion on climate change from International Court of Justice" at <https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice> (accessed 11 July 2022).

⁷ Press Release 5 May 2022 at <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/> (accessed 11 July 2022).

⁸ Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law (COSIS Agreement) at <https://cpij-pciji.ca/wp-content/uploads/2021/11/Agreement-for-the-establishment-of-COSIS.pdf> (accessed 11 July 2022). See further, D. Freestone, R. Barnes and P. Akhavan, "Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law" (2022) 37 *International Journal of Marine and Coastal Law* 1.

⁹ Twitter, at https://twitter.com/cosis_ccil/status/1495555277453934594?s=20&t=Q33rvmHvhYEHMMX-Z-6nbw (accessed 11 July 2022).

international law.¹⁰ Sensing a change of mood, Philippe Sands has written of his reduced skepticism about the prospects and value of adjudication of climate issues in international fora.¹¹ In contrast, Meyer offers a far more skeptical analysis.¹² In light of the above initiatives, as well as the divided views about utility of advisory proceedings, it is timely to analyse the opinions of the prospects of a case being successfully brought in more detail. It may be noted that ITLOS has not declined a request for an advisory opinion in the two cases where this has been requested. The ICJ has declined a request in only one case from 27 applications,¹³ and the Permanent Court of International Justice refused to give an advisory opinion only one case from 29 applications.¹⁴ Given the willingness of international courts and tribunals to entertain requests, history may favor an advisory opinion on questions of climate commitments.

This article investigates the prospect of an advisory opinion before ITLOS and asks whether such an opinion might usefully contribute to a clarification of States' duties to prevent or mitigate the impacts of climate change.¹⁵ I argue that there are no insurmountable procedural

¹⁰ See also, Communiqué – 33rd Inter-Sessional Meeting of the Caricom Heads of Government, where support for Vanuatu's initiative was expressed. See <https://caricom.org/communique-thirty-third-inter-sessional-meeting-of-caricom-heads-of-government/> (accessed 11 July 2022).

¹¹ P. Sands, "Climate Change and the Rule of Law: Adjudicating the Future in International Law" (2016) 28 *Journal of Environmental Law* 19.

¹² B. Meyer, "International Advisory Proceeding on Climate Change" (2022) *Michigan Journal of International Law* (forthcoming). Available at SSRN: <https://ssrn.com/abstract=4086761> (accessed 11 July 2022).

¹³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66. For the full list of advisory proceedings see: <https://www.icj-cij.org/en/advisory-proceedings> (accessed 11 July 2022).

¹⁴ *Status of Eastern Carelia, Advisory Opinion*, 1923 PCIJ, Series B, No. 5. For a full list, see: <https://www.icj-cij.org/en/pcij> (accessed 11 July 2022).

¹⁵ There is some literature on this topic, but it tends to focus on the ICJ. See: D. Bodansky, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections" (2017) 49 *Arizona State Law Journal* 689; M. Wewerinke-Singh, J. Aguon, and J. Hunter, "Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions" in I. Alogna, C. Bakker, and J.-P. Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill, 2021) 393; A Mile, "Emerging Legal Doctrines in Climate Change Law - Seeking an Advisory Opinion from the International Court of Justice" (2021) 56 *Texas International Law Journal* 59. Boyle and Harrison examine proceedings under UNCLOS, but from a contentious proceeding's perspective: A. Boyle, "Litigating Climate Change under Part XII of the LOSC" (2019) 34 *International Journal of Marine and Coastal Law* 458; J. Harrison, "Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime" in Alogna, Bakker Gauci, *ibid*, 415. Sands provides a schematic outline of how climate change issue may be brought before an international court: P. Sands, note, 11. A more detailed analysis is provided by Meyer, note, 12.

barriers to a request. However, the ambiguous jurisdictional basis for such requests means that ITLOS should be careful to explain and circumscribe any request that it receives. It also means that requesting parties should consider carefully any questions submitted to ensure that they do not lead ITLOS into matters that might undermine the integrity of its judicial function. In the main part of this article, the procedural requirements to obtain an advisory opinion are analyzed in two parts: jurisdiction and discretion. Whereas jurisdiction concerns the power of a court to exercise its judicial authority, discretion (akin to the test of admissibility in contentious proceedings) is focused on whether the matter is suitable for adjudication. In the second part of this article I consider the jurisdiction of ITLOS to hear a request. This raises important questions of procedure because of the liberal jurisdictional basis for an advisory jurisdiction that ITLOS advanced in the *SRFC Advisory Opinion*.¹⁶ I argue that ITLOS has jurisdiction to consider a request, although meeting the jurisdictional requirements for an opinion is not free of difficulty. Even if the conditions for jurisdiction are satisfied, ITLOS still has discretion to exercise its jurisdiction as to whether to give an advisory opinion. In the third part of this article I examine how ITLOS might exercise this discretion, arguing that ITLOS needs to exercise particular care in how this discretion is exercised to ensure the integrity of its judicial function. The analysis of the procedural stages shows that jurisdiction and discretion are connected to the substantive questions that can be submitted to a court or tribunal, so in the final part of this article I consider what questions might be asked of ITLOS, emphasizing that the scope of any such questions must carefully accord to any limitations flowing from ITLOS' jurisdictional limits and be confined to matters falling within or incidental to the substantive provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹⁷

¹⁶ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, 4.

¹⁷ United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

ITLOS' Jurisdiction to Give an Advisory Opinion

The constituent instrument(s) of a court or tribunal establishes its jurisdiction to give an advisory opinion.¹⁸ As such our principal focus is an analysis of UNCLOS, the Statute of the Tribunal, the Rules of the Tribunal and ITLOS' related jurisprudence. This further entails some consideration of advisory proceedings before the ICJ because ITLOS' advisory jurisprudence is limited to two cases, and because ITLOS has drawn heavily upon the procedural jurisprudence of the ICJ to articulate its procedural approach. It might be argued that there is an implied power to issue advisory opinions; namely that such a power is deemed necessary for the court or tribunal to carry out its functions.¹⁹ However, the leading authorities seem to reject such a position.²⁰ Certainly, ITLOS has not relied on this line of reasoning. However, the idea of implied powers is not wholly irrelevant because international courts and tribunals are masters of their own jurisdiction and so each court has authority to determine the proper scope of its judicial function.²¹ How courts and tribunals perceive their judicial function informs how they determine the scope of their jurisdiction. There are several analyses of the

¹⁸ One may observe that there is a wealth of literature on the advisory jurisdiction of the ICJ. See for example, R. Ago, "'Binding' Advisory Opinions of the International Court of Justice" (1991) 85 *American Journal of International Law* 439; C.N. Brower and P.H.F. Bekker "Understanding 'Binding' Advisory Opinions of the International Court of Justice" in N. Ando, E. McWhinney and R. Wolfrum (eds) *Liber Amicorum Judge Shigeru Oda* (Kluwer, 2002), 251; H. Thirlway, "Advisory Opinions" Max Plank Encyclopedias of International Law (online); K. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff, 1971); M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015* (5th ed., Brill, 2016), chapter 5; A. Aust, "Advisory Opinions" (2010) 1 *Journal of International Dispute Settlement* 123; A. Zimmerman, C.J. Tams, K. Oellers-Frahm and C. Tomuschat (eds), *The Statute of the International Court of Justice* (3rd ed, Oxford University Press, 2019). This contrast with the smaller body of literature on ITLOS, which is largely a response to the two advisory opinions. See *infra*, footnote 30. More generally, see P. Chandrasekhara Rao and P. Gautier, *The International Tribunal for the Law of the Sea. Law, Practice and Procedure* (Edward Elgar, 2018), Chapter 3.10; K. Kittichaisaree, *The International Tribunal for the Law of the Sea* (Oxford University Press, 2021), chapter 4.

¹⁹ See C. Brown, "The Inherent Powers of International Courts and Tribunals" (2005) LXXVI *British Yearbook of International Law* 195, 228 (although this is mainly concerned with contentious proceedings).

²⁰ Thirlway, note 18, [4]; 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, 456-8; K. Oellers-Frahm, "Lawmaking Through Advisory Opinions?" (2011) 12 *German Law Journal* 1033.

²¹ *Interpretation of the Greco-Turkish Agreement*, PCIJ Rep, Series B No 16 (1928), p 20; *Nottebohm case (Preliminary Objection)*, Judgment of November 18th, 1953, *I.C.J. Reports 1953*, p. 111, 119-20.

judicial function of international courts in the literature,²² but as the ICJ itself has observed, the precise extent and limits to this are difficult to catalogue.²³ Despite specific uncertainties, it is clear that the ICJ treats its advisory jurisdiction as a key element of its judicial function.²⁴ It is possible such thinking has helped inform how ITLOS judges perceive the judicial function of ITLOS, and there is certainly potential for advisory proceedings to inform our understanding of UNCLOS and related rules of international law. In any event, what is important to note is that the idea of protecting the integrity of judicial function has helped the ICJ frame the exercise of its advisory jurisdiction, and this jurisprudence is likely to inform ITLOS' future jurisprudence.²⁵ This has tended to support a cautious approach to staying within the proper bounds of judicial activity, and is discussed further in the third part of this article.

There are two forms of advisory jurisdiction enjoyed by ITLOS.²⁶ The first is expressly provided for under Section 5 of Part XI of UNCLOS. Article 191 permits the Seabed Disputes Chamber to give advisory opinions at the request of the International Seabed Authority Assembly or the Council on legal questions arising within the scope of their activities. This avenue is ill-suited for a climate advisory opinion given its limited scope. The second form of advisory opinion concerns the authority of the full Tribunal to consider requests for an advisory opinion in respect of any matter related to UNCLOS. This has been described as an innovation

²² L. Gross, "Limitations Upon the Judicial Function" (1964) 58 *American Journal of International Law* 415; Keith, above note 18, 220-1; C. Greenwood, "Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice" in G. Gaja and J.G. Stoutenburg (eds), *Enhancing the Rule of Law through the International Court of Justice* (Brill, 2014) 63; G.I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press, 2014), chapter 3.

²³ *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, *Judgment of 2 December 1963*, I.C.J. Reports 1963, p. 15, 30.

²⁴ C.F. Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer, The Hague, 2003), 537; E. Hambro, "The Authority of the Advisory Opinions of the International Court of Justice" (1954) *International and Comparative Law Quarterly* 3, 21; L.M. Goodrich, "The Nature of the Advisory Opinions of the Permanent Court of International Justice" (1938) 32 *American Journal of International Law* 738, 758; M.O. Hudson, "Advisory Opinions of National and International Courts" (1924) 37 *Harvard Law Review* 970, 1000

²⁵ See Hernández, note 22, 74-85.

²⁶ See further, M.G. García-Revilla, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Brill, 2015).

because this form of advisory jurisdiction is not expressly provided for in the text of UNCLOS.²⁷ It was first recognized and acted upon by ITLOS in the *SRFC Advisory Opinion*.²⁸ During this case, a number of States objected to the Tribunal's jurisdiction, raising serious questions about its legal basis.²⁹ It has also been questioned and strongly criticized by commentators.³⁰ Given that it is this plenary advisory jurisdiction that would be used to seek a climate related opinion, it is important to ascertain any procedural obstacles to this route by the Commission of Small Island States on Climate Change and International Law (COSIS Commission).

Part XV of UNCLOS does not expressly confer upon ITLOS or any other court or tribunal a general advisory jurisdiction.³¹ This may be contrasted with the Statute of the ICJ, which confers a wide advisory jurisdiction on the Court to give an opinion on "any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".³² Assuming that a request is most likely to emanate from the UN General Assembly, it is worth noting that a key part of the process is that any request must garner enough support from member States of the UN to initiate the request. Such

²⁷ S. Rosenne, "International Tribunal for the Law of the Sea: 1996–97 Survey" (1998) 3 *International Journal of Marine and Coastal Law* 487, 507; T. Treves, "Advisory Opinions Under the Law of the Sea Convention" in M. H. Nordquist and J. N. Moore (eds) *Current Marine Environmental Issues and the International Tribunal for the Law of The Sea* (Martinus Nijhoff, 2001) 81, 92.

²⁸ *SRFC Advisory Opinion*, note 16, [219]. For analysis of the substance of the decision, see, V. Schatz, "Fishing for Interpretation. The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ" (2016) 47 *Ocean Development and International Law* 327.

²⁹ Argentina, Australia, China, European Union (addressing only admissibility, without prejudice to jurisdictional issues), Ireland, Spain, Thailand, United Kingdom, and the United States. Other States supported the jurisdiction of ITLOS: Chile, Federated States of Micronesia, Germany, Japan, New Zealand, Somalia, and Sri Lanka.

³⁰ M. Becker, "Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission" (2015) 109 *American Journal of International Law* 851; Y. Tanaka, "Reflection on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015" (2015) 14 *The Law and Practice of International Tribunals* 318; Lando, note 20; 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 *Leiden Journal of International Law* 155; A. Proells, "Advisory Opinion: International Tribunal for the Law of the Sea (ITLOS)" Max Plank Encyclopedias of International Law (online)

³¹ See *SRFC Advisory Opinion*, note 16, [53].

³² Article 65, Statute of the International Court of Justice.

support need not be unanimous; it merely needs to secure the support of a majority of members present and voting.³³ This diplomatic stage is critical because it permits a wider range of interested States to engage in the formulation of the request. It may also act as a political filter for the request, helping to refine the scope of potential questions. This, in turn, may help remove objections to the question when it comes before the ICJ. As discussed below, there is no equivalent diplomatic stage for requests to ITLOS, which may increase political and legal resistance to proceedings.

It was previously assumed that ITLOS had no jurisdiction to consider requests for an advisory opinion as a full tribunal.³⁴ Moore states that this reflects the fact that ITLOS is not the judicial arm of an international organization with broad powers to govern the oceans, and so there is no need for such a function.³⁵ Indeed, most advisory proceedings appear to focus on the constitutional issues of the powers of international organizations.³⁶ However, this ignores the key role ITLOS plays in interpreting and applying UNCLOS provisions. It is at least arguable that ITLOS should enjoy should an advisory opinion function given its key role in supporting the interpretation and application of the Convention. ITLOS' jurisdiction is set out in Article 288(2), which provides that jurisdiction exists over “*any dispute* concerning the interpretation

³³ UN Charter, Art 18(3). For example, in the request for an advisory opinion on the Chagos archipelago, the request was made by the United Nations General Assembly (UNGA) through Resolution 71/292, which was adopted on 22 June 2017 with 94 votes in favor, 15 against and 65 abstentions. See UNGA Res A/RES/71/292 (22 June 2017). In the 1994, the resolution on a request for an advisory opinion on the legality of a threat or use of nuclear weapons was adopted with 127 votes in favor, 30 against and 23 abstentions. See UNGA Resolution A/RES/49/75 (15 December 1994). The request for an advisory opinion on the construction of a wall in the Occupied Territory of Palestine was adopted with 90 votes in favor, eight against and 74 abstentions. See UNGA Resolution A/RES/ES-10/14 (12 December 2003). In the *Kosovo Advisory Opinion*, the request was made with 77 States supporting it, six objecting and 74 abstentions. See UNGA Resolution A/RES/64/298 (13 October 2010).

³⁴ M. N. Nordquist et al. (eds), *United Nations Convention on the Law of the Sea: A Commentary*, Vol. V (Martinus Nijhoff, 1989) 416.

³⁵ J.N. Moore, “The International Tribunal for the Law of the Sea” (1999) 32 *Cornell International Law Journal* 107, 137.

³⁶ See L Boisson de Chazournes, “Advisory Opinions and the Furtherance of the Common Interest of Humankind” in L. Boisson de Chazournes (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, 2002) 105, 106.

or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement” (emphasis added). Since Article 288(2) specifically refers to “disputes”, it does not establish a basis for non-contentious proceedings.³⁷ Accordingly, the basis of ITLOS’ general advisory jurisdiction must be sought under either the Statute of the Tribunal or the Tribunal’s Rules of Procedure (the Rules).

By way of context, Article 16 of the Statute states that “[t]he Tribunal shall frame rules for carrying out its functions”.³⁸ This includes laying down its rules of procedures. The Statute of the Tribunal is annexed to UNCLOS and, according to Article 318 of UNCLOS, the Statute forms an integral part of the Convention. As such, the Statute is not subordinate to the main text of UNCLOS (and more specifically to Article 288(2)).³⁹ Rather, each should be regarded as a set of normatively equivalent and complementary provisions. This much is uncontroversial. What is less clear, however, is exactly the extent of ITLOS’ competence to determine its jurisdiction. Even if the Tribunal has the power to determine its own rules of procedure, this does not mean that it can extend its jurisdiction in an unlimited way. ITLOS’ jurisdiction is still restricted to what is provided for in its constitutional instruments (UNCLOS and the Statute), as well as any power that may be derived from general international law (i.e., inherent powers). This tension between its main constituent instrument, UNCLOS, and its power to determine its jurisdiction procedures is at the heart of disagreements about ITLOS advisory jurisdiction.

³⁷ Tanaka, note 30, 324.

³⁸ At https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf (accessed 11 July 2022).

³⁹ See *SRFC Advisory Opinion*, note 16, [52].

Acting under Article 16 of the Statute of the Court, the Tribunal adopted its Rules of Procedure in 1997.⁴⁰ During the drafting of the Rules, the possibility of ITLOS giving advisory opinions was considered.⁴¹ The result was Article 138 of the Rules, which provides that:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

Although Article 138 expressly permits the Tribunal to give an advisory opinion, it cannot of itself establish jurisdiction since it is a subsidiary instrument. As such it must be based upon and be limited to any powers that are set out in UNCLOS or Statute of the Tribunal. Article 138 can only explain and delimit how the Tribunal will exercise any pre-existing jurisdictional power.

Accordingly, the legal basis for advisory opinions under Article 138 has been rightly questioned by You and others.⁴² If we discount Article 288(2) of UNCLOS, then this leaves only the Statute of the Tribunal. This was the approach taken by ITLOS in the *SRFC Advisory Opinion* where, in order to circumvent this apparent limitation of Article 288(2), the Tribunal shifted its analysis to Article 21 of the Statute of the Tribunal. Article 21 provides that “[t]he

⁴⁰ At https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf (accessed 11 July 2022).

⁴¹ J.J. Jesus, “Article 138” in P. Chandrasekhara Rao and P. Gautier (eds) *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, 2006), 393.

⁴² K.-J. You, “Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited” (2008) 39 *Ocean Development & International Law* 360. Also, authors at footnote 30. In contrast, T.M. Ndiaye is favourably disposed to a plenary advisory jurisdiction: “The Advisory Function of the International Tribunal for the Law of the Sea” (2010) *Chinese Journal of International Law* 9, 58 et seq.

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” (emphasis added). The key term here is “all matters”, since this does not necessarily restrict jurisdiction to contentious matters – i.e., “disputes”. Given the contentious nature of the Tribunal’s ruling, the reasoning behind this decision merits more careful analysis.

Advisory Jurisdiction in the Sub-Regional Fisheries Commission Advisory Opinion

Rather than simply founding jurisdiction upon Article 21, ITLOS articulated its jurisdiction in a more nuanced fashion. As a first step, ITLOS construed Article 21, and specifically, the use of the phrase “all matters” to extend its jurisdiction to a wider range of proceedings than merely contentious proceedings.⁴³ As ITLOS reasoned, if its jurisdiction was limited to disputes, then Article 21 would have used the word “disputes”. Since Article 21 did not use “disputes” to delimit its jurisdiction, ITLOS took the view that “all matters” had a wider meaning than disputes, and so could include an advisory jurisdiction. The Tribunal also rejected the argument that “all matters” should have the same meaning as those words as used in the Statutes of the ICJ and PCIJ.⁴⁴ As a matter of treaty interpretation, ITLOS took the view that it was untenable that similar words in different treaties should yield identical results given the different contexts, objects and purposes, and practices of States parties at play.⁴⁵

ITLOS then observed that Article 21 alone is not enough to establish jurisdiction.⁴⁶ This suggests that Article 21 is merely facilitative, and so further depends upon the existence of

⁴³ *SRFC Advisory Opinion*, note 16, [56].

⁴⁴ *Ibid*, [57].

⁴⁵ *Ibid*, citing *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, *ITLOS Reports 2001*, 95, [51].

⁴⁶ *SRFC Advisory Opinion*, note 16, [58].

other agreements to establish the jurisdiction of ITLOS. The critical phrase in Article 21 is “provided for in any other agreement”. Whilst this acknowledges the fundamental role of consent in establishing jurisdiction, by enabling jurisdiction to be determined under agreements other than UNCLOS, ITLOS has opened the door to a highly expansive advisory jurisdiction on an ad hoc basis. This could be seen as going beyond the scope of UNCLOS or, at least, upsetting the institutional checks and balances found within the Convention. As Ruys and Soete note, if States had intended ITLOS to possess an advisory jurisdiction, it would have been carefully delimited by States when they were negotiating UNCLOS.⁴⁷ Gao has argued that ITLOS’ approach gives other agreements a predominant function in determining its jurisdiction.⁴⁸ However, Gao overstates the matter since there is nothing in the Tribunal’s decision which attaches specific weight to “other agreements” or limitations inherent in the Tribunal’s constitutive instruments. Certainly, this does not mean the other agreement is controlling of jurisdiction since this would deny the Tribunal competence to determine its jurisdiction. It seems that the Tribunal merely made a strategic choice to move away from a narrow and exclusive focus upon the inconclusive textual provisions of UNCLOS or the Statute of the Court. It was also a response to the argument by some States that the rule making power of ITLOS cannot be used as the source of authority to establish a jurisdiction that the Tribunal did not originally possess.⁴⁹ Unsurprisingly, several commentators have rightly observed that the reasoning of the Tribunal on this point is rather cursory and not wholly convincing.⁵⁰ First, as Tanaka notes, just because something is not precluded, this does not mean that it is included.⁵¹ Second, by relying on the conferral of jurisdiction through another agreement,

⁴⁷ Ruys and Soete, note 30, 160.

⁴⁸ J. Gao, “The ITLOS Advisory Opinion for the SRFC” (2015) 14 *Chinese Journal of International Law* 735, 741.

⁴⁹ Written Statement of Australia, [5]. Also, Statement by Ireland, [2.12]. Available at <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21/> (accessed 11 July 2022). See also, H. Thirlway, “Article 30” in A. Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed., Oxford University Press, 2012) 516, 518.

⁵⁰ See Tanaka, note 30, 323; Lando, note 20, 460; and Ruys and Soete, note 30, 165.

⁵¹ Tanaka, note 30, 328.

ITLOS has opened up the possibility of an unrestricted jurisdiction being conferred upon the Tribunal.⁵² Third, as both Tanaka and Lando argue, an analysis of the relevant provisions of UNCLOS and the Statute according to the rules of treaty interpretation fails to yield a reasonable construction of the texts that could support an advisory jurisdiction.⁵³ In the absence of a clear provisions in UNCLOS, resort should have been had to the wider context, subsequent agreements or practice of the parties, and any other relevant rules of international law. For Tanaka, a contextual interpretation of Article 21 should have considered Article 288.⁵⁴ Given that this provision also uses the term matters (to refer to contentious disputes), then there is doubt that Article 21 could have bestowed upon the same term a wider meaning. Although subsequent practice can be used to help determine the meaning of a treaty term, until the *SRFC Advisory Opinion*, there appeared to be little if any indication of States' positions on this matter. However, during the proceedings it became abundantly clear that there was no consensus on whether the Statute established an advisory jurisdiction.⁵⁵ Ten States took the view the Tribunal lacked an advisory jurisdiction, whilst five States supported an advisory jurisdiction. Three international organizations were also supportive of an advisory jurisdiction.⁵⁶ This small cross section of positions certainly falls short of demonstrating the agreement of the parties as a whole.⁵⁷

Given the lack of clear textual meaning, or one that can be derived from the practice of the parties, Lando advances an alternative argument that favors a restrictive approach to the jurisdiction of the Tribunal. On the basis of Article 33 of the Vienna Convention, he argues

⁵² Tanaka, *ibid*, 327-8.

⁵³ Tanaka, note 30, 329-331; Lando, note 20, 444-454.

⁵⁴ Tanaka, note 30, 327.

⁵⁵ See *SRFC Advisory Opinion*, note 16. See also, the views of the authors cited in note 30.

⁵⁶ These are the IUCN, the Caribbean Regional Fisheries Mechanism, and the Sub-Regional Fisheries Commission.

⁵⁷ Lando, note 20, 448.

that the French and Chinese texts should be preferred since they best reconcile the textual ambiguities found in each of the authentic texts.⁵⁸ According to Article 33(4) of the Vienna Convention, “when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁵⁹ Arguably, Lando’s approach assumes that the French and Chinese versions are clear. However, despite his nuanced explanation of their terms, this is perhaps a questionable assumption. It also seems to run counter to the main premise of Article 33, which provides that each text is equally authoritative. As such it is difficult to resolve any latent ambiguity across the different language texts by preferencing one language version over another.⁶⁰

The term “all matters” is ambiguous, and despite this being raised in the written proceedings,⁶¹ the Tribunal did not investigate this further. This approach seems to be consistent with the Tribunal’s pragmatic and flexible approach to interpretation; one that also favors a teleological approach.⁶² The Tribunal merely rejected the argument that the words in Article 21 should have the same meaning as the similar words in Article 36 of the ICJ Statute.⁶³ As such, the Tribunal failed to prove positively that the legal meaning of this term was inclusive of an advisory jurisdiction.⁶⁴ In his Declaration, Judge Cot suggested that the Tribunal should have examined

⁵⁸ Lando, note 20, 453. The French text reads: “[1]e Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention *et toutes les fois que cela est expressément prévu dans tout autre accord* conférant compétence au Tribunal » (... “whenever expressly provided for in any other agreement conferring jurisdiction on the Tribunal...”). There is no equivalent of the phrase “all matters” as found in the English version. The Chinese text refers only to applications, not all matters.

⁵⁹ Vienna Convention on the Law of Treaties, adopted 12 May 1969, entered into force 27 January 1980, 115 UNTS 331.

⁶⁰ See the *SRFC Advisory Opinion*, note 16, Declaration by Judge Cot, [3-4].

⁶¹ As was observed by the UK, such a power was simply not considered during the drafting of UNCLOS. *SRFC Advisory Opinion*, note 16, Written Statement of the United Kingdom, 28 November 2013, [8].

⁶² See ILA, *Final Report of the ILA Study Group on Content and Evolution of the Rules of Interpretation* (2020), 8-10.

⁶³ *SRFC Advisory Opinion*, note 16, [57].

⁶⁴ Tanaka, note 30, 327.

the travaux préparatoires to ascertain whether this could help clarify the meaning of the provision.⁶⁵ However, such an endeavour would appear to be inconclusive. References to any advisory jurisdiction in UNCLOS first appeared in the work of the First Committee, but this was limited to seabed issues and the work of the ISA.⁶⁶ Beyond this there is appears to be little record of discussions concerning a wider advisory jurisdiction. Given that ITLOS has accepted a plenary advisory jurisdiction, the matter seems to be beyond doubt, unless the Tribunal was minded to reverse its own ruling in any later case. This seems to be an unlikely occurrence, so its continued function will therefore very much depend upon the willingness of States to make use of it. Of course, this does not free its use from all difficulties.

Lando and Ridi have argued that the decision of ITLOS to recognize a general advisory opinion is problematic because the conditions for seeking such an opinion are lax, especially when compared to the threshold required for States seeking an advisory opinion from the ICJ under Article 18 of the UN Charter.⁶⁷ Here a majority of States is required to support the adoption of a resolution authorizing the request and this acts as a strong diplomatic filter on the proceedings. By contrast, in the *SRFC Advisory Opinion*, seven States comprising the SRFC were able to initiate proceedings. This should prompt genuine questions about the legitimacy of proceedings in which a small number of States are able to secure opinions with declaratory consequences on significant questions of international law that may affect many other States. It might be observed that the scope of the *SRFC Advisory Opinion* was limited to the geographical scope of the SRFC member States' exclusive economic zones (EEZs), something

⁶⁵ *SRFC Advisory Opinion*, note 16, Declaration by Judge Cot, [3].

⁶⁶ L.B. Sohn, "Advisory Opinions by the International Tribunal for the Law of the Sea or its Seabed Disputes Chamber" in M.H. Nordquist and J.N. Moore (eds) *Oceans Policy. New Institutions, Challenges and Opportunities* (Martinus Nijhoff, 1999), 61.

⁶⁷ M Lando and N Ridi, *Submission to the House of Lords Inquiry 'UNCLOS: Is it fit for purpose in the 21st Century?'* Submission UNC0041, 26 Nov 2021, [27]. Available at https://committees.parliament.uk/writtenevidence/40882/html/#_ftnref30 (accessed 11 July 2022).

that the Tribunal was at pains to emphasize.⁶⁸ However, this did not stop the Tribunal from expressing a view on the obligations of SRFC members or flag States in respect of high seas areas beyond SRFC member States' EEZs.⁶⁹ Furthermore, it also ignores the fact that the reasoning of the Tribunal pertains to relevant legal provisions that are applicable to all States (e.g. Article 56, 61, 62, 192 and 193 of UNCLOS), and that this is likely to influence how such commitments are understood more generally.⁷⁰ These are important concerns because questions about climate change cannot meaningfully be divorced from the rights, obligations and interests of third States. In the case of a potential advisory opinion on climate change, efforts to initiate proceedings is currently in the hands of three States: Antigua and Barbuda, Tuvalu and Palau. As Lando and Ridi have observed, it is questionable whether a small group of States should be able to bypass the guarantees of participation in diplomatic procedures that is inherent in mechanisms for initiating advisory proceedings before the ICJ.⁷¹ Although Lando and Ridi concede that this may not necessarily be a bad thing considering the urgency of climate change, one must also acknowledge that too liberal an approach to jurisdiction may undermine the legitimacy and credibility of ITLOS.⁷² The lack of inclusion could be offset by other States submitting written statements during the proceedings, but concerns about procedural legitimacy remain. This is despite the Tribunal pointing to some additional conditions attaching to the exercise of its jurisdiction: jurisdictional prerequisites under Article 138 of the Rules.

⁶⁸ *SRFC Advisory Opinion*, note 16, [87, 154, 179 and 214].

⁶⁹ *Ibid.*, [217].

⁷⁰ On the substantive aspects of the advisory opinion, see D. Freestone, "International Tribunal for the Law of the Sea Case 21. Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)" (2016) 1 *Asia-Pacific Journal of Ocean Law and Policy* 126.

⁷¹ Lando and Ridi, note 67, [29].

⁷² *Ibid.*

The fact remains, however, that ITLOS has asserted a plenary advisory jurisdiction. Some States are supportive of this, and ultimately, it is the willingness of States to engage in advisory proceedings that will be determinative of their continued use. ITLOS has advanced a potentially useful judicial tool in the form of a plenary advisory jurisdiction. Through Article 21 this remains dependent upon consent. Accordingly, it remains up to States whether they use or ignore this judicial tool. Given that the door is now open to plenary advisory opinions, the focus ought to be on how carefully applications are considered in practice. This makes the judicial prerequisites under Article 138 and the exercise of discretion critical.

Jurisdictional Prerequisites for ITLOS Advisory Jurisdiction

ITLOS was quite clear in stating that Article 138 did not establish jurisdiction, and that it “only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.”⁷³ The Tribunal continued to state that: “These prerequisites are: an international agreement related to the purposes of the Convention [that] specifically provides for the submission to the Tribunal... a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on ‘a legal question.’”⁷⁴ Unfortunately, the Tribunal did not elaborate further on the nature of these prerequisites. Does Article 138 simply list only those factors to be considered by the Tribunal in determining its jurisdiction? Given the brief content of Article 138, this seems unlikely. Perhaps it implies a distinction between jurisdiction in the abstract and jurisdiction in the specific case, and Article 138 lists those requirements needed to ascertain jurisdiction in specific cases? Considering this uncertainty, it is necessary to explain the nature of the Article 138 pre-requisites.

⁷³ Ibid, [59.]

⁷⁴ *SRFC Advisory Opinion*, note 16, [60].

“Jurisdictional prerequisite” is not a term of art, nor is it found frequently in the literature. More common is the term precondition. For example, this term is used explicitly in the Rome Statute of the International Criminal Court (ICC). States Parties to the Rome Statute accept the jurisdiction of the ICC over crimes of genocide, crimes against humanity, war crimes and aggression. However, the exercise of specific jurisdiction depends on further preconditions: a nexus of territoriality or nationality under Article 12 of the Rome Statute. Article 12 was designed as a compromise between States with divergent views on whether the Court should have a broad or narrow basis of jurisdiction.⁷⁵ As such its meaning is particular to the ICC. Beyond the literature on the ICC, there is scant material analyzing so-called jurisdictional preconditions. For example, Xue categorizes questions concerning the existence of a dispute and preconditions for the seisin of the court (such as the completion of negotiations) as two jurisdictional pre-requisites.⁷⁶

Although not labelled preconditions, there are some provisions of UNCLOS and Rules of the Tribunals that operate in a similar manner to Article 138 of the ITLOS Rules, and so provide insight into how jurisdictional prerequisites operate. These include the requirements in Article 292 of UNCLOS that limit prompt release proceedings to the flag State or its agent, and in situations where the detaining State has not complied with certain procedures as regards prompt release. Furthermore, Section E of the Rules adds certain requirements as to the content of an application for prompt release, and criteria to ascertaining whether it has been properly made. Accordingly, only if these conditions are satisfied then can ITLOS entertain an application.

⁷⁵ See further, W.A. Schabas and G. Pecorella, “Article 12. Preconditions to the exercise of jurisdiction” in O. Triffterer and K. Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (CH Beck/Hart/Nomos, 2016) 672.

⁷⁶ H. Xue, *Jurisdiction of the International Court of Justice* (Brill, 2017), chapter V.

Similarly, Article 127 of the Rules sets out certain factual conditions that must be met for an application to interpret or revise a judgment to proceed.

Returning to Article 138 of the Rules, the challenge is that if these jurisdictional pre-conditions are applied, then they become determinative of jurisdiction in any given case.⁷⁷ Accordingly, any ambiguity in the meaning of these preconditions will introduce harmful uncertainty into the proceedings. This lack of clarity is something that needs to be addressed, either by way of practice guidance or through the future jurisprudence of the Tribunal. Given the need for flexibility in light of the variable circumstances arising in each case, it seems more appropriate for clarity to be addressed through the Tribunal's reasoning in future opinions. Some indications of what this means in respect of Article 138 are considered in the following subsections.

The requirement to transmit a request for an advisory opinion to ITLOS is a straightforward matter, so the main concerns with jurisdictional prerequisites are: first, determining the existence of an agreement related to the Convention, second, establishing whether that agreement provides authority to request an opinion, and third, identifying whether a legal question has been submitted.

Is an Agreement Related to the Purposes of UNCLOS?

The meaning of "related agreement" was not considered in any detail by ITLOS in the *SRFC Advisory Opinion*.⁷⁸ This was not a difficult issue because the SRFC is a regional fisheries body and so it is clearly related to UNCLOS in respect of its fisheries conservation and

⁷⁷ Ibid, 105.

⁷⁸ *SRFC Advisory Opinion*, note 16, [63].

management function – something obviously linked to Part V of UNCLOS in general, and Articles 61 and 63 in particular. Other than the brief statement in the *SRFC Advisory Opinion* that the purposes of the MCA Convention (the agreement establishing the SRFC) was intended to implement UNCLOS and deal with fisheries exploitation, there is no other directly relevant jurisprudence on this matter.⁷⁹ In light of this, it is possible that jurisprudence on the meaning of Article 288(2) of the Convention could provide a useful point of reference in future cases since this provision also concerns jurisdiction conferred under related agreements.⁸⁰ It might also be useful for the COSIS Agreement Commission to bring the Agreement to the attention of the ITLOS Registry as an Agreement conferring jurisdiction on the Tribunal.⁸¹ If the jurisprudence on Article 288(2) was to be drawn upon, then a couple of points are important to note. First, the scope of UNCLOS is widely drawn in respect of oceans issues, so any agreement addressing aspects of ocean use is likely to relate, *prima facie*, to UNCLOS. Second, even if related agreements also address non-ocean issues, then so long as the legal questions presented to ITLOS for consideration are framed carefully to focus on matters within the scope of UNCLOS, then the Tribunal may be inclined to respond positively to the request for an advisory opinion.

In contrast to the MCA Agreement, which was clearly intended to implement fisheries management measures under UNCLOS, the connection between the COSIS Agreement and UNCLOS is less clear. This merits further analysis and clearly depends upon the scope and meaning of both UNCLOS and the COSIS Agreement. Strictly speaking, the COSIS Agreement, unlike the MCA Agreement, is not implementing UNCLOS. Furthermore, if the

⁷⁹ N. Bankes, “The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention With Respect to Other Treaties” (2021) *Ocean Development & International Law* 346.

⁸⁰ S. Talmon, “The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals” (2016) 65 *International and Comparative Law Quarterly* 927.

⁸¹ See <https://www.itlos.org/en/main/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/> (accessed 11 July 2022).

principal function of the Commission is to promote and contribute to the development of law, but if this is only advanced through a request for an advisory opinion, then one might question whether the Commission has any wider function that can be supported through an advisory opinion. Accordingly, we need a clear indication that COSIS is able and intending to do more with an advisory opinion than simply secure it, such as the provision of advice and guidance to its members, or the promotion of the interests of its members in international fora. This is important because the primary purpose of an advisory opinion is to render assistance to requesting body in the exercise of its functions. If this practical element is missing, then the request could be regarded as purely hypothetical or compromising to the judicial integrity of ITLOS.

Another argument against the relatedness of the COSIS Agreement to UNCLOS would be to claim that the COSIS Agreement is principally concerned with climate change. Since UNCLOS is primarily concerned with ocean matters, then the parties to the COSIS Agreement are seeking to force what are essentially climate matters into an agreement that is primarily intended to govern oceans issues. However, this argument ignores the relevance of UNCLOS to climate issues, as discussed below. The drafters of the COSIS Agreement were sensitive to the importance of showing that the COSIS agreement was related to UNCLOS and so explicitly referred to the subject matter of UNCLOS in the text of the COSIS Agreement. Accordingly, the preamble of the COSIS Agreement refers twice to the framework provided by UNCLOS, and the Commission's mandate includes the promotion of and contribution to the development of rules and principles related to the protection of the marine environment.⁸² Since Article 138 of the Rules of the Tribunal uses the term "related to", this would allow a wide range of agreements to satisfy the test if they are perceived to be related to UNCLOS. This is supported

⁸² COSIS Agreement note 8, Arts 1(3) and 2(1). See Freestone, Barnes and Akhavan, note 8.

by judicial authority indicating that the term “related to” establishes a low threshold of connectivity.⁸³ In short, if an agreement covers matters that are also covered by UNCLOS, then this would appear meet the generous threshold set out under Article 138. On the one hand, it is quite possible that such mere references to UNCLOS and to the protection of the marine environment will withstand robust scrutiny by the Tribunal. Although there is no ITLOS jurisprudence on this, as discussed below, the ICJ has generally refrained from questioning the motives behind a question, so the mere references to UNCLOS might not be a barrier to proceedings.⁸⁴ However, on the other hand, the ICJ has generally been careful to show that a clear jurisdictional basis exists for a request for an advisory opinion, and that a request does not compromise the judicial function of the Court. This is discussed further below.

Given the potential for abuse of ITLOS’ jurisdiction, it is clear that ITLOS will need to carefully explain the meaning of the term “related agreement”. Interestingly, this is exactly the kind of question that might be submitted to the Tribunal for advice – i.e., a question that would allow the Tribunal the chance to clarify the extent to which other climate related agreements contribute towards UNCLOS objectives in respect of the marine environment. Accordingly, any future climate related advisory opinion would indirectly require ITLOS to sharpen up its articulation of its jurisdictional authority.

Does the Agreement Provide a Competence to Request an Opinion?

No opinion can be given by ITLOS if it relates to a matter that is beyond the authority of the requesting body to ask. Given the paucity of cases before ITLOS, it is useful to draw upon the

⁸³ See the *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, I.C.J. Reports 1987, p. 18*, Dissenting Opinion of Judge Schwebel at 114; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports, 1988, p. 12*, Separate Opinion of Judge Shahabuddeen, 63; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports, 1982, p. 325*, Dissenting Opinion of Judge Lachs, 417.

⁸⁴ See the discussion below.

jurisprudence of the ICJ and note that the ICJ has been scrupulous in its analysis of this point. Article 96(1) of the UN Charter provides that the General Assembly and the Security Council may request opinions on “any legal question” from the ICJ. This wide authority to request an opinion means that questions from the General Assembly have been readily entertained by the ICJ.⁸⁵ However, other bodies are authorized to request opinions only on legal questions “arising within the scope of their activities”.⁸⁶ In general, the ICJ has been careful to make its own assessment of the competence of the requesting body.⁸⁷ Here, the more narrowly defined mandates of a UN organ or agency can be a barrier to proceedings. Notably, in the *Legality of the Threat or Use of Nuclear Weapons in an Armed Conflict*, the ICJ was asked whether the use of nuclear weapons by a State would be “a breach of its obligation under international law including the WHO Constitution”.⁸⁸ The Court held that the request made to it was not on a legal question arising within the scope of the activities of the WHO. Therefore, “an essential condition of founding ... [the Court’s] jurisdiction is absent and ... it cannot, accordingly, give the opinion requested”.⁸⁹ Applying this to the present case, it would be incumbent upon COSIS to show that the request for an opinion (and the questions submitted) falls within its mandate.

The purpose of the COSIS Commission is “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 protection and preservation of the marine environment and the responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.”⁹⁰ The first set

⁸⁵ All but eight requests for advisory opinions have been made by the General Assembly. See <https://www.icj-cij.org/en/organs-agencies-authorized> (accessed 11 July 2022).

⁸⁶ UN Charter, Art 96(2).

⁸⁷ *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, I.C.J. Reports, 1973, p. 166, [22]; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, note 83, [21].

⁸⁸ *Nuclear Weapons in Armed Conflict Advisory Opinion*, note 13, [1].

⁸⁹ *Ibid*, [31].

⁹⁰ COSIS Agreement, note 8, Art 1(3).

of activities of the Commission include assisting small island developing States (SIDS) to promote, develop and contribute to development of international law relating to climate change, including, in particular, the preservation of the marine environment.⁹¹ The second purpose of COSIS is to seek an advisory opinion.⁹² COSIS' activities may be further developed and supplemented by the State parties – suggesting an open-ended remit.⁹³ The existence of such functions, however generally framed, might suffice to convince the Tribunal that an opinion would be of value – although it perhaps also means that the Tribunal would be doing much of the work that the Commission was established to achieve. In order to pre-empt questions about the function of the Commission, it might be advisable for the Commission to demonstrate that it is not merely a paper commission, but that its functions are substantive. This could be shown by COSIS clearly engaging in activities beyond the mere development of a request for an advisory opinion. This might include promoting the concerns of its member States in respect of marine environmental and climate related matters, liaising with other regional organizations, hosting meetings, commissioning research and publishing reports.

The scope of Article 138 of the ITLOS Rules, as well as the relevant provisions of the COSIS Agreement indicate that COSIS has sufficient authority to request an advisory opinion from ITLOS. There is no obvious excess of mandate comparable to the WHO case.⁹⁴ One might distinguish a potential request from the COSIS from requests by longer established international organizations because it is self-evident that bodies like the General Assembly have a range of clearly delimited functions. As such, there has been little reason for the ICJ to pierce the institutional veil. However, ITLOS may be willing to do this where the requesting body appears to be an ad hoc institution and with a mandate largely limited to requesting an

⁹¹ Ibid, Art 2(1).

⁹² Ibid, Art 2(2).

⁹³ Ibid, Art 2(3).

⁹⁴ See footnotes 88-89 and the accompanying text.

advisory opinion. Although COSIS has a clear prima facie competence to request an advisory opinion limited to a wider range of activities, ITLOS would be well-advised to scrutinize this point carefully to guard against potential criticism that it was turning a blind eye to abuse of process and to show that it is guarding the integrity of its judicial function. This is particularly important given the low bar set for securing an advisory opinion from the ITLOS as compared to the ICJ.

The Legal Question

The potential questions that may be advanced in a request for an advisory opinion are considered further below, but some general points are necessary here to show that this condition is unlikely to present an insurmountable prerequisite to jurisdiction.⁹⁵ Article 138 of the ITLOS Rules refers to the need for a “legal question” but does not explain the meaning of this further. Although linked to the narrower seabed related advisory jurisdiction, Article 131 provides that the request shall contain a “precise statement of the question”, and it must include all documents likely to throw light upon the question. Precision in the framing of a question is important, because, as Tanaka observes, giving an opinion on a highly abstract question may entail the risk of pronouncing on the legal position of third parties without their consent.⁹⁶ Any questions must be framed in terms of the law. As the ICJ has stated, questions “framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law”.⁹⁷ Questions of law may concern the identification of relevant rules of international law or the meaning of specific legal provisions. As discussed below, this should primarily concern the meaning and application of the terms of UNCLOS. Even if a question

⁹⁵ Meyer provides a very helpful schematic for questions, grouping them into identificatory, interpretative and applicatory questions. Meyer, note 12, section I(C).

⁹⁶ Y. Tanaka, *The International Law of the Sea* (3rd ed., Cambridge University Press, 2019), 529.

⁹⁷ *Western Sahara, Advisory Opinion, I.C.J Reports 1975, p. 12, 20.*

has political aspects, this does not suffice to deprive it of its character as a legal question.⁹⁸ Neither will the court be concerned with the political motivations of the request.⁹⁹ Nor should the Court concern itself with the political implications of the decision.¹⁰⁰ In the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that it “will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution”.¹⁰¹ Also, it is not for a court to determine the utility of a question. As stated in the *Kosovo* case, “it is not for the Court itself to purport to decide whether an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”¹⁰² In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ stated that it “cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion”.¹⁰³ The Court may consider the utility of the question – but only as a matter of judicial propriety and not jurisdiction. In *Western Sahara*, the ICJ stated that:

... the issue of the relevance and practical interest of the questions posed concerns, not the competence of the Court, but the propriety of its exercise. It is therefore in considering the subject of *judicial propriety* that the Court will examine the objection which has been raised in this connection, alleging that the questions are devoid of any useful object.¹⁰⁴

⁹⁸ *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, [14].*

⁹⁹ *Admission of a State to the United Nations (Charter, Art 4), Advisory Opinion I.C.J. Reports 1948, p. 57, 61; and the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p. 226, [13]*

¹⁰⁰ The ICJ has held that it is not for the Court to determine the usefulness of the opinion to the requesting body, *ibid*, [35].

¹⁰¹ *Legality of the Threat or Use of Nuclear Weapons*, note 99, [16].

¹⁰² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion I.C.J. Reports 2010, p. 403, [34].*

¹⁰³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 p. 136, [62]*

¹⁰⁴ *Western Sahara*, note 97, [20] (emphasis added).

This review of relevant cases reveals two key points. First, the importance of ensuring the question has a clear legal and practical focus, and, second, the potential for a court or tribunal to review the question as part of its discretion. This discretion, which includes elements of judicial propriety, is considered next.

Discretion to Give an Advisory Opinion

Both the ICJ and ITLOS have discretion to exercise jurisdiction to consider a request for an advisory opinion. The nature of this discretion has been questioned by Meyer, who argues that it lacks a clear conceptual basis,¹⁰⁵ and accordingly, it seems to collapse back into a basic question of jurisdiction.¹⁰⁶ However, this ignores both the practice of the ICJ and ITLOS, where these questions are treated as discrete matters. A clear distinction can be made between jurisdiction, which concerns the question of whether the court *can* entertain a case, and admissibility or discretion, which concern the question of whether a court *should* proceed with a case even if it has jurisdiction. In its advisory jurisprudence, the ICJ has clearly connected this discretion to the need for the court to protect the integrity of its judicial function.¹⁰⁷ For the ICJ, this discretion follows from the use of the word “*may*” in Article 65 of the Statute of the Court. Accordingly, the ICJ could decline to issue an opinion even if the jurisdictional prerequisites are met.¹⁰⁸ This test is usually framed by the ICJ to mean that it should only decline jurisdiction if there are compelling reasons to do so.¹⁰⁹ The ICJ’s Rules of Procedure do not provide additional detail on this discretion, although the emphasis of the provision

¹⁰⁵ See Meyer, note 12, section III (citing Dworkin, *Taking Rights Seriously* (2013), 48–57. Also, R. Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar, 2016), 274.

¹⁰⁶ Meyer, note 12.

¹⁰⁷ *Kosovo Advisory Opinion*, note 102, [29]; *Eastern Carelia*, note 14, 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, note 87, 175; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, note 83, 334; *Wall Advisory Opinion*, note 103, [44-5]

¹⁰⁸ *Wall Advisory Opinion*, note 103, [44].

¹⁰⁹ *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, I.C.J. Reports 1956*, p. 86; *Wall Advisory Opinion*, note 103, [44]; *Kosovo Advisory Opinion*, note 102, [30]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, [65].

appears to be on whether or not the request concerns a legal question.¹¹⁰ ITLOS enjoys a similar discretion. Article 138 of the Rules provides that “[t]he Tribunal *may* give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion” (emphasis added).¹¹¹ What is important then, is to ascertain those factors that should be taken into account when a court exercises this discretion.¹¹²

ITLOS has not had much opportunity to develop its reasoning on its discretion to exercise jurisdiction, but it has tended to follow the jurisprudence of the ICJ on its “compelling reasons test”. Given the less rigorous jurisdictional preconditions for bringing an advisory request before ITLOS, I think that it is incumbent upon ITLOS to exercise its discretion with great care when deciding to proceed with an opinion. This is important because it will help guard against perceptions of jurisdictional overreach which will undermine the legitimacy its judicial function or of any opinions issued. Unfortunately, in the *SRFC Advisory Opinion*, this matter was dealt with rather cursorily.¹¹³ In a case with much more far-reaching concerns, such as the legal implications of climate change on the law of the sea, ITLOS must be more explicit in how it frames its discretion. The following sub-sections examine the meaning of the compelling reasons test in more detail and provide a template for this. It should be noted that there is not accepted categorization of “compelling reasons” and, indeed, some degree of overlap in how such reasons have been addressed by courts. The following structure is provided to help give some analytical clarity to this important issue.

¹¹⁰ ICJ Rules of the Court (1978, as amended), Article 102(2) reads “[t]he Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, *it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.*” (Emphasis added).

¹¹¹ There is also the more prosaic requirement for the proper transmission of the request. See Article 138(2).

¹¹² Interestingly, Meyer accepts there is some scope for a court to exercise “appreciation” – which surely amounts to the same thing as discretion. Meyer, note 12, section III.

¹¹³ See the discussion below.

Lack of Consent

In the *Status of Eastern Carelia* case, a request was initiated by the Council of the League of Nations to the PCIJ in respect of a treaty between Finland and Russia. Russia was not a member of the League of Nations and had in no way consented to the jurisdiction of the PCIJ over disputes involving Russia. The court declined the request on the grounds that Russia had not consent to the proceedings. This case is accepted as authority for the position that proceedings are barred if one or more of the parties to a dispute has not consented to the judicial settlement of the dispute.¹¹⁴ The PCIJ observed that “no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.”¹¹⁵ This position was reiterated in the *Western Sahara* case, where the Court acknowledged that consent remains fundamental to jurisdiction. Notably the Court adopted a more nuanced position asserting that “the consent of an interested State continues to be relevant, not for the Court’s competence, but for the appreciation of the propriety of giving an opinion.”¹¹⁶ The issue was characterized not so much as one relating to jurisdiction or competence to give an advisory opinion, but one of judicial propriety. The Court continued to state that “the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character”.¹¹⁷ This suggests that the principle of consent is a facet of a wider concept of judicial propriety.¹¹⁸

¹¹⁴ See R. Higgins, “A Comment on the Current Health of Advisory Opinions”, in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 567, 571.

¹¹⁵ *Eastern Carelia* case, note 14, 27.

¹¹⁶ *Western Sahara* case, note 97, [32-3].

¹¹⁷ *Ibid*, [33].

¹¹⁸ See A. Kaczorowska-Ireland, “Judicial Propriety: International Adjudication”, Max Planck Encyclopedias of International Law (online).

The ICJ distinguished the situation in the *Status of Eastern Carelia* case from the situation under consideration in the *Interpretation of the Peace Treaties* case.¹¹⁹ Here, a question was submitted by the General Assembly concerning the process for settling a dispute under the Peace Treaties. The Court held this did not require the Court to touch upon the merits of the underlying dispute, and so any opinion on the question would not compromise the positions of the parties to the dispute.¹²⁰ Notably, the Court accepted that whilst it should be guided by the provisions of its Statute concerning contentious cases (i.e. the principle of consent), it observed that the application of such provisions “depends on the particular circumstances of each case and that the Court possesses a *large amount of discretion in the matter*.”¹²¹ Again, this suggests that consent alone is not determinative of the matter. Similarly, in the *SRFC Advisory Opinion*, ITLOS stressed that consent of non-members of SRFC was irrelevant to its jurisdiction to give an advisory opinion because the opinion has no binding force and is intended as guidance for the requesting body.¹²² This point is clearly recognized in the literature and the jurisprudence of international courts and tribunals.¹²³ Despite this, it is ironic that ITLOS created unnecessary uncertainty on this point in later *Mauritius/Maldives* case where the Special Chamber treated an advisory opinion of the ICJ as determinative of some legal issues relating to a wider dispute between Mauritius and the United Kingdom.¹²⁴ An advisory opinion may have legal consequences, in the sense that it can influence what States do, but this depends upon how States or other actors react to the advice. As Thirlway notes, this largely depends upon the

¹¹⁹ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, 72.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.* Emphasis added.

¹²² *SRFC Advisory Opinion*, note 16, [76].

¹²³ Thirlway, note 18, [2]

¹²⁴ See: S. Thin, “The Curious Case of the ‘Legal Effect’ of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute” *EJIL:Talk!*, 5 Feb 2021, at <https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/> (accessed 11 July 2022). Also, C. Gaver, “Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)” (2021) 115 *American Journal of International Law* 519.

court's reasoning and the extent to which it corresponds to the positive content of the law.¹²⁵

The point to take from this is that ITLOS needs to be careful in how it treats advisory requests and consistent with existing jurisprudence on advisory opinions.

These cases indicate that the principle of consent does not provide an exhaustive basis for explaining the discretionary power of a court to accept or decline a request for an advisory opinion. Rather, consent forms part of a wider matrix of factors (albeit an important one) that is to be considered by a court when determining the scope of its judicial function.

Matters Closely Related to an Ongoing Dispute?

A tribunal may decline a request if that request relates to an ongoing dispute that is closely related to the advisory proceedings. This is another way of framing the decision in *Status of Eastern Carelia* case.¹²⁶ Since Russia had not consented to the proceedings, the Court could not proceed to answer the question since this would be tantamount to deciding a dispute between the parties without the consent of both parties. Although this can be based on consent, the Court did not frame its reasoning in a way that made it clear whether the decision was a matter of discretion or a simple lack of jurisdiction. Neither term was used to frame the decision. I suggest that it is important to adopt a more nuanced approach to the issue than treating this simply as lack of consent. If the question submitted to the court covers precisely the same matter that is in dispute between two States, then this is best treated as a classic case of a lack of jurisdiction based on an absence of consent.¹²⁷ An advisory opinion cannot be used to circumvent the fundamental principle of consent. However, in cases where the question submitted relates to but does not fall absolutely within the same scope of an actual dispute

¹²⁵ H. Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989: Part Eleven" (2000) 71 *British Yearbook of International Law* 71, 123.

¹²⁶ *Eastern Carelia*, note 14, 27-29.

¹²⁷ *Western Sahara*, note 98, [32-33]; *Interpretation of Peace Treaties*, note 119, 72.

between two States, then the matter is less clear. Here it would seem appropriate for the court to treat this as a matter of discretion because the court may be able to separate out issues that fall within the principle of consent, and matters that do not, and then exercise its discretion to proceed with those matters that do not form part of that dispute.

As regards a climate related opinion, this ground is unlikely to prevent ITLOS from proceeding with an opinion because there are no ongoing disputes between States concerning climate change. Of course, this depends upon how one defines a dispute. Meyer takes the position that there does appear to be a dispute with regard to the issues that may be the object of an advisory opinion. Here he draws upon the wide definition of dispute (“conflict of legal views or of interests”) set out in the *Mavromatis* case.¹²⁸ However, this approach is problematic because it could preclude any opinion on a question of international law where a State not party to the advisory proceeding holds a different view on the matter. Moreover, other cases have advanced a more nuanced definition of dispute that entails some degree of opposition between parties in dispute and this requires some objective determination by a court or tribunal.¹²⁹ In the *Chagos Advisory Opinion*, the ICJ noted that the existence of divergent views on the matter that was the object of the opinion did not prevent it from dealing with the issue.¹³⁰ Even if Meyer’s view is correct, the risks of overlap with a “dispute” could be reduced by carefully framing the questions posed to a court or tribunal so as to avoid touching upon matters related to ongoing disputes.

Incompatibility with the Integrity of the Court’s Judicial Function

¹²⁸ Meyer, note 12, 59.

¹²⁹ See the *Interpretation of Peace Treaties*, note 119, p 74. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports, 1962 p. 319, 328.*

¹³⁰ *Ibid*, [89].

There is a wealth of jurisprudence showing that international courts and tribunals are mindful to protect the integrity of their judicial function.¹³¹ Integrity of judicial function is not precisely defined anywhere, but it alludes to some inherent limitation in the function of a court as a court of law. As the PCJ has observed “[t]he Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court”.¹³² In broad terms, this means ensuring that the court or tribunal limits itself to the administration of justice – or in other words, the identification, meaning and application of rules of international law.

In the *Chagos Advisory Opinion*, the ICJ stated that the purpose of its discretion to entertain a request was to protect the integrity of its judicial function as the principal judicial organ of the United Nations.¹³³ The Court did not explain the meaning of its “judicial function”, although it proceeded to examine the exercise of its discretion on more specific grounds, such as consent or complexity of evidential issues. This reinforces the argument that the integrity of judicial function is a way of organizing more specific grounds for declining jurisdiction. For example, in the *ILO Administrative Tribunal Advisory Opinion*, the Court was concerned with the good administration of justice when it was called upon to provide an opinion on matters that might affect an individual.¹³⁴ In particular, it considered any risks resulting from inequality of access between an organization and its officials to the proceedings before the court.¹³⁵ In the *Western Sahara* case, the ICJ held that giving an advisory opinion would be “incompatible with the Court’s judicial character”, if “the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be

¹³¹ *Northern Cameroons*, note 23, 30; *Frontier Dispute (Burkina Faso/Niger)*, Judgment, I.C.J. Reports 2013, p. 44, 69; *Kosovo, Advisory Opinion*, note 102, 416.

¹³² *Eastern Carelia*, note 14, 29.

¹³³ See *Chagos Advisory Opinion*, note 109, [64].

¹³⁴ Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10.

¹³⁵ *Ibid.*, [34ff].

submitted to judicial settlement without its consent”.¹³⁶ This might suggest that judicial integrity is merely a facet of the principle of consent discussed above. However, it is not clear that the integrity of judicial function can be reduced to mere consent, not least because consent is not the basis of advisory jurisdiction. It also depends upon assisting the function of the requesting body. In the *Wall Advisory Opinion*, the ICJ decided to give the opinion requested essentially on the ground that “[t]he opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute”.¹³⁷ Thirlway has noted that the ICJ’s reasoning suggests that if a matter is regarded by the requesting body as one “of particularly acute concern”, then this might override the principle of consent to judicial settlement.¹³⁸ Ultimately, however, the Court did not have to test this point since it found that the opinion would not have circumvented the principle of consent.

The consent issue was raised again in the *Chagos Advisory Opinion*, where some participants argued that to address the question would be to rule on a matter that was the object of a bilateral dispute between Mauritius and the United Kingdom in the absence of their consent.¹³⁹ However, the ICJ avoided this point by framing the issue not as one relating a bilateral territorial dispute, but rather, as relating to assistance to the General Assembly in the discharge of its functions relating to the decolonization of Mauritius.¹⁴⁰ This suggests that the exercise of jurisdiction is in part dependent upon the function of the requesting body. It also means that the way in which questions are framed will be of critical importance. Thus, if the issue is one

¹³⁶ *Western Sahara*, note 97, [33].

¹³⁷ *Ibid*, [50].

¹³⁸ Thirlway, note 18, [16].

¹³⁹ *Chagos Advisory Opinion*, note 109, [83].

¹⁴⁰ *Ibid*, [86].

that is properly associated with the function of the requesting body, then a court or tribunal should proceed with the opinion.

The ICJ has frequently referred to the purpose of an advisory opinion as being to enable requesting bodies to better carry out their functions.¹⁴¹ This is important because the responsive nature of advisory opinions helps frame the function of the Court. It also directs our focus onto the questions that should be asked. It is of no small significance that the ICJ's jurisprudence shows a careful attention to how the questions submitted to it link clearly to the functions of the requesting body.¹⁴² Whilst the ICJ has been careful to ensure the matter falls within the competence of the body to request, it held, in the *Kosovo Advisory Opinion*, that it is not for the Court to determine the usefulness of the opinion to the requesting body.¹⁴³ This appears to contradict the earlier position of the Court in the *Western Sahara* case, that it may consider whether the question is "devoid of any useful object".¹⁴⁴ Here the approach appears to be that whilst the ICJ should not substitute its view of what is useful to the requesting body, it is rightly entitled to consider the suitability of the request:

The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose.¹⁴⁵

For Kolb this has a negative function, and it means not answering moot or political questions.¹⁴⁶ And as the ICJ has stated: questions put to it must "have a practical and contemporary effect, and consequently, are not devoid of object and purpose."¹⁴⁷ Accordingly, one might ask

¹⁴¹ E.g., *Kosovo, Advisory Opinion*, note 102, [44].

¹⁴² See e.g. *Chagos Advisory Opinion*, note 109, [75-78, 163-169]; *Western Sahara*, note 97, [39].

¹⁴³ *Kosovo Advisory Opinion*, note 102, [34].

¹⁴⁴ *Western Sahara*, note 97 [20].

¹⁴⁵ *Ibid*, [73].

¹⁴⁶ R. Kolb, "General principles of procedural law" in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, (eds) *The Statute of the International Court of Justice: a commentary* (Oxford University Press, 2006), 793, 808.

¹⁴⁷ *Western Sahara, Advisory Opinion*, note 97, 37.

whether the creation of a body like COSIS purely for the purpose of seeking an advisory opinion challenges the integrity of the court or tribunal? It might be argued that the creation of a body with the sole objective of seeking an advisory opinion defeats the purpose of the court's advisory jurisdiction. If the body has no purpose other than seeking an advisory opinion, then it is difficult to demonstrate that the opinion would enable the body to make use of the advice. It might even be argued that the creation of a body is an abuse of process or bad faith – regardless of the wider motives behind the initiative to raise issues of common concern related to climate change and sea-level rise.

Complex and Disputed Factual Issues

In the *Chagos Advisory Opinion*, it was argued by some participants that the proceedings would raise complex factual and legal issues that would not be suitable for determination in advisory proceedings.¹⁴⁸ Similarly, in the *Western Sahara* case, the Court focused on whether or not it had “sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character”.¹⁴⁹ In practice, this will depend upon the contributions of participants to the proceedings, as well as any other information provided to the court by interested parties.

In a case concerning legal questions about climate change or matters of marine environmental science there is an abundance of material that could be brought before the ITLOS. As such, the challenge is less one about the sufficiency of information, but rather, the possibility of information overload and hence concerns about whether this could be synthesized effectively

¹⁴⁸ *Chagos Advisory Opinion*, note 109, [69].

¹⁴⁹ *Western Sahara*, note 97, [46].

within the confines of an advisory proceeding. One might also ask whether the judges have the requisite skills to handle questions about such technical or scientific matters. Whilst legal matters are the rightful domain of judges, reaching conclusions on some factual matters may be less straightforward. However, mere difficulties in assimilating information are no bar to proceedings. It is possible, and, indeed, likely that in respect of technical issues, ITLOS would draw upon assistance from experts. Whilst ITLOS cannot outsource its judicial functions, it is entitled to draw upon expert advice to assist the judges when handling technical issues.¹⁵⁰ As such the complexity and availability of information on climate related issues in the law of the sea should be no compelling reason for ITLOS to exercise its discretion to decline a request.

Vagueness or Lack of Clarity in the Question(s)

As discussed above, in order to seize ITLOS of a matter, a question must be submitted to the court. In the *SRFC Advisory Opinion*, some of the participants argued that the questions raised were too vague, general or unclear, and accordingly were not appropriate for an advisory opinion.¹⁵¹ However, ITLOS rejected these arguments, noting that it is well settled that an advisory opinion may be given “on any legal question, abstract or otherwise”.¹⁵² A poorly phrased question is no automatic bar to proceedings, and the ICJ has, on a number of occasions, reformulated a question that is infelicitously phrased.¹⁵³ However, this will be done only to ensure that the opinion given is one based on law.¹⁵⁴ This implies that a court will not reconstruct a question into something that was not asked. In the *SRFC Advisory Opinion*, it

¹⁵⁰ ITLOS may draw upon technical expertise under Article 77 of the Rules of the Tribunal. See further P. Gautier, “Experts before ITLOS: An Overview of the Tribunal’s Practice” (2018) 9 *Journal of International Dispute Settlement* 433.

¹⁵¹ See *SRFC Advisory Opinion*, note 16, Written Statements by UK, [5]; China [88-90]; and Ireland [3.2].

¹⁵² See the *Admission of a State to the United Nations (Charter, Art. 4)*, *Advisory Opinion*, *I.C.J. Reports 1948*, p. 57, 61.

¹⁵³ *Application for Review of Judgement No 273*, note 87, [46]; *Jaworzina*, *Advisory Opinion*, 1923, PCIJ, Series B, No. 8; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *Advisory Opinion*, *I.C.J. Reports 1956* p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 151, 157-162.

¹⁵⁴ *Western Sahara*, note 97, [15].

was argued that an advisory opinion cannot be given on questions of law that are *lex ferenda*.¹⁵⁵ ITLOS has held that it will not address matters beyond its judicial function, i.e., giving answers that are legislative in nature.¹⁵⁶ As shown in the next part of the article, there are clearly a number of existing rules related to oceans and climate that are *lex lata*. Although the ILC is examining sea-level related aspects of climate change under its programme of work, this is not a project concerning the development of new rules, but rather a mapping exercise designed to assist States in responding to the challenges of sea-level rise.¹⁵⁷

The Matter is Properly the Responsibility of Another Body

A more unusual line of argument could be to argue that the matter is properly the concern of another body. This is not yet recognized as factor in the jurisprudence of the ICJ. However, we should be concerned about the risk of different fora developing different guidance on the same subject matter. We should also be concerned about the effective use of limited judicial time and resources, and to avoid unnecessary duplication of efforts. Climate related aspects of sea level rise are currently under consideration by the International Law Commission (ILC).¹⁵⁸ The ILC's programme of work includes: consideration of the possible legal effects of sea-level rise on the baselines and the outer limits of the maritime spaces measured from the baselines; possible effects on maritime delimitation; possible effects on islands and their role in constructing baselines; questions about the exercise of sovereign rights and jurisdiction of coastal States and its nationals, as well as on the rights of third States and their nationals in maritime spaces that could be affected by sea-level rise. It also includes the possible legal

¹⁵⁵ *SRFC Advisory Opinion*, note 16, [73].

¹⁵⁶ *Ibid*, [74].

¹⁵⁷ See 2018 recommendation of the Working-Group on the long-term programme of work, UN Doc A/73/10, [18-20].

¹⁵⁸ International Law Commission, *Sea-level rise in relation to international law. First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN Doc. A/CN.4/470, 28 February 2020. This follows on from the earlier work of the ILA Committee on International Law and Sea level Rise, established in 2012.

effects of sea-level rise on the status of islands, including rocks, and on the maritime entitlements of a coastal State with fringing islands, as well as the legal status of artificial islands, reclamation or island fortification activities as a response to sea-level rise. The fact that oceans related aspects of climate change is under consideration by the ILC raises two distinct questions. First, whether the ILC's mandate excludes other bodies from making requests for an advisory opinion, and second, where it would be appropriate for the court to address an issue that is already under consideration by another UN body. In both cases there seem to be no reasons why the ICJ should decline to give an advisory opinion. However, potential for overlap should at least caution ITLOS to account for such developments in its opinion.

In the first situation, the ICJ has never declined to exercise jurisdiction because the request is made by one body but there is another body which also enjoys jurisdiction over the same subject matter. The key issue is whether the requesting body has competence to make the request. For example, even if the Security Council is seized of a matter, and it pertains to the maintenance of international peace and security, the ICJ has permitted the General Assembly to raise related legal questions – as it did in the *Kosovo Advisory Opinion*.¹⁵⁹ Article 24 of the UN Charter affords the Security Council primary but not exclusive competence, so this leaves room for the UN General Assembly to address related issues.¹⁶⁰ Disputes may have different facets and so be addressed in parallel by different bodies. The situation would be different if the dispute related to something within the exclusive competence of another body. In principle, this would be covered by the existing rules on lack of competence. Returning to our focus on climate related questions, we should consider what effect the mandate of the ILC might have

¹⁵⁹ *Kosovo Advisory Opinion*, note 102, [36-48].

¹⁶⁰ *Wall Advisory Opinion*, note 103, [26].

on the ITLOS assessment of a question from COSIS. The ILC is a subsidiary body of the UN General Assembly, but it does not have authority to initiate requests for advisory opinions. Nor does it enjoy exclusive competence on either the subject matter of climate change or even the development of international law. More generally, one should observe that no international body has an exclusive mandate for climate related issues. Accordingly, the fact that the ILC is seized of the same subject matter is no reason for ITLOS to decline a request for an advisory opinion from COSIS. On the second point, it might be asked whether it is a good use of time and resources for the same matter to be under review by two bodies (i.e., both the ILC and an international tribunal), and whether there is a risk of two discrete legal proceedings resulting in fragmentation and inconsistency. However, this is not a basis for the ITLOS to decline to answer a question.

Questions for Consideration by ITLOS

Throughout the forgoing analysis, it was shown that the way in which questions are formulated will be critical to the prospects of securing an advisory opinion. Accordingly, it is useful to consider what questions might be asked by way of a request for an advisory opinion. As regards the potential ITLOS proceedings, there are four broad limits on the kinds of questions that could be asked. The first relates to restrictions in the mandate of the requesting body – although this is essentially a matter of jurisdiction. The second relates to questions that necessitate answers that would undermine judicial integrity – such as political questions. The third relates to the applicable law. Thus, ITLOS should only address matters that fall within the scope of its applicable law. The fourth relates to matters that will be of value to the requesting body. Cumulatively, each of these factors serves to narrow down the range of potential questions that COSIS could pose to ITLOS.

General Restrictions Flowing from COSIS' Mandate

As discussed above, the ICJ declined to exercise jurisdiction over a request for an advisory opinion by the WHO because the questions asked did not pertain to matters arising within the scope of activities of the WHO. What then are the activities of the COSIS? The COSIS Agreement states that the Commission shall:

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 protection and preservation of the marine environment and the responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.¹⁶¹

COSIS' remit is framed initially with respect to climate change aspects of international law, with marine environmental protection and state responsibility used as indicative areas of concern. These two exemplars are not exhaustive, and this means that additional law of the sea or international environmental law issues related to climate change could be pursued. For example, the protection of the obligation to protect the marine environment also encompasses matters related to the conservation and management of marine living resources and this means that questions related to the regulation of marine living resources could also be raised.

Potential questions raised by COSIS that fall squarely within its wider mandate could include: what are States' obligations to prevent and mitigate the adverse consequences of climate change?; what is the extent of States' obligations to ensure climate related activities do not cause harm to other States?; what does an obligation of due diligence entail and how does this

¹⁶¹ COSIS Agreement, note 8, Art 1(3).

relate to Nationally Determined Contributions?; and do States owe particular or different obligations to small island developing States? A request might even include questions on the role that scientific evidence of climate change should take in framing State's obligations. Of course, ITLOS should not be expected to be an arbiter of scientific issues. As Bodansky wryly observes, "if the IPCC's multi-year, international assessments by hundreds of top climate scientists have been unable to settle the scientific disputes over climate change, it is hard to see how fifteen non-scientist judges could do so."¹⁶² However, international courts, including ITLOS, can certainly ascertain facts and matters upon which a high degree of scientific consensus exists.¹⁶³ Whilst environmental issues frequently involved contested science,¹⁶⁴ there appears to be a high degree of consensus on the causes and effects of climate change on the oceans.¹⁶⁵ Accordingly there could be scope for ITLOS to confirm that there is sufficient scientific certainty on the causes and effects of climate change on ocean and coastal features to inform how States' wider marine environmental responsibilities should be understood and applied.

Article 2(2) of COSIS provides that the Commission may request an advisory opinion on "any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules." This is prima facie expansive and so does not restrict the range of questions that could be asked, other than to matters that are limited to the Tribunal's general jurisdiction, that may threaten the integrity of its judicial function and or exceed its applicable law.

¹⁶² Bodansky, note 15, 708.

¹⁶³ See A. Riddell and B. Plant, *Evidence Before the International Court of Justice* (BIICL, 2009); C. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence Burdens of Proof and Finality* (Cambridge University Press, 2013).

¹⁶⁴ See for example, R. Moncel, "Dangerous Experiments: Scientific Integrity in International Environmental Adjudications after the ICJ's Decision on the Whaling in the Antarctic" (2015) 42 *Ecology Law Quarterly* 305.

¹⁶⁵ H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, et al (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge University Press, 2019). See also, the IPCC Sixth Assessment Reports at <https://www.ipcc.ch/assessment-report/ar6/> (accessed 11 July 2022).

Questions that Invite the Exercise of Discretion to Decline a Request

A number of factors were identified in the third part of this article that are relevant to ITLOS' discretion to exercise its jurisdiction: political questions; questions involving matters related to parties in dispute; questions determinative of States' legal responsibilities; and questions that have no practical purpose or concern *lex ferenda*. Accordingly, COSIS should avoid questions that would invite ITLOS to decline jurisdiction on the grounds that the questions concern matters outside ITLOS judicial functions, or which threaten the integrity of the Court.

The most obvious limitation flows from the need to avoid questions that are wholly political in nature. The distinction between law and policy may be difficult to draw, particularly when legal instruments incorporate policy measures or allow States to exercise discretion in the implementation of their obligations. Some provisions of UNCLOS entail the exercise of some discretion by States, such as the determination of what constitutes a necessary measure (e.g., UNCLOS, Article 194(2)). A good example of where a tribunal should exercise restraint would be in determining what constitutes a measure to protect the environment that is "in accordance with an individual States capabilities".¹⁶⁶ There may be scope to identify what legal obligations might shape such discretion and how because discretion is not legally unfettered, but ITLOS must not be asked to substitute its view over that of an individual State. Some commitments are more clearly political in nature, such as the specific content of National Defined Contributions (NDCs) under the Paris Agreement.¹⁶⁷ Whilst NDCs are a central aspect of States' obligations to address climate change they are clearly framed as commitments within a variable political context, and it is difficult to envisage any court dictating specific ways as

¹⁶⁶ UNCLOS, Art 194(1).

¹⁶⁷ See further, N. Gallo, D. Victor and L. Levin, "Ocean commitments under the Paris Agreement" (2017) 7 *Nature Climate Change* 833; B. Klerk, *Climate Change Obligations under the Law of the Sea: Interpreting UNCLOS in light of the Paris Agreement* (University of Oslo, 2021).

to how States should determine their commitments, other than in very general terms of due diligence, or to indicate what legal obligations are relevant to setting NDCs. On a related point, ITLOS should not be requested to give an opinion on matters that fall within the discretionary competence of other international organizations. For example, Article 203 of UNCLOS provides that developing States should be granted preference by international organizations (e.g., the IMO) in the allocation of funds or technical assistance, and use of specialized services. ITLOS is not able to determine what specific levels of support can and should be provided by agencies like the IMO.

A second limitation is to avoid questions that entail ITLOS determining the legal position of third States. This would include non-parties to the COSIS Agreement, but presumably also non-parties to UNCLOS. Similarly, questions that entail answers that would be determinative of the legality of individual legal State action, or their responsibilities should be avoided, except so far as this relates to matters within the jurisdiction of States parties to COSIS. This reflects the partial limitations advanced by ITLOS in the *SRFC Advisory Opinion*.¹⁶⁸ This clearly rules out questions concerning the liability of individual States to make reparations for harm caused by climate change.¹⁶⁹ Such questions would also be ruled out on the grounds that the link between cause and effect could not reasonably be proven.¹⁷⁰

A third limitation is to avoid questions that concern *lex ferenda* or are without any practical consequence for COSIS. ITLOS is limited to advising on the identification, meaning or application of existing rules. Similarly, ITLOS should not be invited to engage in judicial

¹⁶⁸ See footnote 68 and accompanying text.

¹⁶⁹ See also Meyer, note 12, 78-80.

¹⁷⁰ See for example, S. Mason-Case and J. Dehm, “Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present” in B. Meyer and A. Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021) 170 and A. Zahar, “Historical Responsibility for Climate Change Is Political Propaganda”, in B. Meyer and A. Zahar (eds), *ibid*, 190.

legislation. This rules out questions that entail ITLOS giving an opinion about what regulatory action is required to address any identified gaps or weaknesses in existing regimes. This is not the same as inviting ITLOS to explain and map out what constitutes “global and regional rules, standards and recommended practices and procedures” to prevent climate related pollution or “applicable international rules and standards” in relation to the enforcement of pollution controls.¹⁷¹ The identification of such rules clearly relates to *lex lata* and might usefully contribute to a practical understanding of how generally accepted rules and standards are determined.

ITLOS’ Applicable Law

Although a wide range of questions arise in respect of climate change, it is arguable that some questions cannot be answered by ITLOS because they deal with issues that fall outside the scope of its applicable law. The applicable law includes the provisions of UNCLOS but may also include ancillary rules of general international law. As Oxman has observed:

the meaning of the text of the Convention may itself be clarified by reference to rules found in other instruments or customary international law, such as those that help explain the provenance, wording, or function of the text. This does not, however, entail the application of rules external to the Convention.¹⁷²

It is important to keep the distinction between jurisdiction and applicable law clear.¹⁷³ ITLOS applicable law in advisory proceedings is framed by Article 138 of the Rules of the Tribunal

¹⁷¹ See UNCLOS Arts 212 and 222 respectively.

¹⁷² B. Oxman, “Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals”, in D. R. Rothwell, A. E. Oude Elferink, K. N. Scott et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 394, 414.

¹⁷³ *The Mox Plant Case (Ireland v. United Kingdom)*, PCA Case No 2002-01, Order No 3, Suspension of the proceedings on Jurisdiction and Merits, and request for Further Provisional Measures, 24 June 2003, [19]. Most commentators take the view Article 293 cannot be used to expand jurisdiction under Part XV. See M. Wood, “The International Tribunal for the Law of the Sea and General International Law” (2007) 22 *International Journal of Marine and Coastal Law* 351, 357; P. Tzeng, “Jurisdiction and Applicable Law under UNCLOS”

and Article 23 of the Statute. Article 138(3) states that the “Tribunal shall apply *mutatis mutandis* articles 130 to 137”. Although this relates to the Seabed Disputes Chamber, this provision should extend to the Tribunal’s wider advisory jurisdiction. Article 130 refers to rules in contentious cases, including Article 293 of UNCLOS on applicable law. Article 23 of the Statute also requires the Tribunal to apply Article 293. Article 293 provides that a “court or tribunal having jurisdiction under this section *shall apply this Convention and other rules of international law not incompatible with this Convention*” (emphasis added). There is little discussion of the precise extent of the applicable law in advisory proceedings, and the reasoning of the Tribunal on this issue is rather cursory.¹⁷⁴ However, it seems reasonable to conclude that any limits on the applicable law under Article 293 must be considered by the Tribunal.¹⁷⁵

This begs the question what aspects of UNCLOS concern climate change matters and so can be addressed unquestionably by ITLOS, and what matters external to UNCLOS the Tribunal may draw upon to provide its advice. As a starting point the wide definition of pollution in Article 1(4) of UNCLOS focuses on the direct or indirect introduction of substances or energy into the marine environment that causes deleterious effects. This clearly encompasses the observed impact of climate change through warming of sea temperatures and consequent effects such as depleted oxygen levels and acidification.¹⁷⁶ Part XII of UNCLOS is replete

(2016) 126 *Yale Law Journal* 242. Kate Parlett suggests this matter is still open to debate, “Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals” (2017) 48 *Ocean Development & International Law* 284.

¹⁷⁴ *SRFC Advisory Opinion*, note 16, [80-84].

¹⁷⁵ See L.N. Nguyen, “Jurisdiction and Applicable Law in the Settlement of Marine Environmental Disputes under UNCLOS” (2021) 9 *Korean Journal of International and Comparative Law* 337, 339-343; D. French, “From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber’s 2011 Advisory Opinion” (2011) 26 *International Journal of Marine and Coastal Law* 525, 533 and 540; Tzeng, note 173.

¹⁷⁶ A.J. Hobday and R.J. Matear, “The impact of climate change on oceans: physical, chemical and biological response” in J. MacDonald, J. McGee and R. Barnes (eds), *Research handbook on Climate Change, Oceans and Coasts* (Edward Elgar, 2020), 27.

with provisions relevant to climate change.¹⁷⁷ Article 192 of UNCLOS establishes a general obligation to protect the marine environment, regardless of the sources of harm. More specifically, Article 212 requires States to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere”. This entails the adoption of global and regional rules, standards, recommended practices and procedures to address such pollution. Article 222 establishes complementary obligations to enforce measures with respect to atmospheric pollution. Article 237 provides that Part XII is without prejudice to the obligations to protect the marine environment that are assumed by States under other agreements adopted in furtherance of UNCLOS. This opens the door to considering a range of global and regional agreements that form part of a network of obligations under UNCLOS. More generally, there is scope to consider specific rules on low tide elevations and baselines, or on fisheries management since these too are affected by sea level rise and changing ocean temperatures.

Under Part XV of the Convention, courts and tribunals have adopted a creative approach to the applicable law and have made good use of sources external to UNCLOS to help determine the meaning of obligations under the Convention. For example, in the *South China Sea* arbitration, the Tribunal had recourse to the Convention on Biological Diversity to interpret the meaning of Articles 192 and 194 of UNCLOS.¹⁷⁸ This had the benefit of enabling a dynamic assessment of the law, avoiding fragmentation, and situating the law of the sea within a wider international law framework. Although it will be for ITLOS to determine the applicable law, it is not unreasonable to expect that more specifically focused questions could reassure the Tribunal that it is not being asked to risk the integrity of its judicial function by applying rules that are

¹⁷⁷ See D. Freestone and M. McCreath, “Climate change, the Anthropocene and ocean law: mapping the issues” in MacDonald, McGee and Barnes, *ibid*, 49.

¹⁷⁸ *South China Sea Arbitration, Award on Jurisdiction and Admissibility*, 29 October 2015, [176].

wholly external to the Convention. Nguyen provides a useful set of insights here and notes that resort to external sources should be limited to situations where UNCLOS requires or leaves room for this, using framework obligations, rules or reference, or the application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.¹⁷⁹ More specifically, she notes that tribunals have taken care not to impose obligations on parties to which they have not consented.¹⁸⁰ Accordingly, ITLOS may restrict itself to examining multilateral agreements or regional agreements with widespread or inclusive participation of States. Whilst the issue of consent is more acute in contentious proceedings, as discussed above, this is something that the ICJ has been sensitive to in its advisory proceedings. States should be careful not to frame questions that would necessarily entail a court having to express a view on a matter directly related to an issue in dispute between two or more States. This suggests that questions should be clearly framed in ways that principally concern UNCLOS and not matters obviously situated in other legal regimes, such as the UNFCCC.

What Advice Will be of Value to the COSIS Commission?

The final factor that will frame the potential questions is: what advice will provide the COSIS Commission with information that is useful in meeting its mandate? This is not a formal limitation on the range of questions that could be asked based upon the issue of competence, rather, it reflects the practical motivations behind COSIS' approach to the request. As indicated, a court or tribunal will refrain from questioning the reasons for a request for an opinion. At this stage, we can only speculate on the specific questions that may be asked, but some general observations can be made.

¹⁷⁹ Nguyen, note 178, 344--348.

¹⁸⁰ Ibid, 351.

First, it is perhaps obvious to note that multiple questions can be asked. Most requests for advisory opinions seek advice on several related points. This spreads the risk of getting the question wrong and receiving an answer that is unhelpful. Given that climate change intersects with UNCLOS in several ways, one would anticipate several questions being presented to ITLOS.

Second, COSIS should be mindful of not expecting too much of ITLOS. Whilst an advisory opinion might provide a tempting forum in which to seek guidance on a wide range of climate related matters, a request that is too wide ranging in either the number questions or the form of questions posed could be seen as a general trawling exercise and so not sufficiently connected to assisting the COSIS Commission in the exercise of its functions. As a result, the request as a whole could be deemed to be without practical purpose.

Third, questions may be posed in a sequential manner so that subsequent questions are made contingent upon earlier questions in the request being answered in a particular way. This allows the request to be framed in a way that could invite ITLOS to exercise its discretion in a more nuanced way by, for example, leaving clear opportunities for the Tribunal to select appropriate elements of the request to address. This could reduce the risk of the request as a whole being declined. For example, a question on the meaning or scope of a due diligence obligation to mitigate the effects of climate induced sea-level rise could be made conditional upon ITLOS first addressing a question on the extent to which UNCLOS establishes a duty to protect the marine environment from the effects of climate change.

Fourth, ITLOS can be asked questions involving the ascertainment of facts. In the *Eastern Carelia* case, the PCIJ stated that “[T]he Court does not say that there is an absolute rule that

the request for an advisory opinion may not involve some enquiry as to facts.”¹⁸¹ However, such facts should not be a matter of significant controversy. ITLOS is a court of law and not a scientific body, and should not be asked to give views on matters outside its judicial remit. In any event, it is unclear what powers ITLOS has to ascertain facts that are not supplied to it by the participants in the proceedings.¹⁸² Given this uncertainty, it would be advisable that when framing questions, COSIS should be prepared to research, collate, and furnish ITLOS with sufficient information to enable it to answer a question. In the *Nuclear Weapons Advisory Opinion*, the ICJ refrained from determining whether the use of low yield, tactical weapons would be illegal, and whether recourse to the use of nuclear weapons generally would be illegal in any circumstances because it lacked sufficient information to be able to address such points, particularly in light of the extreme circumstances that might give rise to their use.¹⁸³ This concern with sufficiency of information is of direct relevance to the present discussion because it is conceivable that some aspects of climate change may raise issues that simply cannot be resolved in judicial proceedings. This might include matters that relate to uncertain impacts of climate change in the future, the specific attribution of blame for the historical causes of climate change, or the capacities of individual States to commit to specific courses of action in light of other social and economic demands upon their resources. Questions along these lines should be avoided by COSIS.

Fifth, we have some indication of the kinds of question that might be asked from past statements of interested States. For example, in 2011, Palau (now a signatory to the COSIS Agreement), framed its concerns in terms of responsibility for harm, and indicated that it wished to seek advice on “on whether countries have a legal responsibility to ensure that any

¹⁸¹ *Eastern Carelia*, note 14, 28.

¹⁸² Thirlway, note 18, [23]. Also, M. Benzing, “Article 48” in Zimmerman, note 49, [136].

¹⁸³ *Legality of the Threat or Use of Nuclear Weapons*, note 99 [94-7].

activities on their territory that emit greenhouse gases do not harm other States.”¹⁸⁴ However, as Ridings has observed, this entails discussions of state responsibility and is backward looking. Given the sensitivity of such matters, ITLOS may be hesitant to get involved in arguments about the resolution of historical or political grievances.¹⁸⁵ ITLOS would certainly be cautious in answering any question that was determinative of (or could be perceived to determine) the specific responsibilities of individual States, or even groups of States.

In light of the forgoing, the following questions could be submitted to ITLOS and survive the procedural limitations. First, *to what extent do climate change commitments have to be considered in commitments to protect the marine environment?* Arguably one of the most pressing general concerns we face is understanding the relationship between UNCLOS and the climate regime.¹⁸⁶ There is a need to identify what issues can be best addressed in each regime and to identify means of better coordinating approaches between these two regimes. This is particularly important in the context of ship source emissions, where there is an uneasy tension between the harmonized standard setting approach of the IMO, and the approach under the Paris Agreement, where differential responsibilities are advocated.¹⁸⁷ Subsidiary questions might include the questions concerning the extent of States’ obligations to take climate change into account in the conservation and management of fisheries resources, or to identify what powers or obligations States possess, individually and collectively, to mitigate climate change through oceans related activities, such as sequestration of carbon or enhancing the capacity of blue carbon ecosystems.

¹⁸⁴ UN News, “Palau seeks UN World Court opinion on damage caused by greenhouse gases”, note 2.

¹⁸⁵ P. Ridings, “An ICJ Advisory Opinion on Climate Change: Can it Assist in Driving Ambition?” <https://peneloperidings.com/wp48/index.php/2021/11/01/an-icj-advisory-opinion-on-climate-change-can-it-assist-in-driving-ambition/> (accessed 11 July 2022).

¹⁸⁶ D. Bodansky, “The Ocean and Climate Change Law. Exploring the Relationships” in R. Barnes and R. Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill, 2021) 316.

¹⁸⁷ See R. Barnes, “Global Solidarity, Differentiated Responsibilities and the Law of the Sea” (2022) *Netherlands Yearbook of International Law* (forthcoming).

Second, *what is the extent of due diligence obligations in respect of climate related obligations to protect the marine environment under Article 192 and 194 of UNCLOS?* Article 194 contains a duty to ensure that activities under their jurisdiction or control are so conducted as to not cause harm to the marine environment. This is an obligation of conduct, not result. As in the *South China Sea case*,¹⁸⁸ there is scope to refer to wider rules of international law to help explain the obligations and direct States as to what due diligence means in this context. ITLOS' Seabed Disputes Chamber has already made an important contribution to the deep seabed mining regime, by clarifying the obligations of sponsoring States. Meyer is skeptical about any judicial role here in light of the absence of concrete benchmarks to determine due diligence.¹⁸⁹ However, this seems to ignore the value to be had in identifying and explaining what the relevant maritime rules and standards are in determining the extent of States vigilance.

Third, *what is the impact of climate change on the drawing of maritime baselines and boundaries, and what steps may States take to adapt to the loss or degradation of maritime features used to delimit maritime zones?* Given the fact that climate change is already impacting the physical structure of low-lying maritime features and coasts, there is some urgency in having a declaratory ruling on what States may do to adapt to the real and potential loss of maritime territory.¹⁹⁰ The traditional ambulatory approach to baselines is not well suited to the current situation where significant territorial losses are caused by anthropogenic climate change. States have already responded to this using fixed baseline. An opinion could clarify the legitimacy of such steps within the scope of UNCLOS.

¹⁸⁸ See footnote 178 and the accompanying text.

¹⁸⁹ Meyer, note 12, section I(B).

¹⁹⁰ ILA, "International Law and Sea Level Rise: Committee Report" in *International Law Association, Report of the Seventy-Eighth Conference held in Sydney, August 2018* (ILA 2018). See also D. Vidas, D. Freestone and J. McAdam, *International Law and Sea Level Rise* (Brill Nijhoff, 2019).

Of course, the scope and language of such questions remains to be determined and will be much debated. To assist COSIS with this task, a panel of 14 legal experts was appointed by the Commission.¹⁹¹ Ultimately the selection of questions will be a political decision by the members of the COSIS Agreement, but ensuring these questions are carefully drafted will do much to ensure that a request for an advisory opinion is accepted by ITLOS, and that this leads to advice that can enable COSIS members to respond to the existential threats that climate change poses to its members.

Concluding Observations

With the adoption of the COSIS Agreement, a mechanism is now in place for a group of States, acting through a Commission, to submit a request to ITLOS for an advisory opinion. Given the wide jurisdictional remit of ITLOS to give an advisory opinion, there appear to be no fatal barriers to ITLOS accepting jurisdiction and exercising its discretion to answer such a request. As the work of the International Law Association and ILC shows, there appears to be a significant appetite for clarity in how climate change laws relate to or impact upon the law of the sea, and vice versa. No doubt an advisory opinion would be welcomed for its contribution to an issue of common concern to humankind. However, the Tribunal must be mindful of its proper judicial function, and this means careful assessing the jurisdictional basis for a request and the propriety of giving an opinion.

The COSIS Agreement is symbolic because it shows a faith in the role of international law and international courts to help respond to the existential threat of climate change. The advisory jurisdiction of ITLOS is in its infancy. In its only other advisory case to date, ITLOS showed

¹⁹¹ See footnote 9, above.

an appetite to enhance its judicial function by instantiating its plenary advisory jurisdiction. However, future requests will present challenge for ITLOS because ITLOS' decision has attracted considerable criticism over the legal basis of its advisory jurisdiction. Whilst most commentators acknowledge the value of advisory proceedings, significant concerns remain about the reasoning used by ITLOS to justify its advisory jurisdiction. More specifically, there is concern that the door has been opened to an advisory jurisdiction that is too wide. This is mainly because the basis of the Tribunal's jurisdiction depends upon the provisions of related agreements rather than some clearly and carefully delimited mandate set out within the Tribunal's Statute or Rules of Procedure. The existence of clear rules on both jurisdiction and admissibility (i.e., discretion to proceed with a request) is essential to protect the judicial function of international courts. If these rules are perceived as being ignored or defined too broadly then this can undermine the legitimacy of judicial pronouncements.

In future cases, ITLOS needs to focus on some key issues. First, ITLOS needs to carefully consider what constitutes a related agreement and how far it should scrutinize the mandate of bodies established under such agreements to ensure that they have a *prima facie* function that can be assisted through the giving of an advisory opinion. Second, ITLOS should carefully consider a range of factors when deciding whether there exist compelling reasons for not proceeding with the request. Here, ITLOS would do well to follow the more robust approach of the ICJ and ensure that it fully reasons out its position on the exercise of its jurisdiction. Whilst the issue of consent is important in some cases, this seems to be less critical in respect of climate change issues because the focus of the questions will be on issues of common concern rather than matters related to existing disputes. Here it is important for ITLOS to focus on the question of ensuring the integrity of its judicial function. More specifically, it should ensure that it sets out carefully its reasons on what constitutes a legal or political issue; its

reasons on how any questions relate to the position of third States; and how the outcome of the questions may facilitate some practical purpose for COSIS. It should be emphasised that the prospects of an advisory opinion are not wholly in the hands of ITLOS. Much will depend upon how the COSIS articulates its request. Here COSIS would do well to ensure that its questions are framed in a way that do not present a risk of exceeding ITLOS' jurisdictional limits (e.g. they raise matters that are beyond the mandate of COSIS), that they principally concern matters governed by the law of the sea and related rules on international law, that they do not stray into matters that ITLOS lacks the expertise to address, and that they avoid questions that cannot but entail deciding upon the legal rights and responsibilities of third States.

As a final observation, the prospects of advisory proceedings before ITLOS may also depend upon how initiatives to seize the jurisdiction of the ICJ proceed. As indicated at the outset, such proceedings are gaining traction, and may ultimately prove to be more attractive to States given the wider remit of the ICJ and the scope for using the UN General Assembly to filter and shape potential questions. Ultimately, the proposed proceedings before ITLOS could prove to be just a useful stalking horse for that case. Or the means to provoke political action in other fora.

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