The Contribution of ITLOS to Fight Climate Change: Prospects and Challenges of the COSIS Request for an Advisory Opinion

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Abstract

On 12 December 2022, the International Tribunal for the Law of the Sea (ITLOS) received a request from the Commission of Small Island States on Climate Change and International Law (COSIS) to render an advisory opinion in order to clarify the obligations of States under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to protect and preserve the marine environment in relation to climate change, including ocean warming, sea level rise, and ocean acidification. Although ITLOS has dealt with environment-related issues in the past, it has not yet specifically dealt with climate change and its (in)direct impacts. This contribution, drawing on the first opinion delivered by the Tribunal in 2015, aims to scrutinize some critical legal questions that the request will inevitably face, engaging particularly with its main procedural and substantive aspects. Since it is unlikely that ITLOS will encounter any unsurmountable obstacles to render the opinion, it would be expected that the Tribunal will take this opportunity to shed light on the implications of climate change for the legal regime of the sea, but also on the role of the Tribunal itself, to definitively clarify its advisory function.
Keywords
climate change – ITLOS – advisory opinion – UNCLOS – rules of procedure – COP 26

1 Introduction

On the sidelines of the 26th Conference of the Parties of the 1992 United Nation Framework Convention on Climate Change (“COP 26”), held in Glasgow in November 2021, the governments of Antigua-Barbuda and Tuvalu decided to establish the Commission of Small Island States on Climate Change and International Law (“COSIS”), an international organization with the mandate, among others, to request an advisory opinion to the International Tribunal for the Law of the Sea (“ITLOS”). According to its Statute, the mandate of COSIS is to promote and contribute to the definition, implementation and progressive development of rules and principles of international climate change law thus helping to clarify the States’ obligations on the protection and conservation of the marine environment and the liability for injury arising from international wrongdoing in connection with the breach of such obligations. To this end, recognizing that climate change is a common concern of humanity, the agreement expressly authorises the Commission to seek an advisory opinion from ITLOS on “any legal question within the scope of the United Nations Convention on the Law of the Sea (“UNCLOS”). In this context, on 12 December 2022, the Commission officially submitted its request to ITLOS, namely:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the “UNCLOS”), including under Part XII:

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1 Agreement to establish the Commission of Small Island States on Climate Change and International Law (COSIS), 31 October 2021. The agreement, initially concluded between Antigua and Barbuda and Tuvalu, has been subsequently joined by Niue, Palau, Saint Lucia and Vanuatu and it is open to signature by all 39 members of the Alliance of Small Island States (“AOSIS”).
2 COSIS Agreement, Art. 1, para. 3.
3 Ibid., Preamble.
4 See COSIS Agreement cit. supra note 1, Art. 2, para. 2. The prospect of uncontentious adjudication of climate issues in international fora is gaining momentum worldwide. Indeed, on 29 March 2023, the United Nations (“UN”) General Assembly adopted Resolution: Request for an advisory opinion of the International Court of Justice ("IC") on the obligations of States in respect of climate change (A/77/L.58). The request seeks, among others, to clarify States’ obligations to ensure the protection of the climate system and other parts of the
(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?5

This is not the first time ITLOS is called to render an advisory opinion. On 2 April 2015, the Sub-Regional Fisheries Commission (“srfc”),6 an international organization established by a group of States with the aim of promoting cooperation in the field of fisheries, urged the Tribunal to clarify the obligations of the flag States in contrasting illegal, unreported and unregulated (“IUU”) fishing activities.7 On that occasion, the Tribunal articulated its arguments in

environment from GHGS for States and for present and future generations as well as the legal consequences for States when they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment. Moreover, the ICJ advisory opinion is proceeding in parallel with the request for an advisory opinion, submitted the 9 January 2023, by Chile and Colombia, to the Inter-American Court of Human Rights (Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile). For a discussion see, among others, Savaresi, Kulovesi, and Van Asselt, “Beyond COP 26: Time for an Advisory Opinion on Climate Change?”, EJIL:Talk!, 17 December 2021; Barnes, “An Advisory Opinion on Climate Change Obligations under International Law: A Realistic Prospect?”, Ocean Development & International Law, 2022, pp. 1–34; Mayer, “International Advisory Proceedings on Climate Change”, Michigan Journal of International Law, 2023, pp. 41–115.

5 ITLOS, Request for an advisory opinion on Climate Change and International Law.
6 ITLOS, Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (srfc), Case n. 21, (2015).
7 More precisely, the four questions were: “1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone (EEZ) of third Party States? 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question? 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?”, see ITLOS, cit. supra note 6, p. 8.
two stages. First, it addressed the question of whether the Tribunal itself had a general advisory function. Secondly, it considered whether it had competence in the case, ending up by finally answering both questions in the affirmative. Moreover, the Tribunal had the opportunity to rule not only on the merit of the obligations on coastal States regarding the management of the living resources of their exclusive economic zones (“EEZ”), but also to substantiate its advisory function. While the former did not raise any relevant objection, the latter has been subject of severe criticism, from both States and numerous authors. Intuitively, same objections will be likely raised again in the COSIS request for an advisory opinion.

Although UNCLOS does not explicitly deal with the effects of climate change, it does establish rights and obligations which might be directly affected by or relevant to ocean-based climate change impacts. The request of COSIS, formulated against the background of UNCLOS, seems referring precisely to this possibility, thus considering ITLOS as a valuable forum to clarify States’ obligations under the law of the sea in relation to climate change. While a prima facie link instinctively seems to exist between Greenhouse gas (“GHG”) emissions and climate change, one should not underestimate any legal issues that may arise, particularly related – but not limited – to ITLOS advisory function, which is still considered to date “an unresolved issue”.8

In light of that, the present contribution discusses the prospects and challenges the request might face, using the SRFC opinion as a point of reference. First, the paper will briefly address the advisory jurisdiction of ITLOS (Section 2). Second, a number of preliminary questions regarding the requirements set out in Article 138 of ITLOS Rules of procedure will be examined (Section 3). Third, the merit of COSIS request will be considered (Section 4). Finally, the (possible) discretion of the exercise of the competence will be scrutinized (Section 5), before concluding with some final observations (Section 6).

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The Advisory Jurisdiction of ITLOS: the Debated Issue of the Legal Basis

Among various international jurisdictions with a dual advisory and contentious function, ITLOS represents “a rather special case”. Indeed, an advisory function is not expressly provided for in the Statute of the Tribunal annexed to UNCLOS. Similarly, UNCLOS does not include any rules in this respect, but is limited to set only the advisory function of the Seabed Disputes Chamber, an ITLOS’ specialized chamber entrusted with the exclusive function of interpreting Part XI of the Convention regarding activities carried out in the Area.

As a matter of fact, it was the Tribunal itself that established – autonomously – its advisory function, through the “innovative” inclusion of Article 138 in its Rules of procedure. Harsh criticism, both in the academic debate and by

9 Several international courts and tribunals can render advisory opinions. This competence is generally expressly enshrined in the constituent acts of the judicial body or in a related protocol. This is the case of the ICJ (Art. 65 of the Statute and Art. 96 of the Charter of the United Nations), the Seabed Disputes Chamber (Art. 159 and Art. 191 of UNCLOS), the European Court of Human Rights (Art. 46 of the European Convention on Human Rights), the Inter-American Court of Human Rights (Art. 64 of the American Convention on Human Rights) and the African Court on Human Rights (Art. 4 of the Protocol to the African Charter on Human and Peoples’ Rights).


14 According to Art. 16 of the Statute, “The Tribunal shall determine by regulation the manner in which it shall exercise its functions. It shall in particular regulate its procedure.”
numerous States, has been raised against this initiative, ultimately described as a “remarkable expansion of [Tribunal's] powers” or ultra vires.\textsuperscript{15} In the srfc advisory opinion, in order to substantiate the existence of an advisory function, the Tribunal started from the interpretation of Article 138 of ITLOS Rules,\textsuperscript{17} Article 288 of UNCLOS,\textsuperscript{18} and Article 21 of ITLOS Statute.\textsuperscript{19} According to Article 138(1) of ITLOS Rules, an advisory opinion might be requested “on a legal question if an international agreement related to the purposes of [UNCLOS] specifically provides for the submission to the Tribunal of a request for such an opinion”. However, in the srfc advisory opinion, the Tribunal noted that the article under consideration does not establish the Tribunal’s power to render advisory opinions, since it only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory function. It follows, therefore, that the legal basis for the power to render advisory opinions must be sought from an analysis of Article 288 UNCLOS and Article 21 of ITLOS Statute.\textsuperscript{20}

\textsuperscript{15} Becker, “Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (srfc)”, American Journal of International Law, 2015, p. 858.

\textsuperscript{16} In this vein, see Marotti, cit. supra note 10, p. 1182. See, also, the Separate Opinion of Judge Lucky, para. 98.

\textsuperscript{17} Art. 138 of the Rules of the Tribunal establishes 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”.

\textsuperscript{18} Art. 288, relating to mandatory procedures leading to binding decisions, establishes as follows: “1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. 2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement. 3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith. 4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal”.

\textsuperscript{19} The text of the Article states that “The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.

\textsuperscript{20} As noted by several States, Art. 21 ITLOS should however be interpreted in the light of Art. 288 UNCLOS, being the fundamental rule of the Convention relating to the contentious jurisdiction of the Court and, therefore, potentially useful for interpretative purposes.
According to the Tribunal, the basis of its jurisdiction derives from Article 21 of its Statute, where it is stated that “the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” (emphasis added). In particular, in order to establish the legal basis of its advisory function, the Tribunal focused its scrutiny on three terms, namely “disputes”, “applications”, and “all matters” included in Article 21. In the Tribunal’s opinion, “[t]he use of the word ‘disputes’ [...] is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word ‘applications’ refers to applications in contentious cases”. This would also be supported by Article 23 of the Statute, according to which “the Tribunal shall decide all disputes and applications in accordance with Article 293”. In fact, Article 293 is enshrined in Part xv of the Convention, concerning the “Settlement of Disputes”. It follows logically that this provision cannot establish the power of the Tribunal to make an advisory opinion. Therefore, according to the Tribunal, the terms “disputes” and “applications” cannot determine its advisory function, as they undoubtedly refer to litigation. Nevertheless, a different consideration has been made in respect of the term “matters”, which should not be interpreted narrowly to cover only “disputes”. If this was the case, Article 21 would have referred exclusively to that same term. Accordingly, the term “matters” must mean “something more than only disputes”, that is the possibility of also rendering advisory opinions. Consequently, as the Tribunal pointed out, “Article 21 and the ‘other agreement’ conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal”.

In concluding that it does have a general advisory jurisdiction, ITLOS confirmed that the request submitted by the SRF could be granted because of the combined reading of Article 21 of its Statute and “any other agreement”, namely the MAC Convention of 14 July 1993, which provided in

However, this analysis was not accepted, leading the Court to point out that “As specified by article 318 of the Convention, Annexes ‘form an integral part of this Convention’. As stated in article 1, paragraph 1, of the Statute, ‘[t]he International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute’. It follows from the above that the Statute enjoys the same status as the Convention. Accordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention”, SRF Advisory Opinion, para. 52.

21 Ibid., para. 55.
22 Ibid., para. 56.
23 Ibid., para. 58.
Article 33 that the SRFC might “bring a given legal matter before [ITLOS] for an advisory opinion”. However, the interpretative solution adopted by the Tribunal was not considered convincing by a considerable part of the doctrine. Due to the ambiguity of the term “matters” referred to in Article 21 of the Statute, the Tribunal should have taken into consideration other elements for interpretive purposes, i.e. the normative context of Article 21 and the travaux préparatoires of the Statute, but it did not, limiting itself to the analysis of the text. This approach, as it has been extensively noted both in literature and by several States, as well as by some judges of the

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24 ITLOS, Convention on the Definition of the Minimum Access Conditions and Exploitation of Fisheries Resources Within the Maritime Zones under the Jurisdiction of SPRC Member States, 8 June 2012.

25 Moreover, as noted by Marotti, “Even the possible recourse to the preparatory works by the Tribunal, likewise a correct contextual interpretation, it would have led to a negative outcome as regards the foundation of the advisory competence, since no mention of this competence could be found in it in relation to article 21” [translated by the author], MAROTTI, cit. supra note 10, p. 1176. For a critical assessment of the Tribunal’s reasoning see, ex multis, RUPS, SOETE, cit. supra note 10; GARCÍA-REVILLO, cit. supra note 10; 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”, Leiden Journal of International Law, 2016, pp. 441-461; YOU, “Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited”, Ocean Development & International Law, 2008, pp. 360-371; GAO, cit. supra note 8.

26 In 2015, on this point, participant States had profoundly different views. On one hand, some States have convincingly confirmed its existence, including Germany, Japan, Micronesia, New Zealand and Somalia. For instance, Germany has considered that “In our view Article 21 of the Statute by itself already provides an implicit legal basis for the competence of the full Tribunal to issue advisory opinions”, Written Statement of Germany (n. 45), para. 8. Likewise, New Zealand has considered that the phrase “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” could be interpreted as including a request for an advisory opinion where that request is submitted under an agreement that specifically confers such jurisdiction on the Tribunal”, Written Statement of New Zealand (n. 48), para. 10. In contrast, ten of the twenty-two States that submitted written statements to the Tribunal during the proceedings have instead considered that ITLOS does not enjoy an advisory function under the UNCLOS Convention. Such States are Argentina, Australia, China, France, Republic of Ireland, Portugal, Spain, Thailand, United Kingdom and the United States. For instance, Australia has highlighted in this regard that “It is not open to the Tribunal to exercise an advisory jurisdiction which has been purportedly conferred on the Tribunal by a treaty or agreement independently of the 1982 Convention. Such a conferral of jurisdiction by another treaty or agreement would have been possible had the 1982 Convention itself authorized the Tribunal to exercise advisory jurisdiction pursuant to such a conferral by another treaty or agreement. As established above, the 1982 Convention does not do so”, Written Statement of Australia (n. 35), para. 33. For a complete overview, see https://www.itlos.org/index.php?id=252.
Tribunal, would have led to a different view: that the Tribunal’s advisory function is not supported by a solid legal basis. Quite evidently, the advisory jurisdiction of the Tribunal could be challenged again in the request of an advisory opinion made by cosis. However, although it seems reasonable to imagine that the Tribunal would not deny its own function thus disavowing its existence tout court, it would be desirable that the Tribunal would take the opportunity to engage with the objections to jurisdiction more thoroughly than it did in 2015, if it wishes to convince the reluctant States of the legitimacy of its advisory function. In any event, as it is well known, recognizing the existence of a function does not entail, necessarily, to have jurisdiction in the case or its exercise. This gives the Tribunal a certain margin of manoeuvre, for instance theoretically confirming (again) its general advisory function but not its jurisdiction or competence in the case at hand.

3 Do the cosis Founding Treaty and its Request for an Advisory Opinion Satisfy the Requirements Set Out in Article 138 of ITLOS Rules of Procedure?

After having scrutinized the general function of the Tribunal, Article 138 of the Rules sets out the preconditions that must be fulfilled to render an advisory opinion. Indeed, it states that the Tribunal may give an advisory opinion on a “legal question if an international agreement related to the purposes of [UNCLOS]” specifically provides for the submission of a request to the Tribunal. This Section will briefly discuss these requirements.

With regard to the request made by cosis, the first element to be analysed is therefore the nature of the request, i.e. whether it concerns one or more issues having a legal nature. In 2011, the Seabed Disputes Chamber stated that a legal question arises when it is “framed in terms of law and rais[ing] problems of international law”, and as such “susceptible of a reply based on law”. In the 2015 opinion, in order to ascertain the nature of the questions submitted by the

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27 See Separate Opinions of Judge Lucky and Judge Cot.
28 In this respect, see MIRON, “cosis Request for an Advisory Opinion: A Poisoned Apple for the ITLOS?”, The International Journal of Marine and Coastal Law, 2023, pp. 1–21.
29 ITLOS Rules, Art. 138.
30 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case n. 17 (2011), para. 25.
SRFC, the Tribunal relied extensively on the jurisprudence of the International Court of Justice (“ICJ”)\(^{31}\) according to which the highly political nature of a question does not imply or lead to decline a request, nor likewise a hypothetical vague, unclear and ambiguous wording of the request. Indeed, in principle, the Court can answer “any legal question, abstract or otherwise”\(^{32}\). In the SRFC opinion, the Tribunal confirmed that the Sub Regional Commission asked legal questions. As for the Cosis request, it seems unlikely that this condition will present an insurmountable prerequisite to jurisdiction. A similar consideration can be done regarding the further prerequisite referred to in Article 138, namely the aim of the external agreement conferring jurisdiction, consisting of an “international agreement related to the purposes of the Convention". In the 2015 opinion, the Tribunal proceeded expeditiously on this point, confirming the existence of an external agreement conferring jurisdiction on the Tribunal. Indeed, Article 33 of the MAC Convention empowered the SRFC Council of Ministers to authorize the SRFC Permanent Secretary to request an advisory opinion from ITLOS on a legal matter. Furthermore, regarding the “connection” that must exist between the agreement granting jurisdiction and the purposes of UNCLOS, the Tribunal confirmed that the agreement was closely related to the purposes of the Convention. Indeed, the Tribunal considered the external agreement related to the purposes of the Convention insofar as its objective was to implement UNCLOS’ substantive provisions\(^{33}\) in relation to fisheries as well as it ascertained the presence of a reference to UNCLOS in the preamble.\(^{34}\)

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33 In a critical perspective, see Marotti, cit. supra note 10, p. 1186 ff. Furthermore, with regard to the jurisprudence of the Tribunal, see Bankes, “The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties”, Ocean Development & International Law, 2021, pp. 346–380.

34 Specifically, as highlighted in para. 63 of the SRFC opinion: “As stated in its preamble, the objective of the MAC Convention is to implement the Convention ‘especially its provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector as well [as] the other relevant international treaties’ and ensure that the policies and legislation of its Member States ‘are more effectively harmonized with a view to a better exploitation of fisheries resources in the maritime zones under..."
Accordingly, on the basis of the approach followed in 2015, it seems likely, *mutatis mutandis*, that the Tribunal would act accordingly in regard of the request made by cosis. First, in addition to being a fully-fledged international organization, it is also expressly authorised, under Article 2(2) of the 2021 establishing agreement, to request an advisory opinion to ITLOS on any legal issues within the scope of UNCLOS. Second, as shown above, it is necessary for the agreement to be “related to” the purposes of UNCLOS. In contrast to the 2015 opinion, where the connection appeared crystal-clear since the MAC Convention was designed to regulate matters related to the law of the sea, this might not be the case of cosis. However, this matter seems to have been taken into consideration by the drafters of the agreement establishing cosis. In order to preemptively satisfy this linkage criterion, they explicitly made a twofold reference to UNCLOS in the preamble of cosis as well as in the conferral of the Commission’s mandate to promote and contribute to the development of rules and principles related to the protection of the marine environment (Article 2(1)). Moreover, considering that the degree of linkage is a “low threshold”, it follows that the agreement establishing cosis would presumably meet the requirement.

4 The Merits of the cosis Request: Some Preliminary Remarks

In general terms, the cosis request for an advisory opinion concerns to what extent the UNCLOS can be interpreted as imposing upon States obligations...
on the prevention and conservation of the marine environment also from the deleterious effects that result or are likely to result from climate change. In the following, assuming that ITLOS will assert jurisdiction, it will be briefly explored which UNCLOS provisions can be deemed as addressing the issues submitted by COSIS. It should be first noted that the phenomenon of climate change was not discussed during the negotiations leading up to the adoption of UNLCOs, which does not directly address it. However, as amply reported by recent scientific studies, it is nowadays evident that GHGs, including carbon dioxide ("CO₂") emissions, are responsible for multiple negative impacts on the marine environment and its ecosystems, driving up ocean surface temperatures and causing ocean acidification. Moreover, "oceanic uptake of CO₂ (a 'substance') alters ocean chemistry, leading *inter alia* to acidification and deoxygenation. GHGs furthermore add 'energy' into the marine environment which leads to ocean warming, thermal expansion and, combined with the melting of the cryosphere, exacerbates sea-level rise ("indirect effects")\textsuperscript{40}.

In this regard, due to global warming and its induced sea-level rise, low-lying States and coastal areas will be significantly – and more severely – affected by climate change. Some provisions of UNCLOS, precisely those relating to the protection and conservation of the marine environment (Part XII), to marine scientific research (Part XIII), and to maritime delimitations\textsuperscript{41} appear likely to be considered directly affected by the phenomenon of climate change\textsuperscript{42} and thus potentially fall within the jurisdiction of the Tribunal.

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\textsuperscript{39} In this regard, see Masson-Delmotte et al., Intergovernmental Panel on Climate Change (IPCC), Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, 2021. Regarding the GHGs’ effect on the marine ecosystem see, in particular, Chapter 9, p. 1213 ff.

\textsuperscript{40} Holst, “Taking the current when it serves: Prospects and challenges for an ITLOS advisory opinion on oceans and climate change”, Review of European, Comparative & International Environmental Law, 2023, pp. 1–10.

\textsuperscript{41} In 2019, the International Law Commission ("ILC") decided to include the topic “Sea-level rise in relation to international law” in its programme of work. Moreover, the ILC also decided to establish an open-ended Study Group on the subject. For more information, see https://legal.un.org/ilc/guide/8_9.shtml#ilcrep.

\textsuperscript{42} For an overview, see McCreadeth, "The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes, Climate Change Litigation in the Asia Pacific", in Lin, Kysar (eds.), Climate Change Litigation in the Asia Pacific, Cambridge, 2020, pp. 120–143; Mayer, *cit. supra* note 4; Hobday, Alistair Richard, Mather, “The Impact of Climate Change on Oceans: Physical, Chemical and Biological Response”, in McDonaldb, Jan, Mcgee, Jeffrey, Barnes, Richard (eds.), Research Handbook on Climate Change, Oceans and Coasts, Elgar Publishing, 2020, pp. 27–47; Freestone, McCreath, "Climate Change, the Anthropocene and Ocean Law: Mapping the Issues", in McDonald, Mcgee, Barnes (eds.), Research Handbook on Climate Change, Oceans and Coasts, London, 2020,
Article 1(4) of UNCLOS,⁴³ “pollution of the marine environment” amounts to the introduction “by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities”. Part XII of UNCLOS, specifically Article 192, establishes that States have a general obligation to take all necessary measures “to protect and preserve the marine environment”,⁴⁴ which has been notably interpreted to encompass the living resources of the sea.⁴⁵

This obligation is further elaborated in the following Article 194, which stipulates that UNCLOS parties have to take, individually or jointly as appropriate, all necessary measures “to prevent, reduce and control pollution of the marine environment from any source” and “to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States […] to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.⁴⁶ These articles may therefore appear relevant given the impact of climate change on coral reefs and the animal species dependent on them, i.e. from the general alteration of the balance of complex ecosystems found in the oceans.⁴⁷ Finally, it is also noteworthy that UNCLOS requires not only measures to prevent, reduce and control pollution of the marine environment (Article 194), but likewise measures devoted to cooperation between States with the objective of monitoring the risks or effects of pollution (Article 204) and more specific measures to combat pollution from land-based
sources (Article 207), pollution by dumping (Article 210), pollution from vessels (Article 211), and pollution from or through the atmosphere (Article 212).48

Similarly, although there is no mention in UNCLOS of GHG emissions as sources of contamination of the marine environment49 it is presumable that, given the broad definition of marine pollution provided in Article 1(4) of the Convention, this case may be included too.50 Therefore, it would be plausible that the negative impacts of GHG emissions on the oceans would be considered “pollution of the marine environment” and that, in principle, Part XII of UNCLOS would apply. Accordingly, the obligation to prevent marine pollution by GHG emissions may arise in the interpretation or application of UNCLOS. The rules applicable by ITLOS in advisory proceedings can be found in Article 138 of the Rules of the Tribunal and Article 23 of the Statute. Article 138(3) states that “the Tribunal shall apply mutatis mutandis Articles 130 to 137” relating to the advisory function of the Seabed Disputes Chamber. Finally, Article 23 refers to the rules on disputes, including Article 293 of UNCLOS on applicable law. Under Article 23 of the Statute, the Tribunal is called upon to apply Article 293 of UNCLOS, which states that the Tribunal shall apply the Convention and other rules of international law not incompatible with it, including customary international law. Moreover, the “unique character of UNCLOS as a ‘Constitution of the Oceans’ allows it to be flexible and responsive enough to deal with emerging problems as a living instrument”.51

In the 2016 South China Sea Arbitration,52 the Tribunal elaborated upon the interpretation of the Convention, particularly regarding Article 192 and Article 194 UNCLOS. Overall, this award would potentially provide to ITLOS

49 In doctrine, it has been pointed out that “Part XII of the United Nations Convention on the Law of the Sea (UNCLOS) on the Protection and Preservation of the Marine Environment contains provisions that are formulated in terms of the protection of the marine environment contains provisions that are formulated in a general way”, NGUYEN, “Jurisdiction and Applicable Law in the Settlement of Marine Environmental disputes over the marine environment under UNCLOS”, The Korean Journal of International and Comparative Law, 2021, p. 338.
50 On this topic, among others, BARNES, cit. supra note 4.
useful guidance to the interpretation and application of relevant provisions of
UNCLOS with respect to the marine environment.

In that occasion, the Arbitral Tribunal reaffirmed the obligations upon
States regarding the protection and preservation of the marine environment
and the corresponding duty of cooperation. Specifically, the Tribunal noted
that Article 192 of UNCLOS entails a twofold obligation to take measures to
protect and preserve the marine environment and to ensure that activities
within their jurisdiction and control respect the environment of other States
or areas beyond national control. Notably, the obligation of States to control
polluting activities that occur within their jurisdiction affect the environment
of other States and areas beyond national control is a long-established rule,
recognised as customary international law.53 Furthermore, the Tribunal
specified that the duty to protect the marine environment not only required
the adoption of appropriate measures but also “a duty to prevent, or at least
mitigate significant harm to the environment”.54

If called upon to address climate change issues regarding COSIS request,
ITLOS would have at its disposal other relevant provisions,55 such as the duty
to cooperate which is an essential principle of international environmental
law and a crucial obligation concerning climate change. Indeed, in MOX Plant56
and in the Land reclamation in and around the Straits of Johor Case, the Tribunal
emphasised that “[it] is a fundamental principle in the prevention of pollution
of the marine environment under Part XII of the Convention and general
international law”.57 In this regard, it has been noted that, “ITLOS might also
be expected to consider whether the duty to cooperate in preventing pollution
of the marine environment encompasses solely procedural obligations like the
duty to inform of transboundary harm or includes substantives responsibilities
such as assisting developing countries to enhance their capacity to prevent
and mitigate climate change”.58 Therefore, from this brief overview, it can be

53 Maljean-Dubois, “The No-Harm Principle as the Foundation of International Climate
54 See supra note 52, para. 941.
55 See, on this point, Alarcon, Tigré, “Navigating the Intersection of Climate Change
and the Law of the Sea: Exploring the ITLOS Advisory Opinion’s Substantive Content”,
Climate Law a Sabin Center blog, 2023, available at https://blogs.law.columbia.edu
climatechange/2023/04/24/navigating-the-intersection-of-climate-change-and-the-law
56 MOX Plant (Ireland v. United Kingdom), ITLOS Case N. 10, Provisional Measures, Order of 3
December 2001, para. 82.
57 Case Concerning Land Reclamation by Singapore in and around the Straits of Johor
(Malaysia v. Singapore), ITLOS Case N. 12, Provisional Measures, Order of 8 October 2003,
para. 92.
58 See supra note 55, p. 3.
assumed that the Tribunal has the tools to rely, if not exclusively, primarily on UNCLOS, without prejudice to the possibility of invoking other climate change-related provisions and that it has the power to do so.\textsuperscript{59}

5 The (Possible) Discretion in Rendering the Advisory Opinion

Finally, since Article 138 of the Rules establishes that the Tribunal “may give an advisory opinion”\textsuperscript{60} (emphasis added), it is generally recognised that the Tribunal has the discretionary power\textsuperscript{61} to render an advisory opinion. In 2015, the Tribunal did not decline to render the advisory opinion since, in principle, the request should not be refused except for “compelling reasons”.\textsuperscript{62}

Regarding the request made by COSIS, it has been advanced that, among others, a possible compelling reason could be the complex and highly technical nature of the request. Indeed, whether advisory proceedings are well suited in case of complex and disputed facts is not new.\textsuperscript{63} However, in the case of climate-related issues, it has been noted that due to the vast amount of scientific data “the challenge [is] rather about the possibility of information overload” and that, in principle, the availability of information [...] should be


\textsuperscript{60} ITLOS Rules, Art. 138. Furthermore, it should be noted that such discretion is not possible for the Seabed Disputes Chamber. Indeed, Art. 191 of the UNCLOS states that “The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency” (emphasis added).

\textsuperscript{61} See, in particular, paras. 70–79 of the SRFC opinion. In this regard, Barnes, in a comparative perspective, has pointed out how the 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, and the Permanent Court of International Justice refused to give an advisory opinion in only one case from 29 applications”. See Barnes, cit. supra note 4, p. 3.


no compelling reason for ITLOS to exercise its discretion to decline a request”.64 Ultimately, as noted by Judge Kooijmans in the Wall Opinion, “it is the Court’s own responsibility to assess whether the available information is sufficient to give the requested opinion”.65 Another possible reason, potentially more “insidious”, could be the lack of consent of the States that did not request the opinion. This would be related to the fact that, although advisory opinions are not legally binding,66 it is generally acknowledged that they correspond to authoritative statements with legal effects.67 As a consequence, if the Tribunal will render the advisory opinion, theoretically the legal effects of this opinion would affect also States that did not take part in the request.

In 2015, the Tribunal overcame this possible hurdle not only by reaffirming that advisory opinions lack formal binding force, but also by circumscribing the scope of the request noting that advisory opinions are given only with respect to the requesting organization “in order to obtain enlightenment as to the course of action it should take”.68 Accordingly, the Tribunal did not recognize “compelling reasons” for not ruling. However, if this interpretation could easily apply to the specificities and regional scope of SRFC’s activities, the same approach might appear more problematic vis-à-vis the request from COSIS, which by the nature and scope of the issues raised would per se go to the entirety of the international community. Indeed, the questions submitted to the Tribunal might be regarded as primarily related to the international obligations of non COSIS members, rather than to assisting COSIS to carry out

64 See Barnes, cit. supra note 4, p. 202.

65 Separate Opinion of Judge Kooijmans, para. 28.

66 See, in this regard Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950, ICJ Reports, 1950; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports, 2004; Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS Case N. 21, 2015. Moreover, how it has been highlighted, “[t]here is little distinction between judgments and opinions in terms of their doctrinal authority” in how much “it would discredit the international tribunal if States were free to treat as only advisory an opinion that they had voluntarily solicited”. Respectively, Malick, “The Advisory Function of the International Tribunal for the Law of the Sea”, Chinese Journal of International Law, 2010, p. 579 and Sohn, "Broadening the Advisory Jurisdiction of the International Court of Justice", American Journal of International Law, 1983, p. 125.


68 ITLOS opinion, para. 76–77.
its main function, namely “to promote and contribute to the definition [... of] rules and principles of international law concerning climate change.”

As noted by the Permanent Court of International Justice in its opinion on *East Carelia* and later reiterated by the ICJ in its opinion on *Western Sahara*, “lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion.” Although some scholars have suggested that lack of consent is a (hopeless) argument of inadmissibility, which has been systematically rejected it seems possible to affirm that, due to the peculiarities of the question asked to the Tribunal, this possibility would be potentially insidious inducing the Tribunal to decline to answer.

6 Concluding Observations

Defining the role of an advisory opinion by the Tribunal could be a question, at present, of not ready solution. First of all, numerous critical issues concerning the existence of advisory function of the Tribunal will likely persist, particularly in relation to Article 138 of ITLOS Rules of procedure. Unfortunately, in 2015 the Tribunal did not seem to have taken the opportunity to clarify some fundamental aspects on the legal basis and scope of its advisory function, which, conversely, would have deserved careful consideration. With regards to COSIS request, it seems unlikely that the Tribunal would deny its advisory function, thus overturning its jurisprudence. As briefly illustrated in this article, as far as jurisdiction and admissibility are concerned, the request of an advisory opinion would not pose any impossible hurdles to the Tribunal.

Yet, it seems equally possible to imagine that “the criticisms that have been made in relation to (the 2015 opinion), and those that a new request would inevitably prompt, could lead the Tribunal to adopt a cautious and narrow approach to the scope of this advisory jurisdiction.” This possibility could be even more evident in the context of an opinion related to climate change,

69 COSIS Agreement, Art. 2, para. 1.
72 Ibid., para. 32.
73 See, inter alia, MIRON, cit. supra note 28, p. 20.
74 MAYER, cit. supra note 4, p. 35.
given the politically sensitive nature of the topics as well as the effects that an advisory opinion on this subject might have on the international community as a whole.\textsuperscript{75}

All in all, as pointed out by Judge Ndiaye,\textsuperscript{76} through its advisory function the Tribunal would be potentially able to clarify a significant number of legal issues that the climate change entails for the law of the sea regime. On the other hand, this would take place in a context of (persistent) widespread uncertainty regarding the Tribunal’s advisory function, ultimately undermining not only the legitimacy of the opinion but eventually the Tribunal’s authority as well.

Undoubtedly, COSIS advisory opinion request comes at a time of urgency to address the climate crisis. As the examination conducted shows, while there are practical and legal issues that COSIS request will inevitably face, a positive outcome would be desirable not only as a further means to elucidate the implications of climate change for the legal regime of the sea, but also for the Tribunal itself, in order to definitively clarify its advisory function.
