Booming Advisory Jurisdiction of the International Tribunal for the Law of the Sea

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Abstract

The United Nations (UN) Ocean Decade brings about a noticeable upswing of requests for advisory opinions from international judicial bodies – potentially promising to be an effective tool to develop the Law of the Sea. In the light of new challenges in environmental law, such as climate change and

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sea level rise, advisory opinions ought to provide an operative way for States to seek clarification on legal questions, without needing to threaten their political relationships by suing another State. For Law of the Sea matters, the advisory jurisdiction of its special judicial body has been contested profoundly. Whether advisory opinions as a tool to develop the Law of the Sea through the International Tribunal for the Law of the Sea will experience a boom, hinges upon the question to what extent ITLOS enjoys advisory jurisdiction. Using the means of interpretation under the Vienna Convention for the Law of Treaties, this article argues that the International Tribunal for the Law of the Sea (ITLOS) possesses advisory jurisdiction.

Keywords

Advisory Opinion – ITLOS – Law of the Sea – Advisory Jurisdiction – Climate Change

On 8 December 2022, the Commission of Small Islands States on Climate Change and International Law (Commission of Small Island States)[1], consisting of Antigua and Barbuda, Tuvalu, Niue, Palau, St. Lucia, and Vanuatu, submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS, Tribunal) on the obligations of States to protect the marine environment and their duties regarding climate change. Although not legally binding, advisory opinions significantly contribute to the development of public international law, as a widely accepted international judicial body (for ITLOS currently 168 State parties)[2] officially expresses its opinion on the law, which helps to form binding customary international law (*opinio juris sive necessitatis*). However, it has been contested whether ITLOS possesses this power.

ITLOS is a special judicial body established by the United Nations Convention for the Law of the Sea (UNCLOS),[3] with jurisdiction over any dispute concerning the interpretation or application of UNCLOS, as well as over all matters specifically provided for in any other agreement, which confers jurisdiction on it (Arts 288, 287 (1) lit. a UNCLOS, Art. 21 Annex XI UNCLOS, Statute of the Tribunal for the Law of the Sea, 'Statute').[4]

1 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law of 31 October 2021, UNTS 56940.

2 <https://www.itlos.org>.

3 UNTS, Vol. 1833, No. I-31363.

4 Louis B. Sohn, John E. Noyes, Erick Franck and Kristen G. Juras, *Cases and Materials on the Law of the Sea* (Leiden: Brill Nijhoff 2014), 11.

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Since its inauguration in 1996,[5] ITLOS entertained 28 contentious cases and is now looking at its third advisory opinion. While the first advisory opinion in 2011 was submitted to the specially mandated Seabed Disputes Chamber (SDC),[6] the advisory opinion in 2015,[7] like the new advisory opinion by the Commission of Small Island States, was addressed to the full Tribunal – sparking, back then and now again, a dispute on the jurisdiction of the full Tribunal (advisory jurisdiction): While the advisory jurisdiction of the SDC is expressly codified in Arts 191, 159 (10) UNCLOS and Art. 40 (2) Statute, an express mentioning of the advisory jurisdiction of the full Tribunal can only be found in the 1997 Rules of the International Tribunal for the Law of the Sea (Art. 138 'Rules'). Both of the constituent documents (UNCLOS, Statute), however, do not mention the advisory jurisdiction of the full Tribunal *expressis verbis*. In 2015, ITLOS ultimately accepted its advisory jurisdiction but with a narrow scope, only pertaining to the Exclusive Economic Zone (EEZ) of the State parties. This limitation is of particular interest for the current advisory opinion, the scope of which is not limited to any zone of the sea, and in fact may even exceed the marine zones entirely, as it addresses responsibilities of States for climate change – actions that widely take place on land. This will likely cause the Tribunal to not only re-examine its advisory jurisdiction, but also develop the 2015 precedent.

The literature briefly mentions advisory opinions in several commentaries and monographies.[8] In 2015, the view that the Tribunal possesses advisory jurisdiction was heavily contested (especially by Australia, China, Ireland, Spain, and the United Kingdom).[9] A few articles in the aftermath of the 2015 advisory opinion criticise the Tribunal for confirming its jurisdiction.[10] Lando holds that the basis for the advisory jurisdiction of the full Tribunal was weak[11], Ruys and Soete conclude that it was invented out of the blue.[12]

5 <https://www.itlos.org>.

6 ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, case no. 17.

7 ITLOS, *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, advisory opinion of 2 April 2015, case no. 21.

8 Kriangsak Kittichaisaree, *The International Tribunal for the Law of the Sea* (Oxford: Oxford University Press 2021); José Luis Jesus, 'Articles 130 to 138', in: Patibandla Chandrasekhara Rao/Phillippe Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden: Brill / Nijhoff 2006), 372; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press 2019), 528 f.

9 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 89, para. 4.

10 ITLOS, *SRFC* (n. 7), 4 ff., para. 69.

11 Massimo Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea', LJIL 29 (2016), 441-461 (441).

12 Tom Ruys and Anemoon Soete, '"Creeping" Advisory Jurisdiction of International Courts and Tribunals?', LJIL 29 (2016), 155-176 (173).

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Several authors agree, however, that the lack of the mentioning of ITLOS' advisory jurisdiction in its constituent agreements, cannot be interpreted as explicitly or tacitly excluding such jurisdiction.[13] The request in 2022 by the Commission of Small Island States reignited this discussion. Barnes summarises the arguments for the jurisdiction as discussed in the 2015 advisory opinion and then focuses on investigating the question if advisory opinions are even capable of contributing to the clarification of States' duties with regard to climate change and greenhouse gas emissions.[14] Cruz Carillo provides on the advisory jurisdiction of ITLOS and then focuses on the nature of the international agreement, which ought to confer the advisory jurisdiction on the Tribunal over the legal question.[15] As these voices continue to challenge ITLOS' role in this essential function, it is a matter of necessity to clarify all remaining doubts.

I. The Legal Issue

The advisory jurisdiction of ITLOS is expressly mentioned in Art. 138 Rules. The Rules, however, were formulated by ITLOS itself, based on its competence to do so in Art. 16 Statute, and not the parties. The core issue thus is whether ITLOS exceeded its powers by establishing its own advisory jurisdiction in its Rules. This is the case if the constituent treaties (UNCLOS, Statute) do not provide for advisory jurisdiction.

The Tribunal's main jurisdictional clauses are Art. 288 UNCLOS and Art. 21 Statute. While Art. 288 UNCLOS does not refer to advisory jurisdiction of the Tribunal, Art. 21 Statute states that the Tribunal's jurisdiction arises under three circumstances: for 'all disputes' (1st variation) and for 'all applications' (2nd variation) submitted to it in accordance with UNCLOS, as well as for 'all matters' (3rd variation) specifically provided for in any other agreement which confers jurisdiction on the Tribunal. In the 2015 *Request for an Advisory Opinion submitted by the SRFC*, the Tribunal affirmed its advisory jurisdiction based on the third variation, finding that

13 Miguel García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Leiden: Brill 2015), 311; Jesus (n. 8), 528 f.

14 Richard Barnes, 'An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?', Ocean Development & International Law 53 (2022), 180-213.

15 Carlos A. Cruz Carillo, The Advisory Jurisdiction of the ITLOS (Cambridge: Cambridge University Press 2023), 242, 247.

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'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.'[16]

This article relies on the methods of interpretation pursuant to the 1969 Vienna Convention on the Law of Treaties (Vienna Convention)[17] to determine the content of Art. 21 Statute, proving that the Tribunal's advisory jurisdiction is based under the 3rd variation, and that the Tribunal should thus not be deprived of its fundamental role to develop the Law of the Sea.

II. Interpretation of Treaties under the Vienna Convention

UNCLOS itself does not entail specific regulations on the interpretation of treaties. Recourse may thus be had to the customary provisions[18] on the interpretation of treaties under Arts 31-33 Vienna Convention.[19] According to Art. 31 (1) of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty (literal interpretation) in their context (contextual interpretation) and in the light of its object and purpose (teleological interpretation).[20]

1. Literal Interpretation

UNCLOS and its annexes provide several jurisdictional clauses, including the jurisdiction for advisory opinions. Arts 191, 159 (10) UNCLOS and Art. 40 (2) Statute stipulate the advisory jurisdiction for the SDC, but do not expressly grant advisory jurisdiction to the full Tribunal. The lack of an explicit mentioning of the Tribunal's advisory jurisdiction in the constituent agreements is one of the main arguments used against its advisory jurisdiction.[21] The following interpretation of the wording demonstrates that this does not necessarily corroborate, explicitly or tacitly, that the full Tribunal

16 ITLOS, *SRFC* (n. 7), para. 58.

17 Vienna Convention on the Law of Treaties of 23 May 969, 1155 UNTS, 331.

18 Ulf Linderfalk, *On the Interpretation of Treaties* (Dordrecht: Springer 2007), 7; Rudolf Bernhardt, in: Rudolf Bernhardt (ed.), EPIL 7 (1981), North-Holland: Elsevier Science Publishers, 318, 321; PCA, *Chagos Marine Protected Area Arbitration* (Republic of Mauritius v. the United Kingdom of Great Britain and North Ireland), award 2015, 197, para. 501.

19 PCA, *Chagos Arbitration* (n. 18), 197, para. 501; UNTS Vol. 1155, No.I-18232.

20 Linderfalk (n. 18), 8; Bernhardt (n. 18), 318, 323.

21 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 89, para. 4 (b).

does not have jurisdiction to this end.[22] On the contrary, such a result would be inconsistent with the general wording of Art. 21 Statute.

While it is undisputed that the phrase 'all disputes and all applications' provides for the jurisdiction of the Tribunal for disputes, Art. 21 Statute does not expressly mention the nature of the initiating proceeding (contentious case, provisional measure, prompt release of vessel). Art. 21 Statute thus only mentions the issue (dispute) or act (application) leading up to or initiating a proceeding. It is in the same style of language that the third variation of Art. 21 Statute does not expressly refer to advisory jurisdiction but refers to the issue underlying the advisory proceedings (all matters). If States had wanted to construe Art. 21 Statute more narrowly, they would have needed to draft Art. 21 Statute differently, providing that

> 'the Tribunal has jurisdiction over contentious cases, provisional measures and prompt releases of vessels submitted to it in accordance with this Convention and advisory opinions specifically provided for in any other agreement which confers jurisdiction on the Tribunal.'

Evidently, the State parties decided for a more open formulation when drafting Art. 21 Statute, which allows more flexibility in the proceedings. Moreover, if State parties would have wanted to limit the Tribunal's jurisdiction exclusively to contentious cases, they would have chosen the formulation 'confers contentious jurisdiction on the Tribunal' instead of stipulating the different variations that confer jurisdiction to ITLOS.[23] The lack of an express mentioning of advisory opinion in Art. 21 Statute, thus, does not support the interpretation that Art. 21 Statute does not provide for advisory opinions.

Even more, the literal interpretation, also considering the object and purpose of Art. 21 of the Statute, necessarily provides that 'all matters' must include the advisory jurisdiction of the full Tribunal.[24] As ITLOS explained in its 2015 *SRFC* Advisory Opinion, the first two variations of Art. 21 Statute (disputes and applications) refer to the contentious jurisdiction:

> 'This is made clear by article 23 Statute, which provides: "The Tribunal shall decide all disputes and applications in accordance with article 293." Article 293 is found in Part XV of the Convention, dealing with "Settlement of Disputes".'[25]

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22 Jesus (n. 8), 373; Tanaka (n. 8), 528 f.; ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 89, para. 4 (a) and 4 iii.

23 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 20, para. 51.

24 The distinction between the interpretation according to wording, context, and telos is not always unambiguous. This argument presented for the wording can also be used for telos or context.

25 ITLOS, *SRFC* (n. 7), para. 55.

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By logical inference, the third variation of Art. 21 Statute conferring jurisdiction on the Tribunal (matters), 'must mean *something more* than just "disputes"'.[26] If this was not the case, the additional stipulation of 'matters' would be obsolete. In conclusion, the Tribunal stated '[t]hat something more must include advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal"'.[27] The literal interpretation of 'all matters' therefore provides that the third variation of Art. 21 Statute contains advisory opinions by the full Tribunal. Consequently, granting advisory opinions to the Tribunal does not modify the Statute of the Tribunal but is the result of its interpretation.

This result is further supported by the literal interpretation of Art. 288 (3) UNCLOS, which is the main jurisdictional clause of UNCLOS. While Art. 288 (1) and (2) UNCLOS specifically provide for contentious jurisdiction of the Tribunal in the cases of 'disputes', Art. 288 (3) UNCLOS changes the language to 'matters', when codifying the advisory jurisdiction of the SDC. As the SDC expressly possesses jurisdiction over advisory opinions under Arts 191, 159 (10) UNCLOS, the change in language in Art. 288 UNCLOS from 'dispute' to 'matters' can only be reasoned by the fact that 'matters' refer to advisory opinions. Because Art. 21 Statute is an annex of UNCLOS, and therefore an integral part of UNCLOS itself (Art. 318 UNCLOS), 'matters' under the Statute must be interpreted in the same way as under UNCLOS, i. e. to include advisory opinions. The jurisdiction clause under Art. 288 UNCLOS is therefore complemented by Art. 21 UNCLOS.

Lastly, the wording of Art. 288 (3) UNCLOS, which confers advisory jurisdiction on special organs, cannot be read as to deny ITLOS advisory jurisdiction.[28] Art. 288 (3) UNCLOS only codifies the advisory jurisdiction *under* UNCLOS. ITLOS, however, precisely does not have advisory jurisdiction under UNCLOS but only under 'any other agreement which confers jurisdiction on the Tribunal' (Art. 21 Statute). It is, therefore, only consistent that the advisory jurisdiction of the full Tribunal is not codified in Art. 288 (3) UNCLOS. Evidently, the State parties did not intend to limit the jurisdiction of the Tribunal to Art. 288 (2) UNCLOS; otherwise, the stipulation of Art. 21 Statute would have been obsolete.

26 ITLOS, *SRFC* (n. 7), para. 56.
27 ITLOS, *SRFC* (n. 7), para. 56.
28 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 89, para. 4 (e), (f).

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2. Contextual Interpretation

a) Instruments and State Practice in Connection with the Treaty and Subsequent Practice

The interpretation of the terms of a treaty in their context includes any instrument, which was made by one or more parties in connection with the conclusion of the treaty (Art. 31 (2) lit. b Vienna Convention). The advisory jurisdiction of the full Tribunal is expressly stipulated in the Rules of the Tribunal. The Rules of the Tribunal were established in connection with the conclusion of UNCLOS and the Statue (Art. 31 (2) lit. b Vienna Convention): Art. 16 Statute provides for the authority of ITLOS to frame its own rules. However, Art. 31 (2) lit. b Vienna Convention refers to instruments which were made 'by one or more parties' of the original treaty (UNCLOS, Statue). ITLOS, however, was not a party to these treaties but was established *through* them. The interpretation under Art. 31 (2) lit. b Vienna Convention, thus, does not comprise the Rules.

Nonetheless, by virtue of Art. 31 (3) lit. b of the Vienna Convention the contextual interpretation shall also take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; […]'. It is undisputed in the literature and the proceedings of the 2015 *SRFC* Advisory Opinion that the State parties have applied the Rules of the Tribunal to the procedures of the Statute and UNCLOS since their inception in 1997.[29] Thus, the parties show a subsequent practice in applying the Rules to the Statute and UNCLOS. Following the 2015 *SRFC* Advisory Opinion, however, the literature criticised that this State practice does not extend to Art. 138 Rules. Because this provision was invoked for the first time in the *SRFC* Advisory Opinion in 2015, they saw a lack of practice with regard to this specific provision.[30] Moreover, Lando notes that several States contested the application of Art. 138 Rules in the 2015-Advisory Opinion, thereby impeding the development of a uniform subsequent State practice.[31]

This view is not convincing for several reasons: Art. 31 (3) lit. b Vienna Convention expressly refers to the application of 'the treaty' and not to the application of single provisions of the treaty. The relevant practice in the application of the treaty is thus derived from the application of the Rules in their entirety, and not by single provisions, such as Art. 138 Rules.[32] It is

29 Lando (n. 11), 448; García-Revillo (n. 13), 300 and 312.

30 Lando (n. 11), 448.

31 Lando (n. 11), 448.

32 See Oliver Dörr, 'Art. 31', in: Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2nd ed, Berlin: Springer 2018), para. 81.

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undisputed that the Rules of the Tribunal have been applied by the State parties to the Statute since their inception in 1997.[33]

Furthermore, the Rules are an official document providing information on the jurisdiction of ITLOS, which is freely accessible to the public. So despite the fact that Art. 138 Rules was only applied for the first time in 2015, States were able to inform themselves on the content of the rules for more than 18 years. If they wanted to oppose Art. 138 Rules, they would have been especially inclined to do so at the inception of the Rules in 1997, because conventional rules can evolve into customary international law while also being derived from a treaty regulation. As the relevant point in time to object to a customary rule is the time of its formation,[34] States opposing Art. 138 Rules would have objected to this provision at the time of its formation. Even more, the State parties have expressly approved the Rules, which were drafted by ITLOS in accordance with the Preparatory Commission,[35] without any objection in the Meeting of the State parties. The State parties therefore acquiesced to the existence of ITLOS' advisory jurisdiction. In conclusion, the consistent application of the Rules by the State parties to UNCLOS and Statute for now more than 25 years shows a subsequent State practice of accepting the provisions of the Rules, which must be taken into account when interpreting the Statute pursuant to Art. 31 (3) lit. b Vienna Convention.

b) Advisory Jurisdiction in Context with other Jurisdictional Clauses

In the 2015 advisory proceedings, States argued that Art. 288 UNCLOS was ITLOS' main jurisdictional clause and the jurisdiction under Art. 21 Statute could not grant a broader jurisdiction than UNCLOS itself.[36] Both jurisdictional clauses are titled 'jurisdiction' and provide for the competence of the Tribunal. While Art. 288 UNCLOS is embedded in the main body of the Convention, Art. 21 Statute is located in Annex VI to UNCLOS. Pursuant to Art. 318 UNCLOS, titled 'Status of Annexes', the '[a]nnexes form an integral part of this Convention and, unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to

33 ITLOS, *SRFC* (n. 7), declaration Judge Cot, 73, para. 4.

34 UNGA A/73/10, 152, Conclusion 15; James R. Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: Oxford University Press 2012), 28; Wolfgang Vitzthum, in: Wolfgang Vitzthum and Alexander Proelss (eds), Völkerrecht (7th edn, Berlin: De Gruyter 2016), 1, 51 f., mn. 133; Tanaka (n. 8), 14.

35 García-Revillo (n. 13), 312.

36 ITLOS, *SRFC* (n. 7), 20, para. 48.

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the Annexes relating thereto'. Similarly, the Statute refers to UNCLOS in its Art. 1 (1), by stipulating that the Tribunal is constituted and shall function in accordance with the provisions of UNCLOS and the Statute. The Statute is therefore not subordinate to UNCLOS but an integral part thereof.[37] It was drafted by the State parties as a part of UNCLOS itself. In this vein the Tribunal expressed in its *Request for an Advisory Opinion submitted by the SRFC* Advisory Opinion that

> 'the Statute enjoys the same status as the Convention. Accordingly, Art. 21 Statute should not be considered as subordinate to Art. 288 of the Convention. It stands on its own footing and should not be read as being subject to Art. 288 of the Convention.'[38]

The Tribunal's advisory jurisdiction can therefore be derived from Art. 21 Statute and is not impeded by Art. 288 UNCLOS. In conclusion, the interpretation of Art. 21 Statute in its context also corroborates the result that the Tribunal must have jurisdiction to entertain advisory opinions.

The exercise of advisory jurisdiction is further consistent with Art. 287 (1) lit. a and b UNCLOS. Pursuant to Art. 287 (1) lit. a and b, States are free to choose whether they address the International Court of Justice (ICJ) or Tribunal for proceedings concerning the interpretation of UNCLOS. While the advisory jurisdiction of the ICJ under Art. 96 (1) UN Charter is undisputed, denying the Tribunal's advisory jurisdiction would lead to the inconsistent conclusion that the ICJ did have advisory jurisdiction over matters concerning UNCLOS (provided a competent organ submitted a request), while the Tribunal, as the special judicial body for the interpretation of UNCLOS, would not. This, furthermore, would lead to the result that the entities under Art. 1 (2) (2), 305 (1) lit. b-f UNCLOS would be denied recourse through an advisory opinion to guide their activities: while the Tribunal is open for requests for advisory opinions from any of these entities (and that is bound by an agreement which confers advisory jurisdiction upon the Tribunal), the ICJ is only open to States in contentious proceedings (Art. 34 para. 1 ICJ-Statute) and a few non-State entities in advisory proceedings (Art. 96 UN Charter). Organisations that are party to UNCLOS, and that require clarifications on the laws applicable to them, thus would be deprived of this important means to request an advisory opinion. This is particularly harmful to Regional Fisheries Management Organisations, whose primary role is to promote international cooperation on conservation measures and on the effective management of international fisheries, and that

37 ITLOS, *SRFC* (n. 7), 20, para. 52.
38 ITLOS, *SRFC* (n. 7), 20, para. 52

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therefore have a vital interest to obtain authoritative interpretations of the Law of the Sea to promote the respect of the obligations towards responsible fisheries activities thereunder.

A few arguments engaged with the *implied powers* doctrine, reasoning that exercising advisory jurisdiction was implied in the Tribunal's mandate and because entertaining advisory opinions is not prohibited, it must be allowed.[39] Others argue that a lack of provisions to this effect does not mean that the States intended the opposite. While both hypotheses oppose each other, they are both lacking substance. Even assuming for the Statute not to provide a sufficient basis for advisory jurisdiction, this neither leads to an irrefutable conjecture that States did not want to provide advisory jurisdiction to the Tribunal nor that they did. The previous interpretation however has shown that advisory proceedings are entailed under the Statute. Since the advisory jurisdiction of the Tribunal thus has been conferred to it by the State parties in the constituent agreement, a reference to other mechanisms by which jurisdiction can be invoked, such as implied powers, is not necessary.[40]

Lastly, one author argued that a comparison of the Statute of the Tribunal and the Statute of the International Court of Justice[41] (ICJ-Statute) would also show that the Tribunal does not have jurisdiction to entertain advisory opinions, because Art. 21 of the ITLOS-Statute was inspired by Art. 36 of the ICJ-Statute. Yet, Art. 36 ICJ Statute does not concern Advisory Opinions.[42] This argument, however, is not convincing, as the interpretation of one agreement does not necessarily mean that the same word in a different agreement must be interpreted in the same way. The agreements may have been adopted under different circumstances, apply to different judicial bodies, and therefore have different objectives. In its consistent jurisprudence the Tribunal thus states that:

> 'the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires'.[43]

39 ITLOS, *SRFC* (n. 7), 5, 20, para. 41; see for a critical assessment Lando (n. 11), 456.

40 ITLOS, *Mox Plant Case* (Ireland v. United Kingdom), provisional measures, order of 3 December 2001, ITLOS Reports 2001, 95, 106, para. 51; cited approvingly in ITLOS, *SRFC* (n. 7), 19, para. 41.

41 1055 UNTS, No. 993.

42 Lando (n. 11), 451.

43 ITLOS, *SRFC* (n. 7), para. 57.

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3. Teleological Interpretation

The teleological interpretation honours the intention of the State parties when concluding the treaty, in other words, the effect that the treaty is intended to achieve.

a) The Convention as a Living Instrument

The Law of the Sea is one of the oldest fields in international law. It can easily be traced back to the times of Columbus' voyages across the Atlantic, when Pope Alexander VI delimited the marine territories in the Atlantic Ocean between Spain and Portugal through the papal bulls *Inter Caetera* in 1493.[44] Up until the 20th century, the Law of the Sea was mainly governed by customary law.[45] The codification of the law of the sea in UNCLOS progressed through three Conferences starting in 1958, and was only achieved after nine years of negotiations at the third Conference in 1982.[46] At the first day on which the Convention was opened for signature, on 10 December 1982 in Montego Bay, a historic number of 119 countries pledged to respect their obligations thereunder and to the Ocean. As Tommy T. B. Koh, President of the third UNCLOS Conference put it, the UNCLOS is the 'Constitution for the Ocean'.[47]

Keeping in mind the difficulties of negotiating such an all-encompassing instrument, it becomes obvious that the parties to UNCLOS formulated provisions of the Convention in an open manner, allowing them to remain valid over a period of time, catering to emerging challenges that were not foreseen at the time of its drafting. The formulation of Art. 21 Statute is thus the result of careful discussions, and it was deliberately shaped in an open-worded way that allows it to be interpreted in light of present-day condi-

44 Tullio Treves, 'Historical Development of the Law of the Sea' in: Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), *Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), 1-23; Myron H. Nordquist, Satya N. Nandan and James Kraska (eds), *UNCLOS 1982 Commentary – Supplementary Documents* (Leiden: Martinus Nijhoff 2011), 885; Donald R. Rothwell and Tim Stephens, The International Law of the Sea (Oxford: Hart Publishing 2016), 3.

45 Rothwell, Oude Elferink, Scott and Stephens (n. 44), 3.

46 Tanaka (n. 8), 3, 47; Treves (n. 44), 6; <https://legal.un.org/avl/ha/gclos/gclos.html>, last accessed 17 March 2020.

47 <https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>, last accessed 8 March 2021); Elisabeth Mann Borgese, 'A Constitution for the Oceans', San Diego L. Rev. 15 (1978), 371-408 (371); <https://ioc.unesco.org/topics/law-sea>, last accessed 10 October 2021; UNGA A/74/PV.42, 12.

tions. This, by no means, is due to an ill-articulated provision by the State parties, but rather an express intention of the State parties to shape an instrument which will remain valid over a long period of time. The objective was to create a living instrument with innovative and flexible regulations that remain valid even in the light of the development of new technologies and the rise of new issues in the Law of the Sea.[48]

While jurisprudence can reflect changing values and social context, an evolutionary change in international law and the Law of the Sea necessitates that treaties are interpreted dynamically.[49] Given that UNCLOS lacks a plenary law-making institution, which could promulgate modifications to the Convention,[50] evolutionary interpretation is the only suitable way to cater for a changing world. Although UNCLOS' contents may be developed through the UN General Assembly and its annual resolutions on the Law of the Sea, this forum is, as Barnes argues, generally used to drive policy developments or to flag issues of concern.[51] He therefore argues that the progressive development of the law occurs through the institutional organs of UNCLOS and the reactions of States thereto.[52] Among these institutional organs is the Tribunal, which is tasked with the interpretation and application of UNCLOS and other instruments of the Law of the Sea to matters before it. Limiting the Tribunal's jurisdiction to purely litigious matters would stifle the evolutive interpretation that UNCLOS, as a constitutional document, requires in order to remain relevant. Formulating Art. 21 Statute in a way that absolutely lists the jurisdiction of the Tribunal would not have served the idea of creating a judicial body that is competent to entertain arising matters in the Law of the Sea over a long period of time, such as climate change (*effet-utile*). It is in this open manner that Art. 21 Statute does not limit the jurisdiction of the Tribunal to contentious cases but intends to comprise 'something more',[53] providing the State parties the opportunity to enter into bi- and multilateral agreements conferring jurisdiction on the

48 Alan Boyle, 'Further Development of the Law of the Sea Convention', ICLQ 54 (2005), 563-584; Soekwoo Lee and Lowell Bautista, 'Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change', Ecology Law Quarterly 45 (2018), 129-156 (138); Chie Kojima, 'South China Sea Arbitration and the Protection of the Marine Environment', AYIL 21 (2015), 166-180 (170); Detlef Czybulka, 'Art. 192' in: Alexander Proelss (ed.), UNCLOS Commentary (Munich: C. H. Beck 2017), 1277-1286, mn. 22.

49 Boyle (n. 48), 567.

50 I. e. electing judges to ITLOS and determining budgetary matters under Art. 319 UNCLOS; Jill Barrett and Richard Barnes (eds), *The United Nations Convention on the Law of the Sea: A Living Treaty* (London: British Institute of International and Comparative Law 2016), 466.

51 Barrett and Barnes (n. 50), 466.

52 Barrett and Barnes (n. 50), 464.

53 ITLOS, *SRFC* (n. 7), 21, para. 56.

Tribunal.[54] This evolutionary reading of 'all matters' is supported by ICJ case-law. As the ICJ held 'where the parties have used generic terms in a treaty, the parties necessarily have been aware that the meaning of the terms was likely to evolve over time'.[55] Applying this reasoning to the generic term 'all matters', the parties accordingly intended to allow an evolutionary or progressive interpretation.[56]

The concept of UNCLOS as a living instrument draws from the jurisprudence of the European Court of Human Rights (ECtHR),[57] which proposed the living instrument doctrine as a means to read the protections under the European Convention on Human Rights in light of present-day conditions[58] and as a tool to render these protections 'practical and effective, rather than theoretical and illusory'.[59] *Prima facie*, the living instrument doctrine served to evolve the *substantive* reading of human rights protections. It also allowed the ECtHR to step in and affirm a victim's position where the very Government accused of violating the victim's rights argued that the treatment suffered by the applicant was considered common in their home jurisdiction and therefore not grave enough to constitute a violation.[60] The living instrument doctrine therefore implicitly evolved the procedural reading of the European Convention of Human Rights, permitting the extension of the jurisdiction of the ECtHR in light of newly emerging issues in the consciousness of the Council of Europe's member States. The Tribunal is, in the new request for an Advisory Opinion before it, tasked with addressing the effect of climate change on the marine environment. This request pertains to, arguably, the central systemic issue currently facing humankind. Its jurisdiction must therefore be read so as to extend to advisory opinions, allowing for an answer to this request. Failure to do so would ensure that the protection of the marine environment, and the conservation measures required under UNCLOS, would remain theoretical and illusory in the face of a climate catastrophe.

54 ITLOS, *SRFC* (n. 7), 20, para. 49.

55 ICJ, *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), judgment of 13 July 2009, ICJ Reports 2009, 213, 243, para. 66.

56 Crawford (n. 34), 379 f.

57 Barrett and Barnes (n. 50), 3-40.

58 ECtHR, *Tyrer v. United Kingdom*, app. no. 5856/72, judgement of 25 April 1978, para. 31.

59 Among many authorities: ECtHR (Grand Chamber), *Goodwin v. United Kingdom*, app. no. 28957/95, judgement of 11 July 2002, para. 74; ECtHR (Grand Chamber), *Mamatkulov And Askarov v. Turkey*, app. nos. 46827/99, 46951/99, judgement of 4 February 2005, para. 121.

60 See, among others, ECtHR, *Tyrer* (n. 58), para. 31 in initio.

b) Fundamental Role of the Tribunal to Develop Law

In the *Request for an Advisory Opinion submitted by the SRFC* Advisory Opinions, some States expressed their concern that accepting the advisory jurisdiction of the Tribunal may encourage States to seek advisory opinions even in the absence of a dispute between the State parties and that this would render the true purport of the Tribunal absurd and may even amount to an abuse of process.[61]

One of the fundamental roles of the Tribunal is to develop the law; it is thus not the only purpose of the Tribunal to solve disputes but to contribute to the evolution of the Law of the Sea. Famously, Art. 38 para. 1 ICJ-Statute, which is commonly accepted as stipulating the sources of public international law refers to judicial decisions, as 'subsidiary means for the determination of rules of law' (Art. 38 para. 1 lit. d) ICJ-Statute). Therefore, judicial decisions[62] are not formal sources of international law but play an important role in the development of international law as they are capable of giving evidence of the law.[63] This is even more the case for advisory opinions, which do not have binding effect, but serve the interpretation of law, such as through the development of rules of customary international law. It is thus one of the core functions of the Tribunal to contribute to the development of the Law of the Sea. The preamble of UNCLOS reiterates this fundamental role and importance of the evolution of law by stipulating that the '[…] progressive development of the Law of the Sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations […]'. Advisory opinions in which the Tribunal can interpret and develop the law – *in lieu* of contentious proceedings – serve exactly this ambition to peacefully develop the law.

Moreover, in its more than 25 years of existence, the court has dealt with only 31 cases. Its function to develop the law through judgements and advisory opinion can only be exercised effectively when there is access to the Tribunal. Conformingly, in the *Request for an Advisory Opinion submitted by the SRFC* Advisory Opinion, States like Germany expressed that they

> 'welcome […] the fact that use is being made of the possibility to request advisory opinions from the Tribunal according to Art. 138 2009 Rules of the Tribunal ('Rules'), which will further strengthen the Tribunal's comprehensive role in matters concerning the Law of the Sea'.[64]

61 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 90, para. 4x.

62 An advisory opinion is not a decision but also a subsidiary means for interpretation of law.

63 Crawford (n. 34), 37; Vitzthum, (n. 34), 1, 56, mn. 147.

64 ITLOS, *SRFC* (n. 7), written statement of the Federal Republic of Germany, 147, para. 3.

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The possibility to request advisory opinions from the Tribunal to shed light on legal questions on the Law of the Sea, is thus a fundamental tool to safeguard one of the core functions of the Tribunal to develop the Law of the Sea.

c) States Consent not Required for Advisory Opinions

A further argument invoked by States and authors is that the jurisdiction of international judicial bodies is based on the State's consent. Entertaining the advisory request would violate the 'well-established [Eastern Carelia] principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.'[65] The Eastern Carelia principle is derived from an advisory opinion given by the Permanent Court of International Justice (PCIJ) in 1923,[66] dealing with the consent of States to advisory proceedings. The PCIJ advisory opinion was requested by Finland on obligations arising from bilateral agreements with Russia that determined the status of Eastern Carelia. The PCIJ denied its jurisdiction for several reasons: amongst other reasons, Russia was neither a party to the Statute of the PCIJ nor a member of the League of Nations. It had not consented to having the Council of the League of Nations deal with the dispute. Consequently, the Court should have had no competence either.[67] Furthermore, the question submitted before the PCIJ pertained to an existing bilateral dispute. Providing a reply to the request would settle this dispute in the absence of Russia's consent to do so.[68] The Eastern Carelia principle was then commonly understood to mean that State consent is a precondition for the exercise of the jurisdiction in what is essentially a bilateral dispute. This principle, however, has evolved over time and does not affect the question of the jurisdiction of the Tribunal to entertain requests for advisory opinions for the following reasons:

Firstly, States' consent is only necessary for contentious cases.[69] This is different in advisory proceedings, even if there is a legal dispute pending between two States underlying the advisory proceedings: the very nature of

65 ICJ, *Interpretation of Peace Treaties*, advisory opinion of 30 March 1950, ICJ Reports 1950, 65 (71).

66 PCIJ, *Status of the Eastern Carelia*, advisory opinion no. 5 of 23. July 1923, File F. c. VII., Docket III.3.

67 PCIJ, *Eastern Carelia* (n. 66), para. 33.

68 PCIJ, *Eastern Carelia* (n. 66), para. 33; Julia Wagner, 'The Chagos Request and the Role of the Consent Principle in the ICJ's Advisory Jurisdiction, or: What to Do When Opportunity Knocks', Questions of International Law 55 (2018), 177-189 (181).

69 ICJ, *Peace Treaties* (n. 65), 71.

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an advisory opinion is advisory and not legally binding. No State can stop the requesting States to ask for clarification by the respective judicial body on what it considers 'desirable in order to obtain enlightenment as to the course of action it should take'.[70] Even more, it is the very nature of advisory opinions to answer legal questions abstractly, in the absence of a dispute, to prevent a dispute. While contentious cases seek to solve a dispute between two States in a legally binding way, advisory opinions intend to give a general interpretation on the law and thereby guide the submitting entity in their actions. In their very nature, advisory opinions can therefore not be invoked unilaterally by one State in order to obtain a legally binding decision against another State. As there is no respondent, naturally, consent is not necessary.

Secondly, the special circumstance in the Eastern Carelia Advisory Opinion was that the question addressed to the court was

> 'directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties'.[71]

In consistent jurisprudence, such as in the 1950 *Interpretation of Peace Treaties* Advisory Opinion and restated in its 1975 *Western Sahara* Advisory Opinion,[72] the ICJ denied that an advisory opinion can provide an answer on the merits of the dispute between the State parties. For this reason, there is also no threat of abuse of processes, as advisory opinions do not settle a pending dispute. The 2004 *Wall* Advisory Opinion[73] and the 2019 *Chagos* Advisory Opinion[74] further refined this consideration, reasoning that the issues raised through the requests were located in the broader frame of reference of the question of Palestine for the *Wall* Advisory Opinion,[75] and of decolonisation of the Chagos archipelago in the *Chagos* Advisory Opinion respectively.[76] The ICJ also noted that the mere divergence of legal opinions between State parties on the questions submitted for advisory opinion was not sufficient to constitute a bilateral dispute.[77] In accepting its advisory jurisdiction, the ICJ would therefore not prejudge the dispute between State

70 ICJ, *Peace Treaties* (n. 65), 71.

71 ICJ, *Peace Treaties* (n. 65), 72.

72 ICJ, *The Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, 12.

73 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory oinion of 9 July 2004, ICJ Reports 2004, 131.

74 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion of 25 February 2019, ICJ Reports 2019.

75 ICJ, *Wall in Palestine* (n. 73), para. 50, 88.

76 ICJ, *Chagos Archipelago* (n. 74), para. 34.

77 ICJ, *Wall in Palestine* (n. 73), para. 48; ICJ, *Chagos Archipelago* (n. 74), para. 34.

parties.[78] Furthermore, in the *Request for an Advisory Opinion submitted by the SRFC* Advisory Opinion as well as the *Request for an Advisory Opinion by the Commission of Small Island States* Advisory Opinion, the legal questions submitted to the Tribunal are located within the broader frame of reference of the protection of the marine environment, which arguably guide the submitting entities in their actions. Mere disagreement on the State responsibilities flowing from this issue, notably from States who have not submitted the request for an advisory opinion, would not constitute a dispute. Furthermore, States and organisations do have the opportunity to voice their point of view on the interpretation of the law, as they are invited to present written statements under Art. 133 (3) Rules.

Thirdly, the ICJ clarified in its *Western Sahara* Advisory Opinion[79] that the PCIJ denied its advisory jurisdiction in the *Status of Eastern Carelia* Advisory Opinion because it was a bilateral conflict *and* Russia was not a member of the League of Nations.[80] This issue, therefore, only arises with regard to bilateral advisory opinions that concern the minority of States that are not party to UNCLOS. Currently there are 168 States and other entities parties to the UNCLOS.[81] The *Request for an Advisory Opinion by the Commission of Small Island States* expressly concerns the 'obligations of State Parties to the United Nations Convention on the Law of the Sea'[82] and thus only comprises the obligations of the States who are party to the UNCLOS. Furthermore, neither of the two requests for advisory opinions to the full Tribunal concern bilateral disputes but refer to the responsibilities of States for illegal, unreported and unregulated (IUU) fishing and the protection of the marine environment in the light of climate change respectively. The Sub-Regional Fisheries Commission (SRFC) and the Commission of Small Islands States are tasked with responsible fisheries practices and marine protection respectively, and the advisory opinions will guide them on this matter. They – and not the States – are the recipients of advisory opinions. According to the ICJ, States can therefore not prevent the organ entitled to request the advisory opinion from doing so.[83]

Lastly, the Eastern Carelia principle has evolved in the subsequent advisory opinions before the ICJ. The ICJ clarified in the *Western Sahara* Ad-

78 ICJ, *Wall in Palestine* (n. 73), para. 50; ICJ, *Chagos Archipelago* (n. 74), para. 90.

79 ICJ, *Western Sahara* (n. 72), 12.

80 ICJ, *Western Sahara* (n. 72), 30.

81 ICJ, *Western Sahara* (n. 72), 71.

82 Commission of Small Island States on Climate Change and International Law, Request for an Advisory Opinion, available at <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf>, last accessed 27 February 2023.

83 ICJ, *Peace Treaties* (n. 65), 72.

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visory Opinion that the absence of State consent is not a question of competence, but a question of judicial propriety given the permissive nature of the advisory jurisdiction of the ICJ.[84] This means that the Court has the power to examine whether the circumstances of the request should lead the ICJ, respectively the Tribunal, to decline to answer it (discretionary power) but this is not a question of jurisdiction. It is noteworthy, in this regard, that the ICJ has consistently said that only compelling reasons may justify not heeding a request for an advisory opinion.[85] And although the Eastern Carelia principle is being regularly cited in advisory proceedings, it was never applied again to deny advisory jurisdiction.

4. Historical Interpretation

According to Art. 32 Vienna Convention, the 'supplementary means of interpretation' may serve to confirm the meaning resulting from the application of Art. 31 Vienna Convention. Throughout the preparatory works of UNCLOS, the parties chose to maintain the clear distinction in Art. 21 Statute between 'disputes' and 'matters' (Art. 22 of the Informal Single Negotiating Text,[86] Art. 23 of the Revised Single Negotiating Text[87]). This indicates the negotiating parties' intention to use 'all matters' to describe all those issues which are not contentious and grant the Tribunal jurisdiction over these issues.

There are further traces of this intention in the preparatory work: Art. 20 (2) Statute of the Tribunal governs the Tribunal's jurisdiction *ratione personae*, and opens the Tribunal to entities other than States, such as natural and juridical persons.[88] Art. 20 (2) Statute of the Tribunal was increasingly broad-

84 ICJ, *Western Sahara* (n. 72), para. 21.

85 ICJ, *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, advisory opinion of 23 October 1956, ICJ Reports 1956, 86; ICJ, *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), advisory opinion of 20 July 1962, ICJ Reports 1962, 155; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* advisory opinion of 21 June 1971, ICJ Reports 1971, 27; ICJ, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, advisory opinion of 12 July 1973, ICJ Reports 1973, 183; ICJ, *Western Sahara* (n. 72), 21; and ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, advisory opinion of 15 December 1989, ICJ Reports 1989, 191.

86 Informal Single Negotiating Text, Document A/CONF.62/WP.9, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. V, 111 (119).

87 Revised Single Negotiating Text, Document A/CONF.62/WP.9/Rev.2, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. VI, 144 (152).

88 Art. 21 (1), Informal Single Negotiating Text, Document A/CONF.62/WP.9, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. V, 111 (119).

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ened in scope, in accordance with the paramount goal of ensuring that 'the common heritage of mankind would be used for the benefit of all the peoples of the world'.[89] For example, while earlier versions of the provision used the term 'dispute',[90] this was extended to the word 'case' in the final version of the Statute, again indicating the negotiating parties' intent to extend the Tribunal's jurisdiction to non-contentious matters.

III. Authentic Languages

The reading of 'all matters' as confirmed by the historical interpretation is further supported by the authentic texts of Art. 21 Statute of the Tribunal. UNCLOS and its annexes have been authenticated in six languages: English, Spanish, French, Chinese, Russian, and Arabic. The Spanish text of 'all matters' under Art. 21 Statute of the Tribunal uses the term 'cuestiones,' as does the Russian version 'вопросы', which translates to 'question'. In Arabic the term used is 'المسائل', which, likewise, refers to 'questions' or 'issues'. The Spanish, Russian, and Arabic version, thus, expressly state that the Tribunal shall have jurisdiction for all 'questions' specifically provided for in any other agreement which confers jurisdiction on the Tribunal. As there is no other tool than advisory opinions to ask legal questions to the Tribunal, this necessarily leads to the conclusion that 'all matters' under Art. 21 of the Tribunal must refer to advisory opinions.

The French and Chinese versions are outliers. The Chinese version uses '申请', meaning 'applications', and therefore repeats the terminology used in the first part of the provision. Given the outlying nature of this terminology, it shall not be determinant for the linguistic versions of the text.

The French version of Art. 21 Statute reads:

> 'Le 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.'

With regard to the translation of 'all matters', the French version thus grants competence to the Tribunal 'toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal', meaning 'every time that this (i. e. "cela") is explicitly provided by another agreement'.

89 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds), *UNCLOS – A Commentary*, Vol. V (Leiden: Brill 1989), 376.

90 Informal Composite Negotiating Text, Document A/CONF.62/WP.10,Official Records of the Third United Nations Conference on the Law of the Sea, Vol. VIII, (Art. 21), 59.

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It would, however, be incorrect to read 'cela' as referring to 'compétent […] conformément à la Convention',[91] as this refers not to the Tribunals' jurisdiction, but to the partial phrase 'tous les différends et toutes les demandes qui lui sont soumis' immediately preceding it. The conformity with UNCLOS therefore relates to the submissions of disputes and applications (and their formalities), and not to the jurisdiction of the Tribunal for all other matters in the second part of the provision. This is the same in English, where 'in accordance with this Convention' refers to 'all disputes and all applications submitted to it'. The French version is therefore conclusive in determining the meaning of all other terminology amounting to the non-contentious 'matters', 'questions' or 'issues': the Tribunal is competent every time this is provided by another agreement, no matter the nature of the submission to it.

IV. Geographical Extent of the UNCLOS Jurisdiction

1. Advisory Jurisdiction Beyond National Jurisdiction

Lastly, in the 2015 advisory opinion, the Tribunal expressly limited its jurisdiction to the areas under national jurisdiction, namely the Territorial Sea and EEZ of the States. The *Request for an Advisory Opinion by the Commission of Small Island States*, however, is not limited to a specific zone in the sea but asks for the specific obligations of State Parties of UNCLOS,

> '(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?'[92]

Unlike the SRFC Advisory Opinion, this request is not limited to the EEZ of the States. This invokes the question whether the Tribunal has (advisory) jurisdiction to entertain this request including for areas that are beyond national jurisdiction (Marine Areas Beyond National Jurisdiction (ABNJ), the High Seas and the Area). It is therefore questionable if the Tribunal will accept its jurisdiction also for ABNJ.

91 Lando (n. 11), 452.

92 Commission of Small Island States on Climate Change and International Law, Request for an Advisory Opinion, available at <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf>, last accessed 27 February 2023.

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In the Request for an Advisory Opinion submitted by the SRFC, the Tribunal did not generally limit its advisory jurisdiction to certain maritime zones. On the contrary, the provisions on the jurisdiction of the Tribunal are not linked to specific zones of the sea (with the exception of the jurisdiction of the SDC, which naturally is constrained to disputes concerning the seabed). Rather, the wording of the Request for the 2015 SRFC Advisory Opinion was limited to the responsibilities of the flag States in the EEZ. The fact that the Tribunal limited its jurisdiction is therefore not due to a limited jurisdiction of the Tribunal, but to the request that was geographically limited to the EEZ. There is no reason why the advisory jurisdiction of the Tribunal should thus be limited to the EEZ. The obligation to protect and preserve the marine environment is stipulated in Part XII UNCLOS, without referencing the zonal provisions of the UNCLOS. It therefore applies to the marine environment of all zones of the sea. Questions of sovereignty or jurisdictional zones are irrelevant to the applicability of Arts 192 ff. UNCLOS[93] and to the jurisdiction of ITLOS.

2. Advisory Jurisdiction for Actions on Land

Another problem arising from the current advisory proceedings is whether the Tribunal can give an advisory jurisdiction on actions of the States that take place outside of marine areas. The request addresses the responsibility of States that affect the marine environment but mainly take place on land (climate change). It is thus questionable whether UNCLOS is applicable to those matters.

The landward border of the application of the UNCLOS is not expressly stipulated. One point of reference to determine the landward border of the application of UNCLOS would be to refer to the baselines, from which the territorial sea is measured under Arts 3 ff. UNCLOS. The relevant limit would accordingly be the respective low water line, which is currently accepted to be determined by the lowest astronomical tide.[94] However, there are several provisions in UNCLOS, which expressly exceed this boundary: pursuant to Art. 2 (2) UNCLOS the sovereignty of the coastal State exceeds to the airspace

93 PCA, *South China Sea Arbitration, Philippines v. China*, award of 12 July 2016, 373, para. 940; Gerhard Hafner, 'Schutz der Meeresumwelt', in: Wolfgang Vitzthum (ed.), Handbuch des Seerechts (1st edn, Munich: C. H. Beck 2006), 380 f., mn. 91 ff. and 399, mn. 155.

94 This is the 'lowest tide level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions', (IHO (1994), 135, para. 2936; United Nations (1989), 3, para. 9; Alexander Proelss, 'Art. 5' in: Alexander Proelss (ed.), UNCLOS Commentary (Munich: C. H. Beck 2017), 45-59, mn. 13.

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above the Territorial Sea; pursuant to Art. 1 (1) (4) UNCLOS, the definition of pollution of the marine environment includes pollution from estuaries; furthermore, under Arts 207, 212, 213 and 222 UNCLOS, States shall adopt and enforce laws and regulations to prevent pollution of the marine environment from land-based sources as well as from and through the atmosphere.[95] The obligation to protect and preserve the marine environment thus explicitly extends to sources of pollution from land and the atmosphere, with the latter including greenhouse gas emissions caused by humans on land.[96] This ties in with the definition under Art. 1 (1) (4) UNCLOS, which states that pollution of the marine environment means 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 seawater, and reduction of amenities. The relevant factor to determine the applicability of the relevant provisions of UNCLOS, thus is its potential to directly or indirectly have an effect on the marine environment.

V. Conclusion

The interpretation of the provisions providing for the Tribunal's jurisdiction leads to the conclusion that the Tribunal has the competence to entertain advisory opinions submitted to it. The Tribunal thus did not overstep its powers and act *ultra vires* when specifying the requirements for its advisory jurisdiction in Art. 138 of the Rules, because State parties provided for the legal basis for the Tribunal's advisory jurisdiction themselves, namely in Art. 21 Statute.[97] Moreover, in Art. 16 Statute, the State parties expressly entrusted the Tribunal with the competence to establish the Rules for procedures. The Tribunal specifically clarified in its *SRFC* Advisory Opinion:

> 'Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.'[98]

It is in this light that the Tribunal acted within its powers under Art. 16 Statute, when specifying procedural requirements for advisory opinions to

95 *Czybulka* (n. 48), Art. 192, mn. 25; Hafner (n. 93), 361, mn. 26, 38.
96 *Czybulka* (n. 48), Art. 192, mn. 25; Hafner (n. 93), 361, mn. 26, 38.
97 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 89, para. 4 vi.
98 ITLOS, *SRFC* (n. 7), para. 59.

the full Tribunal under Art. 138 Rules; the basis of which, however, is rooted in Art. 21 Statute.

The root for the conflict about the advisory jurisdiction of the full Tribunal lies in the open formulation of Art 21 Statute, which neither expressly mentions the Tribunal's jurisdiction for contentious cases nor for advisory opinions.[99] It only refers to 'all disputes and all applications' as well as 'all matters'. Understandably, there have been voices calling to modify the wording of Art. 21 Statute to solve the issue.[100] Yet, one should be careful what one wishes for. The legal framework for the protection of the marine environment is constantly affected by newly emerging technologies, such as carbon sinking, and catastrophes such as sea level rise, for which the Law of the Sea requires an appropriate solution. The difficulties to negotiate international treaties that are widely binding and address most of these issues can evidently be seen in the long development of UNCLOS as well as the recent conclusion of the long Biodiversity Beyond National Jurisdiction (BBNJ)-negotiations.[101] Keeping in mind this immense task to negotiate such an all-encompassing international treaty like the UNCLOS, opening its provisions for adaptation resembles the opening of Pandora's box. Instead of developing and contributing to the evolution of effective Law of the Sea provisions through their contemporary interpretation, this could lead to the result that the international community is left with less than it started with. Interpreting Art. 21 Statute as the basis for the Tribunal's advisory jurisdiction is therefore a more time effective way to ensure that urgent matters on the interpretation of the Law of the Sea, in the face of climate change for instance, can be addressed in manner which renders the conservation measures under UNCLOS practical and effective. The request for advisory opinions is also becoming prominent amongst other international judicial bodies.[102] In order to retain its relevance, the essential role of the Tribunal to progressively develop international Law of the Sea to entertain contentious cases and give interpretations on the Law of the Sea through advisory opinions is fundamental and should be strengthened, not challenged.

99 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 89, para. 4 (b).
100 ITLOS, *SRFC* (n. 7), separate opinion of Judge Lucky, 99, para. 28.
101 < https://www.un.org/bbnj/>, last accessed 19 November 2022.
102 <https://www.vanuatuicj.com/>, last accessed 19 November 2022.

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