

The Advisory Jurisdiction of the ITLOS

From Uncertainties to Opportunities for Ocean Governance

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17.1 INTRODUCTION

The advisory function of the plenary of the International Tribunal for the Law of the Sea (ITLOS or Tribunal) has existed since the first rules of the Tribunal, adopted in October 1997, pursuant to Article 16 of the Statute of the ITLOS. This judicial function remained disused and undisputed until 2015 when the Tribunal delivered the advisory opinion *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*.¹ On that occasion, the ITLOS considered that the legal basis for its advisory function derived from the foundational agreement of the requesting entity, in connection to Article 21 of its Statute and Article 138 of its Rules. As explained in this contribution, many States and scholars criticized the Tribunal for exercising this judicial function whereas others supported the decision to do so. Notwithstanding the debate, the advisory function prevails as a tool to enhance the rule of law for oceans and adapt it to tackle new challenges. Indeed, after nearly forty years since the adoption of the United Nations Convention on the Law of the Sea (UNCLOS),² new challenges call for re-interpreting and calibrating UNCLOS. For example, climate change alone poses legal challenges that were even unthinkable during the Third Conference on the Law of the Sea, including the rise in sea levels³ or ocean

¹ *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, 4.

² Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 397.

³ See: International Law Commission (ILC), *Sea-Level Rise in Relation to International Law: First Issues Paper* (by Bogdan Aurescu and Nilüfer Oral) UN Doc. A/CN.4/740, (2020); C. Hioureas and A. Camprubi, “Legal and Political Considerations on the Disappearance of States due to Sea Level Rise”, in T. Heidar (ed.), *New Knowledge and Changing Circumstances in the Law of the Sea* (Leiden: Brill/Nijhoff, 2020), 407–426; D. Vidas, “International Law at the Convergence of Two Epochs: Sea Level Rise and the Law of the Sea for the Anthropocene”, in C. Espósito, J. Kraska, H. N. Scheiber and M. S. Kwon (eds.), *Ocean Law and Policy: 20 Years under UNCLOS* (Leiden: Brill Nijhoff, 2017), 101–123.

acidification.⁴ Similar complex issues derive from technological advances and the quest for natural resources and maritime power. In this context, understanding the advisory function of the ITLOS stands as a tool in enhancing ocean governance.

This chapter aims at elucidating the scope of the advisory function of the ITLOS plenary. In particular, it revises the configuration of this judicial function and underscores the potential use of ad hoc jurisdictional agreements to request advisory opinions. To that end, this contribution will first present the utility of advisory opinions to strengthen the rule of law for oceans; second, it will then examine ambiguities within the legal basis of the advisory function of the ITLOS to determine the plausibility of using special agreements to request advisory opinions..

17.2 ADVISORY OPINIONS AND OCEAN GOVERNANCE

Since the Permanent Court of International Justice, certain international judicial bodies can exercise the judicial function of delivering advisory opinions.⁵ These can be defined as a judicial service to assist with comprehension and compliance with international obligations.⁶ This function allows identification of the abstract field in which the rules apply, their application to concrete situations and the legal consequences flowing from their application.⁷ The main difference with a contentious jurisdiction is that the outcome of an advisory jurisdiction is not binding and thereby does not entail stigmatization as in contentious proceedings.⁸ Exceptions to this are particular cases where an advisory opinion functions as a preliminary ruling,⁹ as a

⁴ D. Bialek and J. Ariel, “Ocean Acidification: International Legal Avenues under the UN Convention on the Law of the Sea”, in M. B. Gerrard (ed.), *Threatened Island Nations: Legal Implication of Rising Seas and Changing Climate* (Cambridge: Cambridge University Press, 2013), 15–54; IOC, *Global Ocean Science Report: The Current Status of Ocean Science around the World* (IOC-UNESCO, 2017), 46.

⁵ M. Samson and D. Guilfoyle, “The Permanent Court of International Justice and the “Invention” of International Advisory Jurisdiction”, in M. Fitzmaurice and C. Tams (eds.), *Legacies of the Permanent Court of International Justice* (Leiden: Brill/Nijhoff, 2013), 41–68.

⁶ SRFC *Advisory Opinion* (n 1), para. 77; IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, [2017] IACtHR Series A No. 23, para. 23; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, 226; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, 71.

⁷ R. Kolb, *The International Court of Justice* (Oxford: Hart Publishing, 2013), 1020.

⁸ See: T. Buergenthal, “The Inter-American Court of Human Rights”, *The American Journal of International Law*, 76(2) (1982), 245; See also: *Interpretation of Peace Treaties*, Advisory Opinion: ICJ Reports (n 6), 65, para. 71.

⁹ E.g., the advisory function of the European Court of Human Rights. See: *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, adopted on 2 October 2013, Council of Europe Treaty Series – No. 214; See: M. Dicosola et al., “The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System”, *German Law Journal*, 16 (6) (2015), 1387–1428.

dispute settlement mechanism¹⁰ or as an appeal instance,¹¹ entailing a compulsory effect.

Notwithstanding its non-binding nature, an advisory opinion entails authoritative statements that contribute to clarification of the applicable law and, in so doing, help to prevent disputes from arising.¹² Likewise, the legal findings in advisory opinions are generally authoritative for the members of a legal system and even foster judicial cross-fertilization between courts and tribunals.¹³ As stated by the ITLOS, judicial determinations in advisory opinions carry no less weight and authority than those in judgments.¹⁴ Therefore, advisory opinions have the same value under Article 38 (1) (d) of the Statute of the International Court of Justice. Furthermore, they might prove to be useful in designing international and domestic public policies, or as suggested, preventing future disputes.

In the context of the law of the sea, recent challenges are finding new legal vacuums in the UNCLOS. Put differently, it seems unclear whether this treaty provides guidance or if it is necessary to adopt new rules. Far from fostering an amendment to the Convention, the advisory function stands as a significant tool to shed light on how to interpret and apply UNCLOS to recent issues. An urgent example is climate change and its effects on the rule of law for oceans such as ocean acidification, ocean deoxygenation or rising sea levels.¹⁵ The International Law

¹⁰ See: *Convention on the Privileges and Immunities of the United Nations*, adopted on 13 February 1946, UNTS 4, Art. VIII, section 30; UNCLOS, Art. 188 (2) (a) and (b); C. Dominicè, “Request for Advisory Opinions in Contentious Cases?”, in L. Boisson de Chazournes et al. (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, Leyden 2002), 91–104.

¹¹ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports 2012, 10, paras. 27 and 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166, para. 39.

¹² Cf. S. Rosenne, *The International Court of Justice: An Essay in Political and Legal Theory* (A.W. Sijthoff, Leyden 1957), 492–493; L. Boisson de Chazournes, “Advisory Opinions and the Furtherance of the Common Interest of Mankind”, in L. Boisson de Chazournes et al. (eds.), *International Organizations and International Dispute Settlement – Trends and Prospects* (n 10), 107.

¹³ For example, the IACtHR relied on previous ITLOS advisory opinions to elucidate the content of environmental obligations. See: IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (n 6), footnotes: 171, 237, 140, 278, 335.

¹⁴ *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and the Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment 28 January 2021, ITLOS Reports 2021–2021, in p.17 para. 203.

¹⁵ See in this volume: C. Voigt (Chapter 2); M. Lennan (Chapter 12). Also see: L. Mayer, “Climate Change and the Legal Effects of Sea Level Rise: An Introduction to the Science”, in T. Heidar (ed.), *New Knowledge and Changing Circumstances in the Law of the Sea* (n 2); C. Redgwell, “Treaty Evolution, Adaptation and Change: Is the LOSC ‘Enough’ to Address Climate Change Impacts on the Marine Environment?”, *The International Journal of Marine and Coastal Law*, 34(3) (2019), 440–457; A. Boyle, “Law of the Sea Perspectives on Climate Change”, *The International Journal of Marine and Coastal Law*, 27 (2012), 834.

Commission (ILC) is already considering the topic within its agenda.¹⁶ In this regard, an advisory opinion on the legal consequences of sea-level rise might assist the ILC's work on the issue by identifying applicable rules and, perhaps, providing novel interpretations.¹⁷ Moreover, an opinion could provide factual and legal statements that later can foster international climate change litigation.¹⁸ Another example is marine litter and plastic pollution, which entail cross-cutting legal considerations in international law. An advisory opinion on this point might provide important material for negotiating a new global instrument. In this context, Article 55 ter of the draft text of the ABNJ agreement introduces a jurisdictional clause for requesting advisory opinions from the ITLOS.¹⁹ If accepted in the final text, Article 55 ter will be helpful in interpreting the provisions of the agreement in the context of technical and scientific changes. Judge Lijnzaad proposes the possibility of an ITLOS Special Chamber on Marine Biodiversity bestowed with an advisory function.²⁰

Another aspect to consider is the utility of two previous ITLOS advisory opinions, which resulted in main inputs to global ocean governance and the development of international law.²¹ The first opinion entails valuable considerations on the scope and content of environmental obligations towards the marine environment in the context of deep seabed mining.²² Some authors consider this opinion to be the most comprehensive treatment of international environmental law by any international

¹⁶ ILC (n 3).

¹⁷ The opinion came after the author raised a question during a conference regarding sea-level rise, displacement, migration and human rights, held online on 28 May 2020.

¹⁸ See: A. Boyle, "Litigating Climate Change under Part XII of the LOSC", *The International Journal of Marine and Coastal Law*, 34(3) (2019), 458–481; P. Sands, "Climate Change and the Rule of Law: Adjudicating the Future in International Law", *Oxford Journal of Environmental Law*, 28 (2016), 29.

¹⁹ Intergovernmental conference on ABNJ, *Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, UN Doc. A/CONF.232/2022/5, available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FCONF.232%2F2022%2F5&Language=E&DeviceType=Desktop&LangRequested=False>

²⁰ L. Lijnzaad, "Dispute Settlement for Marine Biodiversity beyond National Jurisdiction: Not an Afterthought", in H. Ruiz Fabri, M. Benatar et al., *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Leiden: Brill/Nijhoff, 2020) 177.

²¹ V. Golitsyn, "The Role of the International Tribunal for the Law of the Sea in Global Ocean Governance", in S. Minas and J. Diamond (eds.), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters and Emerging Challenges* (Leiden: Brill, 2018), 17.

²² *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, 46; See: E. Kelly, "The Precautionary Approach in the Advisory Opinion Concerning the Responsibilities and Obligations of States with Respect to Activities in the Area", in ITLOS, *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Leiden: Brill/Nijhoff, 2017).

court or tribunal.²³ The second advisory opinion provided legal inputs for tackling illegal, unreported and unregulated fishing.²⁴ Thus, advisory opinions indeed stand as a judicial mechanism to enhance the rule of law for oceans. Nevertheless, in the particular case of the ITLOS plenary, the architecture of its advisory function places legal questions on its operation by potential requesting entities.

17.3 ARCHITECTURE OF THE ITLOS ADVISORY FUNCTION: VACUUMS AND OPPORTUNITIES

In international law, everything exists because of the consent of subjects of international law. Among other aspects, States can agree to establish an international tribunal with particular judicial functions to bring legitimacy to the norms and institutions created by a regime where they will perform its judicial functions.²⁵ Consent operates as a legal condition of jurisdiction imposed by the mandate providers and the parties to a specific dispute; and as an important factor in legitimating the operation of international courts and tribunals.²⁶ Therefore, international judicial bodies can exercise those functions conferred by their creators. In the case of the advisory function of the ITLOS plenary, this statement calls for analysing its legal basis and operation.

This section elaborates on four points: (1) The legal basis of advisory jurisdiction; (2) the scope of the ‘international agreements’ requirement; (3) special agreements for advisory proceedings; (4) the discretionary powers of the ITLOS.

17.3.1 *The Legal Basis of the Advisory Function*

The legal architecture for the advisory function was the subject of debate among States, scholars and practitioners, following the *SRFC Advisory Opinion*. The discussion pointed to the lack of express reference to this function in UNCLOS and its annexes; *ultra vires* action by the ITLOS while drafting its rules of procedure, among others.²⁷ Arguably, the advisory jurisdiction of the ITLOS derives from

²³ A. Boyle, C. Redgwell and P. Birnie, *International Law and the Environment* (Oxford: Oxford University Press, 2021), 266.

²⁴ *SRFC Advisory Opinion* (n 1).

²⁵ Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014), 137; A. Orakhelashvili, “The Concept of International Judicial Jurisdiction: A Reprisal”, *The Law and Practice of International Courts and Tribunals*, 3 (2003), 504–505.

²⁶ Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge: Cambridge University Press, 2016), 7, 34.

²⁷ See: M. Lando, “The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission”, *Leiden Journal of International Law*, 29 (2016), 441–461; T. Ruys and A. Moon Soete, “‘Creeping’ Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea”, *Leiden Journal of International Law*, 29 (2016), 155–176; Y. Tanaka, “Reflections on the Advisory Jurisdiction of ITLOS as a Full Court:

Article 21 of its Statute. According to this provision, the jurisdiction of the ITLOS ‘comprises all disputes and all applications submitted to it in accordance with the convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal’.²⁸ The advisory jurisdiction may be expressly absent from Article 21, however: in the *SRFC Advisory Opinion* the ITLOS considered that the phrase ‘all other matters’ must include advisory opinions.²⁹ The Tribunal endorsed this interpretation in 1997 when it adopted its first rules of procedure. Let us remember that the Tribunal has to frame rules for carrying out its functions, in particular, rules of procedure, pursuant to Article 16 of the Statute.³⁰ In this regard, it has been established that the rules of procedure are a source of law that reflects the consent of States and the judicial body’s conception of the rules and powers needed to carry out its functions.³¹ Bearing this in mind, the 1997 Rules of the ITLOS included Article 138, as a step to regulate the advisory function encompassed in Article 21 of its Statute. Therefore, Article 138 of the Rules elaborated on the requirements in order to request an advisory opinion, namely: the existence of an international agreement related to the purposes of UNCLOS; a legal question; and submission of a request by an authorized body.³²

As a judicial body, the ITLOS is bestowed with inherent powers that exist *ipso facto* for any judicial body,³³ whose function is to safeguard its judicial functions.³⁴ Among these powers, the principle of *compétence de la compétence* enables the Tribunal to determine the scope of its jurisdiction.³⁵ The ICJ established that in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the

The ITLOS Advisory Opinion of 2015”, *The Law and Practice of International Courts and Tribunals*, 14 (2015), 318–339.

²⁸ Annex VI of the United Nations Convention for the Law of the Sea, UNTS 31363, adopted on 10 December 1982, Montego Bay, Art. 21 (The Statute of ITLOS).

²⁹ *SRFC Advisory Opinion* (n 1) para. 56.

³⁰ *The Statute of ITLOS* (n 28) Art. 16.

³¹ C. Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007), 39.

³² *Rules of the International Tribunal for the Law of the Sea*, adopted on 28 October 1997, last amendment on 25 September 2018, ITLOS/8, Art. 138 (Rules of the ITLOS); *SRFC Advisory Opinion* (n 1) paras. 54–56; S. Lekkas, “Article 21, Part XI The Area”, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (München: Verlag C. H. Beck, 2017), 2381.

³³ See: *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports 1974, p. 253, para. 23; F. Weiss, “Inherent Powers of National and International Courts: The Practice of the Iran-US Claim Tribunal”, in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), 191.

³⁴ C. Brown, “The Inherent Powers of International Courts and Tribunals”, *British Yearbook of International Law*, 76(1) (2005), 228.

³⁵ H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford: Oxford University Press, 2013), Vol II, 39.

instruments that govern the jurisdiction.³⁶ In the present case, no prohibition is established in UNCLOS or in the Statute for the Tribunal to exercise an advisory function. Moreover, in the *SRFC Advisory Opinion*, the ITLOS clarified that the basis of the advisory jurisdiction is an international agreement conferring this judicial function on the Tribunal, and that Article 138 of the Rules mainly elaborates on the requirements to seize jurisdiction.³⁷ Therefore, the scope of the advisory function under analysis derives from the Statute and the Rules. Yet, it is the international agreement where States will consent to confer this function on the Tribunal.

17.3.2 *The Requirement of 'International Agreement': A Restrictive or Broad Approach?*

In 2015, the ITLOS underscored that Article 21 of the Statute did not itself establish the advisory jurisdiction but rather the other agreement conferring jurisdiction on the Tribunal. It recognized that the other agreement and Article 21 are interconnected and constitute the substantive legal basis for the advisory jurisdiction under analysis.³⁸ It is possible to affirm that under Article 21 of the Statute and Article 138 of the Rules, an international agreement is the cornerstone to the advisory jurisdiction. It is the international agreement that encompasses the advisory jurisdictional clause, the relation to the object and purpose of UNCLOS and the body authorized to request an opinion. Yet the question arises whether all types of international agreement can establish this jurisdiction; and if yes, what kind of control should be exercised by the Tribunal. In international law, an international agreement must be concluded between States/international organizations in written form³⁹ and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever its particular designation.⁴⁰ Thereby, any international agreement complying with these requirements and those others envisaged in Article 138 of the ITLOS Rules could be the basis for the advisory function of the ITLOS. In order to consider possible consequences, it is pertinent to analyse this terminology under a restrictive and a broad approach.

17.3.2.1 Restrictive Approach

Under this approach, the wording 'international agreement' should comprise exclusively those substantive agreements encompassing a jurisdictional clause in favour of the ITLOS. By substantive agreement, this research considers that the following would

³⁶ *Nottebohm case* (Preliminary Objections), Judgment of November 18th, 1953; ICJ Reports 1953, p. III, p. 119. See also: *Interpretation of the Greco-Turkish Agreement*, Advisory Opinion, PCIJ Rep, Series B No 16 (1920), 18.

³⁷ *SRFC Advisory Opinion* (n 1) paras. 58–59.

³⁸ *SRFC Advisory Opinion* (n 1) para. 58.

³⁹ In some cases, non-written forms may entail legal consequences for the parties. See: C. Eckart, *Promises of States in International Law* (Oxford: Hart, 2012).

⁴⁰ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, 3, para 42.

qualify: foundational instruments for international or regional organizations (e.g., regional fisheries management organizations), multilateral agreements related to the purposes of the UNCLOS (e.g., the forthcoming ABNJ agreement) or bilateral treaties regulating determined maritime areas. Following a restrictive approach will require two main tasks for requesting an advisory opinion: first, finding a treaty containing a jurisdictional clause, and if missing, exploring the institutional channels to amend the treaty to include a jurisdictional clause, or creating a new organization comprising a jurisdictional clause in its constitutive instruments. Second, it will require observing the internal procedure established in that treaty to request an opinion from the ITLOS, such as discussing in the plenary of the organization the possibility of requesting an advisory opinion and the legal questions to be submitted.

Let us remember that the advisory jurisdiction of the ITLOS in the *SRFC Advisory Opinion* emanated from Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission.⁴¹ In that case, the Conference of Ministers of the SRFC enabled the Permanent Secretary to request an advisory opinion from the ITLOS. An interesting development in this regard happened during the 26th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC).⁴² Antigua and Barbuda, and Tuvalu signed an agreement to establish the Commission of Small Island States on Climate Change and International Law (COSIS).⁴³ *Inter alia*, COSIS aims at developing and implementing fair and just global environmental norms and practices. Moreover, COSIS will be able to request advisory opinions from the ITLOS on the legal responsibility of States for carbon emissions, marine pollution and rising sea levels. Despite the early stage of COSIS, its foundational agreement complies with a restrictive reading of Article 21 of the Statute and Article 138 of the Rules to establish the advisory jurisdiction.

17.3.2.2 Broad Approach

Under a broad approach, the terminology ‘international agreement’ should encompass those instruments that can be characterized as a treaty under the rules of international law, such as those reflected in Article 2 (1) (a) of the 1969 and 1986

⁴¹ *SRFC Advisory Opinion* (n 1) paras. 61–63; *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission*, adopted in Dakar, Senegal, on 8 June 2012, Art. 33.

⁴² UNFCCC, *Antigua and Barbuda, Tuvalu*, Press Conference, 1 November 2021. Available at <<https://unfccc-cop26.streamworld.de/webcast/antigua-barbuda-tuvalu>>

⁴³ UNFCCC, *Antigua and Barbuda, Tuvalu*, Press Conference, 1 November 2021. Available at <https://unfccc-cop26.streamworld.de/webcast/antigua-barbuda-tuvalu>; D. Freestone, R. Barnes and P. Akhavan, ‘Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law’ (2022) 37 (1) *International Journal of Marine and Coastal Law* 175–178.

Vienna Conventions on the Law of Treaties⁴⁴ and the jurisprudence.⁴⁵ Moreover, pursuant to Article 138 of the Rules of the ITLOS, the additional requirement is that the agreement should be related to the object and purpose of the UNCLOS and should contain a jurisdictional clause. Therefore, the broad approach of the international agreement may include substantive agreements, foundational instruments and any other type of agreement fulfilling the requirements of law. This opens some opportunities not only for international organizations but also to States willing to use the advisory function of the ITLOS. Among these possibilities is the use of agreements on filing a request for an advisory opinion. Judge Wolfrum endorsed this interpretation, but it points to the relevance of identifying the question to be raised.⁴⁶ This scenario could foster a judicial dialogue among States, international organizations and the Tribunal concerning the application and interpretation of UNCLOS. At the same time, it is crucial to explore the scope and limits of using ad hoc jurisdictional agreements to request advisory opinions.

17.3.3 *Ad Hoc Jurisdictional Agreements: Requirements and Foresights*

Following the broad approach, the use of ad hoc jurisdictional agreements seems feasible to seise the ITLOS. The use of these instruments may enhance the rule of law for oceans due to the plurality of actors that can request advisory opinions without engaging in institutional processes to obtain authorization. This section examines the requirements and the limits of ad hoc jurisdictional agreements.

According to Professor Thirlway, a special agreement or *compromis* is an agreement for the immediate reference of a specific dispute to settlement by a judicial or arbitral body.⁴⁷ Special agreements reflect the consent of the parties to submit disputes to a judicial body voluntarily. In doing so, the parties can delimit or not the jurisdiction of the tribunal.⁴⁸ In the context of the advisory jurisdiction of the ITLOS, an ad hoc jurisdictional agreement should consider the requirements contained in Article 138 of the Rules of the ITLOS. In that context, this section

⁴⁴ *Vienna Convention on the Law of Treaties*, adopted on 23 May 1969, entered into force on 27 January 1980, UNTS 18232, Vol.1155, p.331, Art. 2(1); *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, adopted on 21 March 1986, not yet in force, Art. 2(1).

⁴⁵ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, 3, para. 42.

⁴⁶ R. Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for Settlement of International Disputes?", in R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Berlin/Heidelberg: Springer, 2013), 54; P. Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Cheltenham: Edward Elgar Publishing, 2018), 164.

⁴⁷ H. Thirlway, *Compromis* (Max Planck Encyclopedias of Public International Law, 2006), para. 1.

⁴⁸ Chandrasekhara Rao and Philippe Gautier (eds.), *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (n 45) paras. 3.083 and 3.084.

will address four points. First, the minimum requirements for establishing the advisory jurisdiction in a special agreement. Second, the personality to conclude *special agreements*. Third, the configuration of the legal question. And fourth, the relevance of the discretionary power of the ITLOS as a tool in contentious matters.

17.3.3.1 Minimum Requirements

Considering the wording of Article 21 of the Statute and 138 of the Rules of the ITLOS, an ad hoc agreement should fulfil two main points. First, the agreement should be related to the purposes of the UNCLOS. Second, it should contain a jurisdictional clause granting an advisory function to the ITLOS.

Let us remember that, according to the preamble of UNCLOS, its object and purpose is to establish a legal order for the seas and oceans that will facilitate international communication, and will promote peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources, and study, protection and preservation of the marine environment.⁴⁹ Bearing this in mind, the parties to an intended ad hoc agreement should underscore the relevance of requesting an advisory opinion as a means to interpret UNCLOS provisions and fulfil its obligations. For example, an ad hoc agreement to request an advisory opinion on the sea-level rise could highlight the importance for the parties to clarify Articles 5, 7, 13 or 121 of UNCLOS as a mechanism to guarantee equitable use of the oceans in the context of climate change. As will be shown, this aspect is closely related to the legal question, and both should synergize to demonstrate the utility of an opinion for the requesting entity.

Regarding the second point, the ITLOS recognized in 2015 that its advisory jurisdiction derived from an international agreement providing for that jurisdiction.⁵⁰ Thereby, in an ad hoc jurisdictional agreement, the jurisdictional clause is the cornerstone. The jurisdictional clause expresses the consent of the parties to grant advisory jurisdiction to the ITLOS. Moreover, the clause can comprise some parameters for seising the tribunal, for example, the exhaustion of a particular internal process, such as having previous consultations among the members or the filing of a request by a determined entity. This aspect of the clause may differ according to whether the requesting entity is a State, international organization or both.

17.3.3.2 Personality to Conclude Special Agreements

One of the central issues when considering ‘special agreements’ is who among the subjects of international law can conclude an ad hoc jurisdictional agreement. Article 20 of the Statute of the Tribunal offers some clues:

⁴⁹ *United Nations Convention for the Law of the Sea* (n 2), Preamble.

⁵⁰ *SRFC Advisory Opinion* (n 1) paras. 58–59.

1. The Tribunal shall be open to *States Parties*.
2. The Tribunal shall be open to entities *other than States Parties* in any case expressly provided for in Part XI or in any case submitted *pursuant to any other agreement conferring jurisdiction on the Tribunal* which is accepted by all the parties to that case.⁵¹ [Author's italics]

In principle, State parties to the UNCLOS can bring proceedings to ITLOS. However, the second paragraph of Article 20 broadens the *ratione personae* scope of this provision with the wording 'entities other than States Parties'. This opens the floor to include international organizations that are not entitled to participate in proceedings (e.g., International Maritime Organization (IMO), Intergovernmental Oceanographic Commission of UNESCO (IOC-UNESCO), Commission on the Limits of the Continental Shelf (CLCS), among others). Similarly, one may wonder if a State that is not a party to the UNCLOS (e.g., the United States, Turkey or Colombia) could trigger the jurisdiction of the ITLOS.⁵² In the context of a special agreement, what matters under Article 21 (2) is that the legal instrument conferring jurisdiction to the ITLOS identifies the entities authorized to seise jurisdiction and reflect their consent.

On this issue, Article 138 (2) of the Rules establishes: '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'.⁵³ A literal interpretation of this provision provides for two assumptions. In the first place, a request for an advisory opinion should be filed by a body authorized under the agreement. This assumption encompasses a scenario where an international agreement is the foundational instrument for an international organization. Thereby, as occurred in the *SRFC Advisory Opinion*, it requires the international or regional organization to previously identify and authorize a body or an office within it to perform the function of requesting entity before the Tribunal. The second assumption is that the request for an advisory opinion should be transmitted to the Tribunal in accordance with the agreement. Under this assumption, the personality is open to whatever entities – States and organizations – are identified and authorized by an international agreement, in this case, a special agreement. Likewise, this allows for the agreement to establish any institutional precondition to trigger the advisory jurisdiction (e.g., previous consultation between States or within an international organization). In this vein, academic discussion entails divergent opinions on the topic. In the first place, Professor Rosenne considered that the requirement for a

⁵¹ *The Statute of ITLOS* (n 28) Art. 20.

⁵² See: P. Gautier, "Two Aspects of ITLOS Proceedings: Non-State Parties and Costs of Bringing Claims", in N. Scheiber and J. H. Paik (eds.), *Regions, Institutions and Law of the Sea: Studies in Governance* (Leiden: Brill/Nijhoff, 2013), 77; T. Treves, "UNCLOS and Non-Party States before the International Court of Justice", in Carlos Espósito et al. (eds.), *Ocean Law and Policy* (Leiden: Brill, 2016), 367–378.

⁵³ *Rules of the ITLOS* (n 32), Art. 138 (2).

request to be transmitted to the Tribunal by a duly authorized body does not permit a State, or a group of States, to initiate advisory proceedings otherwise than through a duly authorized body.⁵⁴ Conversely, Professor Gautier and Judge Jesus propose that nothing in the wording of Article 21 of the Statute or Article 138 of the Rules restricts the possibility for States to conclude an international agreement.⁵⁵

Hence, the question of personality in the advisory jurisdiction remains open for international and regional organizations and States. This plurality of actors will increase the judicial dialogue among different actors to enhance the UNCLOS system. As part of this dialogue, the public interest is another factor that will foster identification of issues and a subsequent request for an advisory opinion. However, the issue of personality needs to be tested by the different actors and assessed by the Tribunal to avoid abuses attempting to circumvent the principle of consent to adjudication.

17.3.3.3 Legal Question: The Functional and Legitimate Tests

Under international law, a legal question is framed in terms of law, from which it derives problems of international law and is susceptible to a reply based on law.⁵⁶ In this regard, the legal question should follow the logic in a manner that the answer delivered by the Tribunal represents assistance to the requester and the entire legal system while performing its international obligations.⁵⁷ Article 130 of the Rules of the ITLOS, applicable *mutatis mutandis* to advisory proceedings of the ITLOS plenary, states that the Tribunal must consider whether a request for an advisory opinion relates to a legal question pending between two or more parties.⁵⁸ If this is the case, the interested parties may appoint a judge ad-hoc to act during the proceedings,⁵⁹ a practice also present in other jurisdictions.⁶⁰

⁵⁴ S. Rosenne, "International Tribunal for the Law of the Sea: 1996–97 Survey", *International Journal of Marine and Coastal Law*, 13(4) (1998), 507.

⁵⁵ P. Gautier, "The International Tribunal for the Law of the Sea: Activities in 2006", *Chinese Journal of International Law*, 6(2) (2007), 389–402, para. 32; J. L. Jesus, "Article 138", in P. Chandrasekhara and P. Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden: Brill, 2006), 394.

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 37; *Responsibilities and Obligations of States with Respect to Activities in the Area* (n 22), 10, at 25, para. 39.

⁵⁷ IACtHR, *Advisory Opinion OC-21/14* of 19 August 2014. Series A No. 21, para. 25; IACtHR, *Advisory Opinion OC-22/16* of 26 February 2016. Series A No. 22, para. 21.

⁵⁸ *Rules of the ITLOS* (n 32), Art. 130 (2); J. L. Jesus, "Article 130", in P. Chandrasekhara and P. Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (n 55), 375–377.

⁵⁹ *Statute of the ITLOS* (n 28), Art. 17; *Rules of the ITLOS* (n 32), Art. 130 (2).

⁶⁰ *Rules of the International Court of Justice*, Adopted on 14 April 1978, Rule 102 (3); *Western Sahara*, Order of 22 May 1975, I.C.J. Reports 1975, p. 6. See: E. Jiménez de Aréchaga, "Judges Ad-Hoc in Advisory Proceedings", *Heidelberg Journal of International Law*, 31 (1971), 697–711

In the context of a special agreement, the legal question is relevant for identifying the legitimate interest and the general purpose of the advisory opinion. Both aspects are elements that the ITLOS should consider in the admissibility analysis of the request. Regarding the first aspect, the legal question must relate to the duties performed by the international organization or to the obligations performed by States. This is in line with Article 131 (1) of the Rules of the ITLOS.⁶¹ In the *SRFC Advisory Opinion*, the ITLOS assessed whether the legal questions were related to the performance of the obligation encompassed in the MCA Convention.⁶² In the case of States requesting an advisory opinion, it should be enough to address the importance and necessity of obtaining an advisory opinion for the performance of rights and duties enshrined in UNCLOS. Likewise, the legal question should pursue an answer that may be useful for the entire system. That is, whether the legal questions addresses an issue of major relevance for the international community with particular consequences on the requesting States (e.g., the effects of climate change in the ocean), the general purpose of the opinion may be accredited and will open the floor for other entities to present their views during the written and oral proceedings. For example, in its advisory opinion on human rights and the environment, the Inter-American Court of Human Rights (IACtHR) estimated that an opinion on the topic would 'be of real value for the countries of the region because it will identify, clearly and systematically, the State obligations in relation to the protection of the environment within the framework of their obligation to respect and to ensure the human rights of every persons subject to their jurisdiction'.⁶³

The formulation of the legal question is perhaps the more complex stage of requesting an advisory opinion from any judicial body. Drafting a legal question implies an examination of the purposes of requesting an advisory opinion and how it will be useful for the requesting entity. As mentioned, this process will comprise previous consultations among the members of the requesting entity, mainly a debate between States. There should be a consensus on the goal pursued with the opinion, the drafting and content of the legal question and, perhaps, an assessment of the possible scenarios that a judicial body may take when issuing an opinion.

17.3.3.4 Discretionary Power of the ITLOS

An important feature of the advisory jurisdiction among international judicial bodies is their discretionary power to decide on whether they exercise its jurisdiction in

⁶¹ *Rules of the ITLOS* (n 32), Art. 130 (1).

⁶² *SRFC Advisory Opinion* (n 1), paras. 67–68; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, at 77, para. 22.

⁶³ IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (n 6), para. 23.

light of a compelling reason.⁶⁴ These powers have been described as a wider margin of appreciation of the general considerations of admissibility of requests for advisory opinions to protect the integrity of judicial functions.⁶⁵ In the particular case of the ITLOS, Article 138 of the Rules confers these powers on the Tribunal to consider exercising its advisory function even when the conditions of jurisdiction are satisfied, if there is a compelling reason.⁶⁶ The literature and the jurisprudence identify as main compelling reasons: lack of consent of an interested party, lack of factual documentation and evidence, and the highly political nature of the question.⁶⁷ From among all of these grounds, perhaps the question of consent to adjudication is the most relevant. The ICJ has stated that the consent of an interested State is relevant not for the Court's competence but for an appreciation of the property of giving an opinion, for instance, if the request aims at circumventing the principle of consent to adjudication.⁶⁸ On this point, it has been considered that to determine whether a request is circumventing the lack of consent to adjudication, it is necessary to compare the subject matter of the bilateral dispute with the legal question presented by the request.⁶⁹ The ITLOS should then assess whether the legal question and the reasons behind the request may transgress the principle of consent to jurisdiction. As mentioned, analysing the context and the scope of the legal question are relevant for this assessment. While ensuring this, the Tribunal will be safeguarding its legitimacy as a judicial body within the UNCLOS.

17.4 CONCLUSIONS

Following the 2015 SRFC *Advisory Opinion*, the advisory jurisdiction of the ITLOS plenary has not been used despite the vast legal uncertainties arising from new

⁶⁴ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion ICJ, (2019), para. 65; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 (II), p. 416, para. 30; *SRFC Advisory Opinion* (n 1), para. 71.

⁶⁵ G. Abi-Saab, "On Discretion: Reflections on the Nature of the Consultative Jurisdiction of the International Court of Justice", in P. Sands and L. Boisson de Chazourmes (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), 45.

⁶⁶ *SRFC Advisory Opinion* (n 1), para. 71.

⁶⁷ H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (n 33), Vol II, 1724–1731; P. d'Argent, "Commentary to Article 65", in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed., Oxford: Oxford University Press, 2019), para. 45.

⁶⁸ *Interpretation of Peace Treaties*, Advisory Opinion: I.C.J. Reports 1950, p. 65, p.71; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p 25, paras. 32 and 33.

⁶⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Dissenting Opinion of Judge Donoghue, (2019), para. 10.

challenges to ocean governance. One may wonder whether the reason behind this inaction is lack of knowledge on how to trigger the advisory jurisdiction or just a way to avoid awakening the debate on the advisory jurisdiction triggered in 2015. Drawing on the *lex lata* governing the advisory jurisdiction of the ITLOS plenary, this chapter examined the opportunities offered by this judicial function, as well as the limits that the ITLOS should set.

As a first remark, the advisory function stands as a valuable tool to enhance the UNCLOS system and foster strengthened global governance in the ocean. In other jurisdictions, advisory opinions are demonstrable guidance in the interpretation and application of law. Yet, it should be clear that advisory opinions will not by themselves resolve an issue; rather, they are a complement to a parallel effort. However, their legal effects entail opportunities for stakeholders to reach concrete solutions following the law. In this context, stakeholders should consider the opportunities and the limits of the advisory jurisdiction of the ITLOS to seek legal guidance on how to tackle current challenges in the law of the sea.

Considering the guidance provided by the ITLOS in the *SRFC Advisory Opinion* on the requirements for triggering the advisory jurisdiction, this research underscores the role of an international agreement as the cornerstone of the advisory function. In this regard, this chapter proposes that the terminology ‘international agreement’ should mean that this jurisdiction emanates from multilateral, regional, bilateral and substantive treaties. Yet the terminology likewise enables the use of ad hoc jurisdictional agreements to request an advisory opinion. As established, a group of States and international organizations can conclude an ad hoc jurisdictional agreement to request an advisory opinion. However, this agreement should comply with the minimum requirements under Article 21 of the Statute and Article 138 of the Rules. These minimum requirements could function as a standard to provide legitimacy to the ITLOS. Nevertheless, the use of ad hoc jurisdictional agreements requires meticulous consideration by the ITLOS to avoid potential abuses. In this vein, the discretionary powers of the ITLOS stand as the main mechanism of control that the Tribunal should employ to prevent abuses when using the advisory jurisdiction. The ITLOS should determine whether there are compelling reasons that will menace judicial propriety. Among these compelling reasons, the Tribunal should pay special attention in protecting the principle to consent to adjudication, mainly due to the particular architecture of its advisory jurisdiction.

As mentioned, Antigua Barbuda, and Tuvalu created COSIS to inter alia trigger an advisory proceeding before the ITLOS on questions concerning climate change and the oceans. This new entity will remain open for other States to join the efforts.⁷⁰ The question is whether this agreement will fulfil the requirements

⁷⁰ At the moment of writing, only Tuvalu, Antigua and Barbuda and Palau are members of this Commission.

imposed by Article 138 of the Rules to seise advisory jurisdiction. Drawing on the analysis of this chapter, the answer will depend on the legal question submitted to the ITLOS and the utility of an advisory opinion for the requesting states. Furthermore, COSIS will open a new chapter in the understanding and operation of the advisory jurisdiction of the ITLOS. It will be on the Tribunal and States to determine the outcome of a new request for an advisory opinion.