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Taking the current when it serves: Prospects and challenges for an ITLOS advisory opinion on oceans and climate change

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Abstract

The 2021 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law has brought the prospect of an advisory opinion on climate change from the International Tribunal for the Law of the Sea (ITLOS) a step closer to reality. The Agreement authorizes COSIS to submit a request to the full Tribunal, following the road paved for the first time—and not uncontroversially—by the 2015 ITLOS *Sub-regional Fisheries Commission Advisory Opinion*. This article explores the potential for progressive development of (*erga omnes*) obligations under the law of the sea in relation to climate change by means of an advisory opinion, as well as challenges that may be encountered. Drawing on previous case law, it reflects on the suitability of the ITLOS advisory route, substantive and strategic considerations and potential future implications of an ITLOS advisory opinion on climate change.

1 | INTRODUCTION

On 31 October 2021, the first day of the 26th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC)¹ in Glasgow, the governments of Antigua and Barbuda and Tuvalu signed an Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS Agreement).² The COSIS Agreement is open to all members of the Alliance of Small Island States, and Palau and Niue have since acceded.³ Undoubtedly, the most notable feature of the Agreement is that it authorizes the Commission to request an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS).⁴

It thereby enables the Commission to follow the road paved by the ITLOS' 2015 *Sub-regional Fisheries Commission Advisory Opinion* (SRFC Advisory Opinion),⁵ where it was established for the first time that the full Tribunal can exercise advisory jurisdiction over a legal question if an international agreement related to the purposes of the United Nations Convention on the Law of the Sea (UNCLOS)⁶ specifically provides for such a request.⁷ This conclusion and, in particular, the rather succinct reasoning of the Tribunal to support it were not uncon-

¹United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

²Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (adopted 31 October 2021, entered into force 31 October 2021) UNTS 56940 (COSIS Agreement). For a discussion see D Freestone, R Barnes and P Akhavan, 'Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)' (2022) 37 International Journal of Marine and Coastal Law 166.

³COSIS Agreement (n 2) art 4(3), and COSIS 2022 Annual Report, October 2022 <dropbox.com/s/h6i96vtyz0pogy9/COSIS%20Annual%20Report%20-%2031.10.2022.pdf?dl=0>.

⁴*Ibid* art 2(2).

⁵*Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* [2015] ITLOS Rep 4 (SRFC Advisory Opinion).

⁶United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 (UNCLOS).

⁷*SRFC Advisory Opinion* (n 5) paras 58–60. This is based on Article 138(1) of the Rules of the Tribunal: 'The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion', read together with Article 21 of the Statute of the International Tribunal for the Law of the Sea (ITLOS Statute), which provides that 'the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal' (emphasis added). See Rules of the Tribunal (ITLOS/8) (adopted on 28 October 1997 and amended on 15 March 2001, 21 September 2001, 17 March 2009, 25 September 2018, 25 September 2020 and 25 March 2021) <itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf>; and Statute of the International Tribunal for the Law of the Sea <itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf>.

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troversial given the lack of an explicit legal basis for advisory jurisdiction of the full Tribunal in UNCLOS itself.⁸ Uncertainties remain as to the exact prerequisites for and the limits of general advisory jurisdiction of the ITLOS. As the request for the *SRFC Advisory Opinion* has shown, States hold divergent views on the issue and jurisdiction may well be challenged again when COSIS submits a request.⁹

For the purposes of the present article, however, it will be assumed that the ITLOS will follow its course set out in the *SRFC Advisory Opinion*—with or without further elaborating it—and that jurisdiction and admissibility hurdles can be passed.¹⁰ From this point of departure, the article critically assesses the possibilities for progressive development of (*erga omnes*) obligations under the law of the sea in relation to climate change by means of an advisory opinion, as well as challenges that may be encountered. It shifts the focus to what pursuing the ITLOS advisory route could bring to the table—seeing it not as an alternative to an eventual advisory opinion on climate change from the International Court of Justice (ICJ), but as complementary thereto. Drawing on UNCLOS case law, in particular lessons learned from the previous two ITLOS advisory opinions, the *Seabed Advisory Opinion* and the *SRFC Advisory Opinion*, it will first reflect on the suitability of the ITLOS advisory route for climate change-related questions (Section 2), before turning to substantive and strategic considerations (Section 3). Concluding remarks will be offered on overarching questions of legitimacy and potential future implications of an ITLOS advisory opinion on climate change (Section 4).

2 | SUITABILITY OF THE ITLOS ADVISORY ROUTE

Climate change is a ‘common concern of humanity’,¹¹ and a governance challenge that reaches well beyond the law of the sea, in particular in terms of its causes, which are largely land-based. Why then is there an interest and potential added value in pursuing an advisory opinion from a specialist law of the sea tribunal? Some brief reflections on this preliminary question are warranted, before moving on to the specificities of ITLOS advisory proceedings and its appropriateness as a forum to deal with climate change-related questions.

In biophysical terms, the ocean-climate nexus is abundantly clear and far more complex than currently reflected in the international legal framework.¹² On the one hand, oceans are a major victim of climate change impacts which are widely, but not evenly, dispersed, whether that is the impacts of sea-level rise, ecosystem degradation, biodiversity loss or changes to the abundance and distribution of commercially exploited fish stocks. Climate change also has a main driver—carbon dioxide (CO₂) emissions—in common with another major cause of marine environmental degradation, namely, ocean acidification and deoxygenation and has multiplier effects alongside other pressures on the marine environment.¹³ On the other hand, oceans play a vital role in mitigating the effects of global climate change by virtue of their function as the world's largest carbon sink. Apart from acknowledging this function of the ocean as a natural carbon sink, the UNFCCC and the Paris Agreement¹⁴ are effectively silent on all dimensions of the ocean-climate nexus.¹⁵ While UNCLOS does not regulate climate change as such, it does provide a comprehensive legal framework for the oceans, and as a result, diverse rights and obligations under UNCLOS are directly affected by or relevant to ocean-based climate change impacts. We will turn to the substance of potential legal questions arising at the ocean-climate nexus in more detail in Section 3, suffice it to point out here that climate change poses direct challenges and interpretative questions for the law of the sea.

The next question is then whether advisory proceedings are a suitable avenue to seek clarification or even progressive development of the law of the sea in relation to climate change. There is a long-standing and ongoing debate (focused mostly on the ICJ) about how appropriate advisory proceedings are in different contexts.¹⁶ One common concern is that when advisory proceedings are used to obtain judicial pronouncements on issues that are of a highly political nature, this would be incompatible with the judicial function of a court or tribunal.¹⁷ Also, in relation to ITLOS, concerns for strategic ‘abuse’ of the advisory procedure have been raised. Judge Cot, for example, warned in connection to the request for the *SRFC Advisory Opinion* that the Tribunal could be placed in an awkward position when States, through bilateral or multilateral agreement, can create and authorize an entity to submit a question, and thereby seek to gain advantage over third States.¹⁸ The main ‘risk’ associated with entertaining a request from a body like COSIS is that it would mean that two or more States can enter into an agreement with the sole purpose of

⁸Contrary to the advisory jurisdiction of the ITLOS Seabed Disputes Chamber, which is provided for in UNCLOS (n 6) art 191. For a critical assessment of the Tribunal's reasoning see, e.g., *SRFC Advisory Opinion* (n 5) Declaration of Judge Cot, 73, para 4; M Lando, ‘The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission’ (2016) 29 *Leiden Journal of International Law* 441; T Ruys and A Soete, ‘“Creeping” Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea’ (2016) 29 *Leiden Journal of International Law* 155; Y Tanaka, ‘Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015’ (2015) 14 *The Law and Practice of International Courts and Tribunals* 318.

⁹See, for a discussion of States' positions, Y Tanaka, ‘The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility’ (2023) 32 *Review of European, Comparative and International Environmental Law*.

¹⁰See, for a discussion of these potential hurdles, *ibid*; R Barnes, ‘An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?’ (2022) 53 *Ocean Development & International Law* 180.

¹¹COSIS Agreement (n 2) preamble; UNFCCC (n 1) preamble.

¹²See RJ Roland Holst, ‘The Climate-Oceans Nexus: Oceans in the Climate Regime, Climate in the Oceans Regime’ in PG Harris (ed), *Routledge Handbook of Marine Governance and Global Environmental Change* (Routledge 2022) 28.

¹³HO Pörtner et al, ‘IPCC Special Report on the Ocean and Cryosphere in a Changing Climate’ (2019) <[ipcc.ch/srocc/download-report-2/](https://www.ipcc.ch/srocc/download-report-2/)>.

¹⁴Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 107.

¹⁵See, for a discussion of the first references to oceans in the Glasgow Climate Pact, M Lennan and E Morgera, ‘The Glasgow Climate Conference (COP26)’ (2022) 37 *International Journal of Marine and Coastal Law* 137.

¹⁶M Wood, ‘Understanding the Advisory Jurisdiction of the International Tribunal for the Law of the Sea’ in ITLOS (ed), *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Brill/Nijhoff 2018) 214–216.

¹⁷See for a discussion also *ibid* 215; Barnes (n 10) 200–202.

¹⁸Declaration of Judge Cot in *SRFC Advisory opinion* (n 5) para 9.

requesting an ITLOS advisory opinion, while—contrary to requests for ICJ advisory opinions¹⁹—other States do not have influence on whether and what questions are submitted.²⁰ The perceived lack of legitimacy of the requesting body could then affect the legitimacy of the eventual advisory opinion. On the face of it, this concern may seem more prevalent in relation to COSIS compared to the SRFC, yet, as will be argued below, it should also not be overstated.

The legitimacy concern relates in the first place to the nature of the requesting body and the admissibility of its request. The SRFC is a long-standing regional fisheries organization that sought judicial guidance to help it carry out its mandate and functions; or, at least, that was how it was formally framed both by the SRFC in its request and by the Tribunal.²¹ The questions that a requesting body submits should be within the scope of the agreement conferring jurisdiction onto the Tribunal. In the *SRFC Advisory Opinion*, ITLOS saw no reason to interpret Article 21 of the ITLOS Statute restrictively in this connection and followed the ICJ in that a “sufficient connection” with the purposes and principles’ of the other agreement is enough.²² As far as COSIS is concerned, this broad test does not seem to raise any problems. Requesting an advisory opinion is explicitly one of COSIS’ functions,²³ and directly linked to its mandate, which is

to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.²⁴

COSIS’ activities include, inter alia,

assisting Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals.²⁵

Whether an advisory opinion on climate change legitimately serves to provide ‘guidance’ on COSIS’ activities or merely serves

political ends is a separate question, and it is unclear if and on what basis the Tribunal would assess this. ITLOS judge and former president Jesus has suggested that ‘it seems to be of little relevance to dwell on the nature of [the requesting body]. Its legitimacy to transmit the request is derived from the authority given to it by the agreement and not by its nature or any other structural or institutional considerations.’²⁶ That said, the Tribunal is of course free to reject particular questions or to rephrase them.²⁷

A second objection, which was also raised with respect to several of the SRFC’s questions that concerned flag State obligations, is that the Tribunal should not pronounce on rights and obligations of third States that are not parties to the conferring agreement without their consent. The Tribunal dismissed this concern with the formalistic argument that consent of non-SRFC member States was not relevant because the advisory opinion has no binding force, and is given only to the SRFC whose objective was to ‘seek guidance in respect of its own actions’.²⁸ The Tribunal was ‘mindful of the fact that by answering the questions it will assist the SRFC in the performance of its activities and contribute to the implementation of the Convention’.²⁹ It also took care to—at least formally—limit its jurisdiction to the Exclusive Economic Zones (EEZs) of SRFC member States and the rights and obligations of other States (flag States) therein.³⁰ Still, that ‘does not hide the obvious fact’ that the answers given by the Tribunal are general in nature, and that several questions related primarily to ascertaining the obligations of non-SRFC member States in their capacity as flag State, rather than (only) assisting the SRFC in carrying out its functions.³¹ It cannot be denied that the *SRFC Advisory Opinion* sets out the Tribunal’s views on the general due diligence obligation of flag States under UNCLOS to prevent illegal, unreported and unregulated (IUU) fishing by vessels flying their flag in the EEZ of other States, which has been reaffirmed in subsequent UNCLOS jurisprudence.³²

As for the rights and obligations of non-COSIS member States that may be affected by an advisory opinion on climate change, this concern is not necessarily unique to advisory proceedings and may equally arise in contentious cases. Nor is the situation all that different from that of the *SRFC Advisory Opinion*, which in essence also concerned a global problem: IUU fishing. It seems almost inevitable, even when COSIS asks for clarifications of its own members’ obligations and implementation of the Convention, that this would have some legal effect for other States parties to UNCLOS—in particular because

²⁶JL Jesus, ‘Article 138 of the Rules of the Tribunal: Commentary’ in P Chandrasekhara Rao and P Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Brill/Nijhoff 2006) 394.

²⁷This discretionary space follows from the word ‘may’ in Rules of the Tribunal (n 7) art 138; see also *SRFC Advisory Opinion* (n 5) para 71. See on discretion and propriety also Tanaka (n 9); and B Mayer, ‘International Advisory Proceedings on Climate Change’ (2023) 44 *Michigan Journal of International Law*.

²⁸*SRFC Advisory Opinion* (n 5) para 76.

²⁹*ibid* para 77. See also *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 (*Seabed Advisory Opinion*) para 30.

³⁰*SRFC Advisory Opinion* (n 5) paras 69, 87–89.

³¹Ruys and Soete (n 8) 171–172.

³²*South China Sea (The Philippines v The People’s Republic of China)* (Merits) (Award) (12 July 2016) [2020] 33 RIAA 153 (*South China Sea Arbitration*) 521–522, paras 743–744. See further Section 3.

¹⁹In accordance with the United Nations (UN) Charter, the General Assembly, Security Council or any other UN organs and specialised agencies authorised by the General Assembly can request an advisory opinion from the ICJ on legal questions arising within the scope of their activities. See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 96.

²⁰See for a discussion of these concerns in more detail Tanaka (n 9).

²¹*SRFC Advisory Opinion* (n 5) paras 76–77.

²²*ibid* para 68, referring to *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 78, para 22.

²³COSIS Agreement (n 2) art 2(2).

²⁴*ibid* art 1(3).

²⁵*ibid* art 2(1). In addition, the Commission may take on other tasks and responsibilities as the parties may determine (*ibid* art 2(4)).

the most relevant obligations, those on the protection of the marine environment, are of an *erga omnes* character.³³ Would this be fundamentally problematic in light of the principle of consent?³⁴ Those disagreeing with the ITLOS' view on the role of consent in the *SRFC Advisory Opinion* may point to the fact that parties to UNCLOS who are not COSIS members have not consented to general advisory jurisdiction of the full Tribunal, as there is no explicit basis for this under the Convention. On the other hand, by becoming a party to UNCLOS, States did consent to a more far-reaching system of compulsory contentious dispute settlement to which those same *erga omnes* obligations can be subjected by any State party to UNCLOS.³⁵ It may be questioned what exactly the difference would be in terms of legal effect on third States between a judicial interpretation of a general obligation contained in an advisory opinion or in contentious case law. As the purpose of an advisory opinion is to advise, and not to settle a dispute, requests for advisory opinions may remain relatively abstract in the absence of concrete disputed facts.³⁶ Alternatively, in cases where concrete facts are before the Tribunal, they may not be given full consideration in an advisory procedure to the extent this is deemed inappropriate in relation to any underlying (bilateral) dispute. It can thus be argued that exactly because of the nature of the topic of climate change impacts on the oceans and the interests involved it is particularly appropriate for advisory rather than contentious proceedings³⁷—not in the least because of the participatory arrangements that can be accommodated within advisory proceedings, which allow interested and affected States to exercise greater influence than in contentious proceedings.³⁸

All States parties to UNCLOS as well as 'intergovernmental organisations which are likely to be able to furnish information on the question' shall be identified and invited to present written and oral statements in ITLOS advisory proceedings.³⁹ In the *SRFC Advisory Opinion* proceedings this opportunity was widely used, with 22 States parties to UNCLOS and seven intergovernmental organizations

submitting written statements.⁴⁰ In addition, there is a practice to accept *amicus curiae* briefs from, for example, nongovernmental organizations that are not formally part of the case file but nonetheless placed on the ITLOS' website.⁴¹ For an advisory opinion on climate change, there is most likely an even larger number of relevant organizations that the Tribunal may wish to invite to submit statements.⁴² These possibilities to participate arguably go some way towards accommodating the diversity and multilateral character of interests involved. As was the case in the *SRFC Advisory Opinion* proceedings, it may be expected that this opportunity will also be used to voice objections to the jurisdiction of the Tribunal and the propriety of questions submitted by COSIS. In addition to facilitating participation and input by States parties and relevant organizations, the Tribunal may also seek to enhance the legitimacy of an eventual advisory opinion by using the opportunity to elaborate its reasoning on the conditions and limits of its advisory jurisdiction.

3 | SUBSTANTIVE AND STRATEGIC CONSIDERATIONS

This section focuses on the questions that could be posed to the ITLOS and the implications thereof. Again, a few preliminary observations are due. As noted above, ITLOS has discretion to consider 'any legal question, abstract or otherwise',⁴³ if an international agreement related to the purposes of the Convention specifically provides for the submission thereof.⁴⁴ There is some debate as to whether this potentially opens the door for an agreement to confer onto the Tribunal jurisdiction to advise on non-law of the sea questions as long as the conferring agreement itself relates to the purposes of UNCLOS.⁴⁵ It is unlikely that Article 21 of the Statute and Article 138 of the Rules of the Tribunal would be interpreted in this manner,⁴⁶ but, in any event, the COSIS Agreement appears to preclude any doubt by limiting the authorization to 'any legal question within the scope of [UNCLOS], consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules'.⁴⁷ This means that the Tribunal cannot extend jurisdiction *ratione materiae* to other areas of international law, unless this would be truly incidental to the interpretation and application of

³³Part XII of UNCLOS (n 6) on the protection and preservation of the marine environment applies to all States in all maritime zones, both within and beyond national jurisdiction. See further Section 3. See on the *erga omnes* character of the general obligation to protect the marine environment also J Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press 2017) 24–25.

³⁴Mayer (n 27) considers consent to be 'a critical obstacle' for the advisory opinion requested by COSIS.

³⁵UNCLOS (n 6) Part XV, Section 2. Disputes concerning the interpretation and application of the obligations to protect the marine environment are not excluded; see *ibid* arts 297–98. It may be noted that for the establishment of contentious jurisdiction, *ibid* art 288 does not explicitly require applicants to act exclusively in defence of its individual rights, it merely requires a disagreement 'concerning the interpretation and application' of UNCLOS. See also R Wolfrum, 'Enforcing Community Interests through International Dispute Settlement: Reality or Utopia?' in U Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 1145.

³⁶See further Section 3.1.

³⁷See also Freestone et al (n 2) 168; P Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 *Journal of Environmental Law* 19, 33. More generally L Boisson de Chazournes, 'Advisory Opinions and the Furtherance of the Common Interest of Humankind' in L Boisson de Chazournes, C Romano and R Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Brill/Nijhoff 2002) 105.

³⁸R Wolfrum, 'Advisory Opinions: An Alternative Means to Avoid the Development of Legal Conflicts?' in H Ruiz Fabri (ed), *International Law and Litigation: A Look into Procedure*, vol 15 (Nomos Verlagsgesellschaft 2019) 105.

³⁹See Rules of the Tribunal (n 7) arts 133 and 138(3).

⁴⁰This includes the European Union. In addition, the United States (a non-party to UNCLOS) submitted a statement by virtue of its party status to the 1995 Fish Stocks Agreement. All submissions can be found at <[itlos.org/index.php?id=252](https://www.itlos.org/index.php?id=252)>.

⁴¹See, e.g., *Amicus Curiae* brief from WWF International (submitted 29 November 2013) <[itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_Written_Statement_1_WWF.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_Written_Statement_1_WWF.pdf)>.

⁴²For the *SRFC Advisory Opinion*, the Tribunal identified and invited 48 intergovernmental organizations, see *Request for an Advisory Opinion Submitted by the SRFC* (Order of 24 May 2013) ITLOS Rep 2013, 202.

⁴³*SRFC Advisory Opinion* (n 5) para 72, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 61.

⁴⁴UNCLOS (n 6) Annex VI: ITLOS Statute (n 7) art 21 and Rules of the Tribunal (n 7) art 138.

⁴⁵Mayer (n 27); KJ You, 'Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited' (2008) 39 *Ocean Development and International Law* 360, 362–363.

⁴⁶See also You (n 45) 363; Ruys and Soete (n 8) 175.

⁴⁷COSIS Agreement (n 2) art 2(2) (emphasis added).

UNCLOS.⁴⁸ This excludes questions on the content and scope of obligations under, for example, the UNFCCC or the Paris Agreement. However, once the Tribunal has established jurisdiction, in terms of applicable law it shall apply UNCLOS, the conferring agreement (i.e., the COSIS Agreement) and other relevant rules of international law not incompatible with UNCLOS.⁴⁹ As we shall see in more detail below, UNCLOS case law has made reference to other instruments of international law in the interpretation of obligations under UNCLOS on various occasions, and this will most likely prove an important interpretative tool for UNCLOS obligations in relation to climate change as well. Finally, as far as the phrasing of questions to be put to ITLOS is concerned, it is important to bear in mind that questions that seek answers *de lege ferenda*, thus entailing ‘a legislative role’ of the Tribunal, are outside the scope of its judicial functions.⁵⁰ That said, plenty of scope for (strategic) choices remains.

Given the nature of the ocean-climate nexus as sketched in the previous section, questions concerning the interpretation of UNCLOS *vis-à-vis* climate change could relate to provisions as diverse as those on the protection of the marine environment, the effects of sea-level rise on baselines and maritime boundaries, fisheries management and the implications of fish stocks relocating due to ocean warming, or rights and obligations of States seeking to implement negative emission solutions in the marine environment.⁵¹ Not all legal questions that arise at the ocean-climate nexus, however, may be equally relevant to the interests that COSIS seeks to pursue with its request. To take the example of sea-level rise, it may be noted that the topic is already under consideration by the International Law Commission (ILC),⁵² and that there is growing evidence of emerging State practice on the ‘freezing’ of existing maritime entitlements, notably among particularly affected island States in the Pacific.⁵³ Judicial advice as an additional route to review the law on this point may thus not be the most effective use of this avenue. Instead, two themes of particular interest appear to be emphasized in the COSIS Agreement and will therefore be the focus of the following discussion: obligations to protect the marine environment, and State responsibility for breaches thereof.⁵⁴

3.1 | Obligations to protect the marine environment

As far as the obligation to protect the marine environment is concerned, there is potential for the Tribunal to build on the already relatively elaborate jurisprudence of UNCLOS courts and tribunals on this topic. The general obligation to protect and preserve the marine environment is set out in Article 192 and elaborated in the remainder of Part XII of UNCLOS, in particular Article 194, which stipulates that States shall take all measures ‘necessary to prevent, reduce and control pollution of the marine environment’ from activities under their jurisdiction and control. UNCLOS courts and tribunals have interpreted this general obligation as not being limited to ‘pollution’ in a strict sense, but to include the preservation of ecosystems and biodiversity—an interpretation in line with subsequent developments in international (environmental) law following the adoption of UNCLOS.⁵⁵ For the impacts of climate change on the marine environment, it is important to note that the general obligation under Articles 192 and 194 covers ‘all sources of pollution’,⁵⁶ including land-based sources and pollution ‘from or through the atmosphere’.⁵⁷ It would seem uncontroversial that the oceanic uptake of atmospheric greenhouse gas (GHG) emissions qualifies as ‘pollution of the marine environment’.⁵⁸ This term is broadly defined in UNCLOS as

the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.⁵⁹

At least scientifically speaking, it is clear that the oceanic uptake of CO₂ (a ‘substance’) alters ocean chemistry, leading *inter alia* to acidification and deoxygenation.⁶⁰ GHGs furthermore add ‘energy’ into the marine environment which leads to ocean warming, thermal expansion and, combined with the melting of the cryosphere, exacerbates sea-level rise (‘indirect’ effects).⁶¹ In other words, the ‘deleterious effects’ on the marine environment, human health and economic activities are evident, and atmospheric GHGs appear to fit the

⁴⁸See generally, e.g., L. Marotti, ‘Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals’ in A. Del Vecchio and R. Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 383; K. Parlett, ‘Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals’ (2017) 48 *Ocean Development and International Law* 248; N. Klein, ‘Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions’ (2016) 15 *Chinese Journal of International Law* 403.

⁴⁹*SRFC Advisory Opinion* (n 5) para 84. See also Rules of the Tribunal (n 7) arts 130(1) and 138 (3); ITLOS Statute (n 7) art 23; and UNCLOS (n 6) art 293.

⁵⁰*SRFC Advisory Opinion* (n 5) para 74.

⁵¹See further, e.g., Roland Holst (n 12).

⁵²See ‘First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law’ UN Doc A/CN.4/740 (13 May 2020).

⁵³This is affirmed in COSIS Agreement (n 2) preamble, which states that ‘maritime zones ... and the rights and entitlements that flow from the, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise’. See also International Law Association, ‘International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise’ (2018) 17–19; and Pacific Island Forum, ‘Declaration on Preserving Maritime Zones in the face of Climate Change Related Sea-Level Rise’ (2021) <forumsec.org/wp-content/uploads/2021/08/Declaration-on-Preserving-Maritime.pdf>.

⁵⁴See COSIS art 1 cited above (n 24).

⁵⁵*Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Rep 1999 280, para 70; *South China Sea Arbitration* (n 32) para 945.

⁵⁶UNCLOS (n 6) art 194(3).

⁵⁷*Ibid* arts 207 and 212.

⁵⁸See, e.g., A. Boyle, ‘Climate Change, Ocean Governance and UNCLOS’ in J. Barrett and R. Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 211, 217–218; J. Harrison, ‘Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime’ in I. Alogna, C. Bakker and J. P. Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill/Nijhoff 2021) 421; R. J. Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Brill 2022) 250–252. See also Tanaka (n 9).

⁵⁹UNCLOS (n 6) art 1(1)(4).

⁶⁰Pörtner et al. (n 13) Summary for Policy Makers, para A.2.

⁶¹*Ibid* para A.3.

definition of 'pollution'. It may furthermore be noted that GHGs are undoubtedly treated as 'pollution' when emitted by ships⁶²; thus, it would seem odd to treat them differently when emitted by other sources.

Regardless of whether the Tribunal will be explicitly asked to confirm whether atmospheric GHGs constitute pollution of the marine environment, it might choose to treat it as a sub-question of any question concerning the general obligation to protect the marine environment under Part XII. In that case, this would almost inevitably require the Tribunal to engage to some extent with the abundant scientific evidence relating to the ocean-climate nexus, which—although the science as such is unlikely to be disputed—could be interesting if this leads the Tribunal to make a judicial statement on the status or relevance of, for example, the reports by the Intergovernmental Panel on Climate Change. This could be of particular relevance in relation to ocean acidification. Scientists typically treat ocean acidification not as a consequence of climate change, but as a self-standing and concurrent problem resulting from increased levels of oceanic uptake of CO₂ from the atmosphere. Legally speaking, ocean acidification falls in a 'governance gap' where no single regime of international law specifically addresses it. Mitigation measures would need to focus specifically on CO₂ emission reduction (rather than all or other GHGs) and/or on ocean acidity measured in terms of pH levels. The causes and effects of ocean acidification, however, fall within the scope of several regimes, including UNCLOS, the UNFCCC and the Convention on Biological Diversity (CBD).⁶³ If the Tribunal were to explicitly frame oceanic CO₂ uptake and/or ocean acidification as a form of marine pollution, this could support and enhance the relevance of UNCLOS as a governing framework for mitigation action directed at combating ocean acidification specifically,⁶⁴ which would concurrently be beneficial for climate change mitigation in general.

Potential questions to ITLOS could also relate to the interpretation and application of a number of specific, sectorally limited pollution prevention obligations under Part XII, of which Article 207 on pollution from land-based sources, and Article 212 on pollution from or through the atmosphere are the most relevant to GHG emissions. These provisions contain so-called 'rules of reference', meaning that they refer to 'generally accepted international rules and standards' (GAIRS) to inform the content of laws and regulations that UNCLOS requires States to adopt to prevent, reduce and control pollution from these sources. Crucially, however, not all rules of reference in Part XII impose the same degree of normativity. Article 207 and 212 merely require these GAIRS to be 'taken into account'. By comparison, the

rule of reference in Article 211 on ship-source pollution (including GHG emissions) requires States to adopt laws and regulations that have 'at least have the same effect' as the relevant GAIRS (i.e., those adopted by the International Maritime Organization), thereby imposing a binding global minimum standard. The Tribunal could be asked to confirm which are the GAIRS relevant for Articles 207 and 212, respectively, the Paris Agreement being the most likely suspect, yet the mere 'taking into account' requirement does not give these articles a lot of teeth as a legal basis to say anything meaningful about binding or minimum emission reduction standards that ought to apply by virtue of UNCLOS.⁶⁵

More potential for progressive development may be found in the general obligation to protect the marine environment vis-à-vis climate change. It may be noted that the general obligation under Articles 192 and 194 has already been interpreted progressively to cover both 'protection' from future damage and 'preservation' in the sense of maintaining and improving the present condition, thus entailing both a positive obligation to take measures to protect and preserve the marine environment and a negative obligation not to degrade its current status.⁶⁶ Key is that the general obligation is one of due diligence, and not of result, the content of which is informed by the other provisions of Part XII and—importantly—'the corpus of international law'.⁶⁷ ITLOS' two previous advisory opinions have been instrumental in developing this obligation of due diligence. The Seabed Disputes Chamber was the first to employ the notion of 'due diligence', which is not explicitly found in UNCLOS, when it interpreted sponsoring States' 'responsibility to ensure' that activities in the Area are carried out in conformity with UNCLOS.⁶⁸ A further elaboration of due diligence was given in the *SRFC Advisory Opinion*, where, as indicated above, it concerned flag State obligations to prevent IUU fishing by their vessels in the EEZ of other States.⁶⁹ By reference to the Chamber's reasoning in the *Seabed Advisory Opinion*, the Tribunal found that flag States should 'deploy adequate means, to exercise best possible efforts, to do the utmost' to prevent IUU fishing.⁷⁰ As a result, when a State fails to adopt the appropriate measures and/or enforcement actions to ensure compliance by its fishing vessels, it may be found to not only have breached its obligations as a flag State, but also its general obligations under Part XII. This emphasis on enforcement is significant, and was later reiterated in the *South China Sea arbitration*, in which the arbitral tribunal specified that due diligence to protect the marine environment not only requires (i) the adoption of appropriate measures but also (ii) 'a certain level of vigilance in their enforcement and the exercise of administrative control'.⁷¹ This is relevant for questions of attribution and responsibility for breaching these obligations, to which we shall come back in Section 3.2.

⁶²See UNCLOS (n 6) art 211; International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (MARPOL) Annex VI, as amended; and International Maritime Organization, 'Initial Strategy on Reduction of GHG Emissions from Ships', MEPC 304(72) (13 April 2018) Annex 1.

⁶³Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD). See, e.g., E Harrould-Kolieb and O Hoegh-Guldberg, 'A Governing Framework for International Ocean Acidification Policy' (2019) 102 Marine Policy 10.

⁶⁴See also KN Scott, 'Ocean Acidification: A Due Diligence Obligation under the LOSC' (2020) 35 International Journal of Marine and Coastal Law 382; ER Harrould-Kolieb, 'The UN Convention on the Law of the Sea: A Governing Framework for Ocean Acidification?' (2020) 29 Review of European, Comparative and International Environmental Law 257.

⁶⁵See also Roland Holst (n 58) 252–359; A Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 International Journal of Marine and Coastal Law 458, 468.

⁶⁶*South China Sea Arbitration* (n 32) para 941.

⁶⁷*ibid*.

⁶⁸*Seabed Advisory Opinion* (n 29) paras 110–117, following the ICJ's approach in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 (*Pulp Mills*).

⁶⁹*SRFC Advisory Opinion* (n 5) para 129.

⁷⁰*ibid*.

⁷¹*South China Sea Arbitration* (n 32) para 944, referring to *SRFC Advisory Opinion* (n 5) para 131, and *Pulp Mills* (n 68) para 197.

The benefit of the open-ended character of due diligence obligations is that it requires a case-by-case assessment, which allows for progressive development of treaty obligations within their larger normative context.⁷² After all, exactly what measures are 'necessary' depends on the context of a specific case. In essence, due diligence can be said to establish 'positive obligations of conduct that are to be assessed in the light of a general regulatory position that extends beyond immediate treaty obligations'.⁷³ It thereby also provides an opening for systemic integration by interpreting UNCLOS by reference to other relevant rules and instruments of international law.⁷⁴ In connection to climate change, the Tribunal may refer to the UNFCCC, Paris Agreement or rules of customary international law that it deems relevant for interpreting the general obligation under UNCLOS, in the same vein as the arbitral tribunal in the *South China Sea Arbitration* referred to the CBD to interpret the term 'rare or fragile ecosystem' and to the Convention on International Trade in Endangered Species (CITES) to interpret the phrase 'depleted, threatened or endangered species' in article 194 of UNCLOS.⁷⁵ The due diligence obligation has been lauded as a 'powerful instrument to further develop the law of the sea' that may assist in 'overcoming alleged gaps and shortcomings that result from developments in scientific knowledge with regard to threats to the ocean and new approaches to protect the marine environment'.⁷⁶

At the same time, this open-ended nature could also prove a challenge in the context of advisory proceedings, as the Tribunal may stop short of spelling out exactly what standard of care or mitigation action is required in relation to climate change impacts on the oceans. In the *SRFC Advisory Opinion*, the Tribunal reiterated but did not elaborate on the content of the 'necessary measures' that flag States are required to take to prevent IUU fishing (a point on which UNCLOS itself is silent) and was criticized for failing to do so by Judge Paik.⁷⁷ On the other hand, it could be argued that this is an appropriate approach to take in an advisory opinion, whereas case-specific assessments of due diligence should be left to contentious proceedings.⁷⁸ Yet, even then, interpreting the general obligation of due diligence by reference to external standards is limited to the extent that it would be difficult to read, for example, more ambitious mitigation standards into obligations under UNCLOS than those that States were willing to agree on under the Paris Agreement and in their nationally determined contributions (NDCs).⁷⁹ In that sense, it is unlikely that due diligence under UNCLOS could go 'beyond' the existing climate change regime in terms of its agreed ambition and the 1.5/2°C goal. As long as current NDCs collectively fall short of reaching this target,⁸⁰ it can

be argued that due diligence under UNCLOS obliges States to do more. Nevertheless, it is unlikely that in an advisory setting the Tribunal would spell out what and how much 'more' exactly would be required from individual States, especially as States are free under the Paris Agreement to determine the substance of their NDCs as long as they are progressively ambitious. There could potentially be room for a different approach in relation to ocean acidification if it is regarded as a self-standing problem that is not directly addressed by the climate change regime. The argument has been made that when commitments under the Paris Agreement can be shown to be insufficient to 'prevent, reduce and control' pollution or damage to the marine environment caused by ocean acidification, compliance with these commitments would not meet the 'due diligence' standard required under Part XII.⁸¹ In other words, to act with due diligence under UNCLOS would require States to take measures directed specifically at combating ocean acidification, either as part of their NDCs, or in addition thereto.⁸² Small island States of course have an interest in enhanced climate action across the board and are suffering from environmental change well beyond ocean acidification alone, but as the common denominator is atmospheric CO₂ emissions either way, it could be a strategic choice for COSIS not to put all eggs in one basket.

3.2 | Questions of State responsibility

In the *SRFC Advisory Opinion*, the Tribunal relied on general international law on State responsibility as reflected in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)⁸³ as 'relevant rules of international law' and thus applicable law pursuant to Article 293 of UNCLOS.⁸⁴ It found that the liability of the flag State does not arise from a failure of its vessels to comply with coastal State regulations, as such a violation is 'not *per se* attributable to the flag state'.⁸⁵ Instead, liability of a flag State arises from its failure to comply with its due diligence obligation, while conversely, it is not liable if it has taken all necessary and appropriate measures to meet its standard of due diligence.⁸⁶ For Part XII of UNCLOS, Article 235 specifically provides that 'states are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment' and that they 'shall be liable in accordance with international law'.⁸⁷ The terminology (at least in the English language version of UNCLOS) is somewhat confusing here, but the term 'responsibility' refers to the primary obligation, whereas 'liability' refers to secondary obligations arising from a breach of the

⁷²See more extensively Roland Holst (n 58) 218–230.

⁷³R Barnes, 'The Continuing Vitality of UNCLOS' in Barrett and Barnes (n 58) 480.

⁷⁴UNCLOS (n 6) art 293, and Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(3)(c).

⁷⁵*ibid* paras 944–945.

⁷⁶N Matz-Lück and E van Doorn, 'Due Diligence Obligations and the Protection of the Marine Environment' (2017) 42 *L'Observateur des Nations Unies* 177, 178–179.

⁷⁷*SRFC Advisory Opinion* (n 5) Separate Opinion Judge Paik, 102, paras 21, 25.

⁷⁸For example, the *South China Sea* award applied and built on many of the Tribunal's findings in the *SRFC Advisory Opinion* (n 5).

⁷⁹See more extensively Boyle (n 65) 481; Roland Holst (n 59) 259–265.

⁸⁰United Nations Environment Programme (UNEP), 'Emissions Gap Report 2022: The Closing Window—Climate crisis calls for rapid transformation of societies' (UNEP 2022).

⁸¹Scott (n 64) 402–403.

⁸²This higher standard of due diligence under UNCLOS could be supported by soft law targets, such as Sustainable Development Goal 14.3, UNGA resolutions and decisions by the COP of the Convention on Biological Diversity, which could be interpreted as an implicit recognition of the fact that the UNFCCC regime does not adequately address ocean acidification specifically (*ibid* 402).

⁸³UNGA 'Responsibility of States for Internationally Wrongful Acts' UN Doc A/RES/56/83 (12 December 2001), as corrected by UN Doc A/56/49 (Vol. I)/Corr.4.

⁸⁴*SRFC Advisory Opinion* (n 5) paras 143–144.

⁸⁵*ibid* para 146.

⁸⁶*ibid* paras 146–148.

⁸⁷UNCLOS (n 6) art 235(1).

primary one.⁸⁸ With 'liability in accordance with international law' the article thus refers to the general rules on state responsibility as set out in the ARSIWA.⁸⁹

In terms of invoking State responsibility for a breach of a due diligence obligation *erga omnes*, it is noteworthy that the *Seabed Advisory Opinion* made reference to Article 48 of the ARSIWA in support of the view that any State party to UNCLOS would be able to claim compensation for damage to the marine environment of areas beyond national jurisdiction.⁹⁰ This means that States that are not directly 'injured' may nevertheless invoke the responsibility of a State that breached its obligations under Part XII, which would also be relevant in connection to climate change impacts on the ocean. It may be noted that the occurrence of damage is not a prerequisite for State responsibility in accordance with Article 235 and the general rules on State responsibility,⁹¹ whereas conversely, in cases where there is damage but no internationally wrongful act, liability cannot be established.⁹² Damage is relevant, however, when it comes to reparation, and this is where things could get tricky if the Tribunal would be asked to say anything—in general terms or otherwise—about compensation for climate change-related damage to the marine environment. This inevitably triggers questions of causation and attribution, which are notoriously difficult in any climate change-related context and ill-suited for an advisory setting in the absence of concrete disputed facts.

4 | CONCLUSION

The preceding discussion sought to map some of the prospects and challenges that a COSIS request for an ITLOS advisory opinion on climate change might face. A number of observations can be made as to potential future implications of such a request and an eventual advisory opinion.

First of all, a COSIS request for an advisory opinion is likely to reignite the debate about the legal basis for advisory jurisdiction of the full Tribunal and may well trigger the same objections that were raised in relation to the SRFC's request. While it is likely that the Tribunal will follow its previous approach, it may want to use this opportunity to elaborate its reasoning as to the conditions for jurisdiction and the admissibility of the questions. It is often suggested that this would not only guard the integrity of procedure and the Tribunal's judicial function⁹³ but also enhance the legitimacy and authority of the eventual advisory opinion itself.⁹⁴ That said, and aside from objections to the advisory jurisdiction of the full Tribunal that may persist,

it can also be noted that in terms substance, the *SRFC Advisory Opinion* was ultimately well received. There are no obvious indications in State practice or otherwise to suggest that it lacks normative authority or legitimacy or that it has affected the authority of the Tribunal. While a comprehensive empirical enquiry would be required to actually assess this, one may at least deduct from the reliance on the Tribunal's reasoning in the *SRFC Advisory Opinion* in subsequent UNCLOS case law that it does not lack any normative force or significance.

An advisory opinion on climate change will almost inevitably have legal effects that are relevant for other State parties to UNCLOS beyond the COSIS members. In that respect, it may not actually be all that different from the *SRFC Advisory Opinion*, or even from contentious proceedings, but what arguably sets a COSIS request apart is the politically sensitive nature of the topic. Those who see the request for an advisory opinion as a mere tool in a political campaign for enhanced climate action well beyond the law of the sea would question the propriety of ITLOS entertaining such a request.⁹⁵ Be that as it may, the brief overview of legal questions arising at the ocean-climate nexus sketched in this article illustrates the wide range of rights, obligations and interests at stake, many of which fall squarely within the law of the sea. Any questions relating thereto would be asking the Tribunal to interpret and provide guidance on the law of the sea, not emission reduction standards or climate ambition *in abstracto*. Expectations that an ITLOS advisory opinion on climate change will have a direct impact on global climate action across the board should perhaps be tempered, yet equally, its potential value and significance for the law of the sea and governance challenges arising at the ocean-climate nexus should not be underestimated. In reality, the global climate system and ocean health are inextricably linked; a reality that is not currently reflected in the international legal system, but that small island States in particular are all too aware of. If, in addition to providing any generic or specific guidance on the interpretation and implementation of UNCLOS in this context, an advisory opinion were to raise awareness of the importance of taking the ocean-climate nexus into account in the implementation of obligations under existing regimes, this would arguably already be of value. It might, for example, encourage at least some States to think about including ocean-related measures and ambitions in their NDCs—a development which has thus far been slow to take off.⁹⁶ The issue of ocean acidification is furthermore a key example of harm to the marine environment that is not necessarily addressed by mere compliance with the Paris Agreement and its temperature goal without taking targeted measures (and that could even be exacerbated by mitigation measures that seek to enhance the oceanic carbon sink), thus underlining the need for synergistic implementation of obligations arising under different regimes.

⁸⁸I.e. no strict liability. See also *Seabed Advisory Opinion* (n 29) paras 65–67.

⁸⁹See also T Stephens, 'Article 235' in A Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart 2017) 1585, 1588–1589.

⁹⁰*Seabed Advisory Opinion* (n 29) para 180.

⁹¹Contrary to, for example, UNCLOS (n 6) art 139(2) on liability for damage to the marine environment of the Area.

⁹²The *Seabed Disputes Chamber* acknowledged the work of the ILC on strict liability but concluded there are at present no provisions entailing State liability for lawful acts, see *Seabed Advisory Opinion* (n 29) para 209.

⁹³See, e.g., the recommendations made by Barnes drawing on ICJ case law; Barnes (n 10).

⁹⁴See, e.g., Wood (n 16).

⁹⁵See also Mayer (n 27).

⁹⁶See, e.g., ND Gallo, DG Victor and LA Levin, 'Ocean Commitments under the Paris Agreement' (2017) 7 *Nature Climate Change* 833. The 'oceans dialogue' that took place for the first time in 2020, and which the Glasgow Climate Pact intends to make an annual occurrence from 2022 onwards could further support these developments within the UNFCCC context. See also BJ Dobush et al, 'A New Way Forward for Ocean-Climate Policy as Reflected in the UNFCCC Ocean and Climate Change Dialogue Submissions' (2022) 22 *Climate Policy* 254.

As far as the law of the sea is concerned, the preceding discussion has illustrated that a future ITLOS advisory opinion on climate change could fit in and build on an established track record developed in UNCLOS case law, notably including the previous two advisory opinions, in relation to obligations to protect the marine environment and possibly even questions of responsibility. Given the nature of these obligations and of advisory proceedings, the Tribunal's answers are likely to remain at some level of abstraction, yet they could nevertheless provide a legal basis for further cooperation, developments in State practice, or potentially even contentious proceedings under Part XV of UNCLOS. The Tribunal itself recently recognized that advisory opinions are 'authoritative statements of law', which have 'legal effect'.⁹⁷ This authority may be understood in terms of the 'new reference points for legal discourse'⁹⁸ that an advisory opinion can provide. The previous two ITLOS advisory opinions certainly have done so. Even within the confined context of the *Seabed Advisory Opinion*, the Chamber has provided normative reference points of relevance well beyond the law of the sea, noting for example the 'trend towards making [the precautionary principle] part of customary international law'.⁹⁹ There is no reason why an ITLOS advisory opinion on climate change could not similarly provide legal reference points of wider relevance. This broader perspective on the role of international courts and tribunals recognizes that they are 'one among many actors that occupy the large space in which global public consciousness is formed. In this way, the international courtroom may be a place to forge international legitimacy'.¹⁰⁰ While likely to remain a point of contention, there appears to be no fundamental reason based on UNCLOS' legal framework at large or the Tribunal's advisory practice to date, that would bar the Tribunal from entertaining a request from COSIS for an advisory opinion on climate change or from delivering an authoritative result. Whether it has the potential to bring about a sea change remains to be seen.

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⁹⁷Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (*Mauritius v Maldives*) (Preliminary Objections, Judgement of 28 January 2021) paras 202–205.

⁹⁸I Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law' in HP Olsen and P Capps (eds), *Legal Authority beyond the State* (Cambridge University Press 2018) 106; L Nguyen, 'The Public Authority of the International Tribunal for the Law of the Sea: An Inquiry' in H Ruiz Fabri et al (eds), *International Judicial Legitimacy: New Voices and Approaches* (Nomos 2020) 147.

⁹⁹*Seabed Advisory Opinion* (n 29) para 135.

¹⁰⁰Sands (n 37) 26.