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Jurisdiction of the International Tribunal for the Law of the Sea in Terms of Giving Advisory Opinions and Prospects of the Delivery thereof on Combating Climate Change

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Abstract: On 25 September 2023, the landmark request for an advisory opinion addressing issues of State responsibility for the ongoing climate crisis took a new turn — oral hearings were concluded in the International Tribunal for the Law of the Sea (ITLOS). The article explores on what exactly rests the jurisdiction of the Tribunal, allowing it to issue the sought advisory opinion. The article outlines the main arguments, presented by the States parties to the United Nations Convention on the Law of the Sea (UNCLOS), which question the conclusiveness of ITLOS's jurisdiction to some extent. The article reveals that despite a very debatable nature of the aforementioned advisory jurisdiction of the full Tribunal, it is highly probable that ITLOS will eventually formulate the sought opinion given that the subject matter of the case is quite resonant. The authors also argue on the potential influence the climate-related advisory opinions of international judicial organs may have on the development of international law.

Keywords: advisory opinions; International Tribunal for the Law of the Sea (ITLOS); Commission of Small Island States on Climate Change and International Law (COSIS); climate change; jurisdiction; competence; progressive development; State responsibility; international law

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I. Introduction

Formulation of advisory opinions is one of the functions of many international judicial organs granted with such powers. According to the contemporary doctrine of international law, advisory opinion is considered to be a non-binding interpretation of a legal question. Despite advisory opinions having a legally non-binding nature, they contribute to the clarification and development of international law (Abashidze, Solntsev and Syunyaeva, 2012, p. 74).

In the words of J. Brownlie, the uses of the advisory jurisdiction are to assist the political organs in settling disputes and to provide authoritative guidance of points of law arising from the function of organs and specialized agencies (Brownlie, 2003, p. 691).

As A.Ya. Kapustin points out, "judicial interpretation of the norms of international law possesses an immense advantage over any other type of interpretation, as it is a process of professional crystallization of understanding the content of an international legal rule, embodied in implementing the latter in a specific situation, it is a presentation of a norm at the highest professional level" (Kapustin, 2018, p. 129).

Proceeding from all of the above, the authors consider it would be safe to say that advisory opinions are of somewhat conflicted nature, as on the one hand, their contents are not to be imperatively followed, but on the other hand, they are formulated by the professional judiciary of the international level, which results in the highest credibility of the opinion's content.

It has a somewhat distinct circumstance at the disposal of the International Tribunal for the Law of the Sea (ITLOS). Its jurisdiction, in addition to disputes, is established by Art. 21 of the Statute that states the organ having thereof in relation to "all applications, submitted to it in accordance with this Convention"[1] (the 1982 United Nations Convention on the Law of the Sea), as well as "all matters, specifically provided for in any other agreement which confers jurisdiction on the Tribunal." ITLOS itself affirmed in the context of the request for an advisory opinion from the Sub-Regional Fisheries Commission that "the use of the word 'disputes' in Art. 21 of the Statute is an unambiguous reference to the contentious jurisdiction of the Tribunal."[2] In addition, it was emphasized that "one should not interpret the Art. 21 of the ITLOS Statute as featuring only 'disputes,' because if this was the case, then this very term would have been used."[3] Therefore, the phrase "all matters" is to mean something else, which implies advisory opinions "if specifically provided for in any other agreement,"[4] as ITLOS affirms.

[1] Statute of the International Tribunal for the Law of the Sea, 1982. Available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf [Accessed 02.02.2024].

[2] ITLOS, Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, Para. 55. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf [Accessed 02.02.2024].

[3] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 56.

[4] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 56.

All of this underlines that the delivery of advisory opinions should fall directly in the context of the jurisdiction of the Tribunal. Moreover, in the view of Ye. S. Orlova, since ITLOS began to function it has become the one and only body to formulate advisory opinions regarding the matters of the international maritime law (Orlova, 2020, p. 137). At the same time, such a look on the authority of ITLOS to issue advisory opinions, while seemingly unambiguous, cannot be universally accepted, as will be discussed in more detail below.

It is worth mentioning that two advisory opinions have been issued by ITLOS so far, namely "Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area" (Case No. 17)[5] and Case No. 21 at the request of the Sub-Regional Fisheries Commission.[6]

In our view, it is necessary to disclose the definition of the phenomenon of advisory opinion. Thus, R. Kolb provides the following definitions (Kolb, 2013, pp. 1019–1020):

— opinion of an international court or tribunal given at the request of a body, authorized to make such a request, with the intention of clarifying a legal question in the interest of the aforementioned body;

— statements of the Court on questions of law referred to the Court by UN bodies and other authorized international legal bodies.

Having analyzed the above given formulations, it is possible to suggest that advisory opinion is an interpretation on a legal matter of a non-binding nature (Abashidze, Solntsev and Syunyaeva, 2012, pp. 73–74) and, simultaneously, a special type of act of an international body of justice distinct from a judgment. Accordingly, the authors believe that there is a need to enumerate the differences that distinguish advisory opinions of a court from its decisions. Modern international legal doctrine highlights several key inconsistencies, namely:

— *The advisory opinion is non-binding on the body requesting the opinion*. Consequently, "the requesting organ to some extent remains

[5] Responsibilities and obligations of States sponsoring persons and Entities with Respect to Activities in the Area: Request for Advisory Opinion Submitted to the Seabed Disputes Chamber, 6 May 2010. Available at: https://www.itlos.org/en/cases/listof-cases/case-no-17/ [Accessed 02.02.2024].

[6] ITLOS, Request for an advisory opinion submitted by the SRFC.

free to decide how to react to the opinion" (Kolb, 2013, p. 1095). Nevertheless, when it comes to the International Court of Justice (ICJ) opinion, it is worth mentioning a certain nuance, namely "the good faith obligation under Art. 2, Para. 2 of the Charter of the United Nations. Hence also the duties of mutual consideration, respect and cooperation between the organs of the United Nations" (*organtreue principle* cited in Kolb, 2013, p. 1095). Accordingly, in view of all the above, it must be stated that the organ seeking an advisory opinion from ICJ should treat the opinion formulated by the Court with due deference. With all this, there are instances when advisory opinions will nevertheless have a binding force — for instance, it happens when a State unilaterally takes any type of commitment upon itself, if an agreement is concluded, or when an international treaty explicitly enshrines so (Convention on the Privileges and Immunities of the Specialized Agencies, 1947[7]). In addition, ITLOS itself gave a kind of assessment of the legal nature of advisory opinions of the International Court of Justice, noting that the positions formulated therein should not be disregarded merely because opinions themselves are non-binding, as the latter "do have a legal effect."[8] Furthermore, ITLOS definitively stated that "an advisory opinion entails an authoritative statement of international law on the questions with which it deals."[9] The Tribunal even goes beyond that, claiming the necessity to delimit such notions as binding nature and authoritative nature as "an advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigor and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of

[7] Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&clang=_en [Accessed 02.02.2024].

[8] ITLOS, Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Preliminary Objections, Para. 205. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf [Accessed 02.02.2024].

[9] ITLOS, Mauritius v. Maldives, Para. 202.

international law."[10] The main takeaway from all this, in the view of the authors, is that while not being binding legally, advisory opinions sure possess a large amount of authoritative power;

— *Non-recourse to the res judicata principle with respect to advisory opinions:* in other words, the terms of the Art. 59 of the ICJ Statute[11], according to which the Court may not examine twice the same dispute between the same Parties, do not apply to advisory opinions. It follows that, in fact, the Court is entitled to examine twice an identical legal question from the same organ, while formulating different opinions. Nevertheless, such a situation is hardly possible in practice, for no other reason that that "an advisory opinion is a jurisdictional act. As a court of justice, the Court must not contradict itself," thus ensuring the unity of jurisprudence (Kolb, 2013, p. 1096). It was showcased by the Advisory Opinion of ICJ of 7 June 1955, concerning South-West Africa, in which the Court essentially reinterpreted expressions that it had already used in an earlier Advisory Opinion of 1950 on a similar subject.[12] The Court thus considered that the opinion it had previously expressed on a similar legal question in the course of delivering the advisory opinion did not need to be modified and was fully usable. With this in mind, the authors presume that in case any new legal element or changes in the law were present or in the event that any brand new, unknown before facts became clear to the Court, there is an extremely high probability that the Court would change its previous conclusions;

— *Two legal procedures are distinct from one another:* when comparing analytically judgments and advisory opinions, the procedural criteria must not be overlooked. A judgment is always the outcome of a dispute, in which the Parties are undoubtedly the primary participants. The inherent feature of this status, in turn, is nothing but procedural

[10] ITLOS, Mauritius v. Maldives, Para. 203.

[11] Statute of the International Court of Justice, 26 June 1945. Available at: https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice [Accessed 02.02.2024].

[12] ICJ, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955, pp. 9–16. Available at: https://www.icj-cij.org/sites/default/files/case-related/24/024-19550607-ADV-01-00-EN.pdf [Accessed 02.02.2024].

rights, which are most often enshrined in the statute and rules of procedure of the relevant judicial body. Meanwhile, there are no Parties as such in the process of formulating an advisory opinion, and therefore it is logical to conclude that no special protection of their inherent rights is required — this fact makes the procedure itself much less burdensome. The absence of an Applicant and Respondent also means that "there is no formal burden of proof" (Kolb, 2013, p. 1116);

— *Distinguishing the process into stages:* characterizing the procedure available in ICJ, it is essential to specify that the Court does not divide the algorithm into two stages concerning jurisdictional issues and the examination of the merits, respectively. Moreover, the process of rendering an advisory opinion does not include a procedure similar to the preliminary objections referred to in Art. 79 of the Rules of Court.[13]

Thus, the authors make a conclusion that an advisory opinion, whose possibility of delivery derives from the competence (in case of ICJ) or jurisdiction (ITLOS) of a court, is an opinion formulated by an international judicial body on a legal question, which is requested by an authorized body and is in essence a judicial act. However, this act by its nature differs significantly from a judicial decision in certain aspects. The main one of them is the absence of a binding force as a general rule, the non-use of the *res judicata* principle, the absence of parties to the process as such, as well as the distinction of the latter at the stage of determining jurisdiction and resolving the dispute on the merits.

II. Legal Analysis of the Basis for the International Tribunal for the Law of the Sea's Jurisdiction to Provide Advisory Opinions on Climate Change Issues

Last year ITLOS received a one-of-a-kind request for delivering an advisory opinion on behalf of the organization named Commission of Small Island States on Climate Change and International Law (hereinafter the Commission, or COSIS), which is an acronym for the Commission of Small Island Developing States on Climate Change and

[13] Rules of Court (International Court of Justice): adopted on 14 April 1978, Art. 79. Available at: https://www.icj-cij.org/rules [Accessed 02.02.2024].

International Law.[14] The entity in question, whose 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" is by its nature an international intergovernmental organization and was established in 2021, on 30 October.[15] In addition, the constituent agreement of this organization provides that "the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea in accordance with Art. 21 of the ITLOS Statute and Art. 138 of its Rules."[16]

Based on all the above provisions of the constituent instrument, the Commission has taken the step of seeking an advisory opinion from the Tribunal. Since COSIS expected that the outcome of this inquiry should be a clarification by the judiciary organ of the specific obligations of States under the UN Convention on the Law of the Sea, the organization compiled the following questions:

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

(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

[14] ITLOS, Request for advisory opinion, 12 December 2022. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf [Accessed 02.02.2024].

[15] Agreement for the establishment of the COSIS, 31 October 2021, Art. 2, Para. 1. Available at: https://commonwealthfoundation.com/wp-content/uploads/2021/12/Commission-of-Small-Island-States-on-Climate-Change-and-International-Law.pdf [Accessed 02.02.2024].

[16] Agreement for the establishment of the COSIS, 31 October 2021, Art. 2, Para. 2.

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"[17]

Rightfully so, one may wonder (as did the authors of this very article) if there is a credible basis for confirming that ITLOS has the necessary jurisdiction to initiate advisory proceedings in response to the COSIS request?

Article 191 of the 1982 United Nations Convention on the Law of the Sea stipulates that "the Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities."[18] It is worth mentioning that in its advisory opinion concerning the responsibilities and obligations of States with respect to activities in the Area, the Tribunal identified three conditions for the Chamber to have this type of jurisdiction, namely: "(a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these very questions have arisen within the scope of the Council's activities."[19]

"The more controversial question relates to the advisory jurisdiction of ITLOS as a full tribunal. An explicit provision under UNCLOS and the ITLOS Statute conferring advisory jurisdiction to ITLOS as a full tribunal is absent, giving rise to much debate regarding the full ITLOS's advisory jurisdiction" (Nguyen, 2023, p. 240). The Tribunal resolved the controversy in a rather paradoxical way by basing its advisory jurisdiction through combinedly interpreting Art. 21 of the Statute and Art. 138 of the Rules (Nguyen, 2023, p. 241). In details, it was emphasized

[17] Re: Request for Advisory Opinion, COSIS, 12 December 2022. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf [Accessed 02.02.2024].

[18] United Nations Convention on the Law of the Sea, adopted 10 December 1982, Art. 191. Available at: https://jusmundi.com/en/document/pdf/treaty/en-united-nations-convention-on-the-law-of-the-sea-1982-unclos-friday-10th-december-1982 [Accessed 02.02.2024].

[19] Reports of judgments, advisory opinions and orders. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for advisory opinion submitted to the seabed disputes chamber). Case No. 17. Advisory Opinion, 1 February 2011, Para. 32. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf [Accessed 02.02.2024].

by ITLOS that Art. 21 of its Statute, which "should not be considered as subordinate to Art. 288 of the Convention" and "stands on its own footing," states that the Tribunal has jurisdiction over "all matters, specifically provided for in any other agreement."[20] "All matters" here are also supposed to display jurisdiction for issuing advisory opinions. The Tribunal clearly declared that the aforementioned agreement and Art. 21 are intertwined and thus they proof that ITLOS does have required advisory jurisdiction.[21] Moreover, the fact that Art. 138 of the Rules served as a foundation for its advisory jurisdiction was denied by ITLOS which considered that it rather "furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction."[22] "These prerequisites are as follows,

— an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion;

— the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above;

— and such an opinion may be given on 'a legal question'."[23]

Judging by some of the written statements, presented by States parties to UNCLOS in the context of this advisory opinion request, the authors concluded that the Tribunal's arguments had convinced not all countries. To illustrate the thesis, in its corresponding statement France articulated the idea that the factual background of the case in question predetermined the limits which ITLOS would inflict upon itself while also bearing in mind that the Tribunal's jurisdiction here amounted exclusively to *ratione materiae* one. Considering the above, the French side's reasoning consisted of the following,[24]

[20] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 52.

[21] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 58.

[22] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 59.

[23] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 60.

[24] ITLOS, Request for an advisory opinion submitted by the COSIS, Written statement of France, 2023, Para. 11. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-19-France_translation_ITLOS.pdf [Accessed 02.02.2024].

a) The Tribunal was constituted and functions in accordance with UNCLOS, as set out in Art. 1, Para. 1, of the Statute of the Tribunal and as follows from Part XV of the Convention. [...] As the Seabed Disputes Chamber and later the Tribunal have emphasized, the advisory jurisdiction they exercise is intended to contribute to the implementation of the Convention's regime.[25] In such a way, the authors underscore that it so happens that these conditions determine the existence of limitations inherent in the Tribunal's jurisdiction.

b) The COSIS Agreement in Art. 2(2) clearly defines the relative limits of the Tribunal's jurisdiction by providing that COSIS "shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on any legal question *within the scope of the 1982 United Nations Convention on the Law of the Sea*." This limitation is stricter than that reflected in Art. 138 of the Tribunal's Rules, which cites "an international agreement *related to the purposes of the Convention*."[26]

In our view, in discussing the Agreement establishing COSIS, the following should be added. As already established, the Special Agreement requires ITLOS to demonstrate jurisdiction to render an advisory opinion, but Art. 2(2) of the Agreement does not apply in this case because it merely cites the provisions of Art. 21 of ITLOS Statutes and Art. 138 of the Tribunal's Rules, which hardly clearly establish that the latter has the necessary jurisdiction. Moreover, assuming that the Agreement did grant this type of jurisdiction upon ITLOS, it would be an abuse of Art. 21 of the Statute of the Tribunal — the sole purpose of the Agreement, signed by some certain States, was to confer advisory jurisdiction on ITLOS without considering interests of other States, which totally contradicts the dispute settlement system of the Convention itself.[27] Global warming caused by the radical changes in the climate

[25] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 12.

[26] Available at: https://www.itlos.org/fileadmin/itlos/documents/basic-texts/Itlos_8_E_17_03_09.pdf [Accessed 02.02.2024].

[27] The Advisory Jurisdiction of the ITLOS in the Request Submitted by the COSIS. Available at: https://blogs.law.columbia.edu/climatechange/2023/04/12/the-advisory-jurisdiction-of-the-itlos-in-the-request-submitted-by-the-commission-of-small-island-states/ [Accessed 02.02.2024].

represents a universal predicament which directly and indirectly affects each and every member of the international community. In addition, the unclear procedural framework has the potential to undermine the credibility of both the Tribunal itself and its advisory opinion, thus undermining the remaining efforts of States to confront the global rise in the Earth's temperature.

c) Among other things, jurisdiction *ratione materiae* was limited by the language contained in the Commission's request.[28] First, ITLOS was requested solely to highlight existing obligations and not an opinion as to on those obligations, their implementation or any other factual circumstance.[29] In this case, the French side reasonably refers to the ICJ point of view from the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, where it is highlighted that the consultative function of the Court is that "it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify the scope and sometimes note its general trend."[30] However, the Tribunal itself also noted in the 2015 Advisory Opinion that it does not express its stance on matters "beyond the scope of its judicial functions"[31] and can therefore operate only with existing law (*lex lata)* and not future law *lex ferenda*.

d) The substantive content of the request plays a vital part here as it is evident that it features the word combination in plural — "States Parties," implying that the purpose of the request was to ascertain the specific commitments of all States combined together. Having analysed that, French international lawyers came up with three main ideas. The first one is about the fact that since the request outlines "States parties" and not "State party" in singular, its purpose is to determine the

[28] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 14.

[29] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 15.

[30] ICJ, Advisory Opinion, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, Para. 18. Available at: https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf [Accessed 02.02.2024].

[31] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 15.

specific obligations of each and every State of the world community in accordance with the United Nations Convention on the Law of the Sea. The authors of the article, in turn, agree with the exegesis, since this literal interpretation of the said phrase seems to be the most reasonable. The main thesis of the second one is that there is indeed no explicit or implicit mention of the commitments under the COSIS Agreement which should have served as the grounds for the submission of the request. Correspondingly, the specific obligations under the Convention were the only thing subject to the ITLOS jurisdiction and in addition, judging by the request's context, one should interpret such commitments as a mean to identify the way to construe and then apply the Convention's obligations with respect to the pollution, conservation and protection of the marine environment towards adverse effects and impacts of climate change and ocean acidification "caused by anthropogenic emissions of greenhouse gases into the atmosphere."[32] In this context the authors consider it necessary to add that such a conclusion also suggests that Commission is thus presuming an undoubted and direct impact of climate change on the state of the marine environment. From where the authors stand, such a statement would be premature. Although, some scientists tend to challenge this thought, alluding to that the definition of the pollution of the marine environment in Art. 1 of UNCLOS contains the phrase "is likely to result" as applied to the harmful effects, so a clear causal link is not required by the definition.[33]

It is further noted by the authors that the Tribunal will inevitably find itself in a position where it would have to ascertain the specific obligations of a non-Party States to COSIS without their consent in response to the raised questions. ITLOS itself has already expressed its position on the matter, noting that, since the advisory opinion is auxiliary in nature, the consent of all other States not requesting an opinion is not required at all. It is also pointed out that the purpose of

[32] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 17.

[33] Legal Analysis: Request for an Advisory Opinion from the International Tribunal for the Law of the Sea, p. 8, Para. 34. Available at: https://www.clientearth.org/media/c1spsafh/itlosao_legal-briefing_final.pdf [Accessed 20.02.2024].

the request for an advisory opinion by an organization is precisely to clarify its further course of action.[34]

In France's view, applicable law and jurisdiction must be distinctly separated from one another[35] to solidly demonstrate the necessity to set apart these two notions. ITLOS cites the *Norstar case*, where it was said that "Art. 293 of the 1982 Convention on Applicable Law cannot be used to extend the Tribunal's jurisdiction."[36] In this particular case, the Tribunal's jurisdictional capacity is limited solely to clarifying obligations under the UN Convention on the Law of the Sea and, more specifically, Part XII of the international legal instrument. Nevertheless, pursuant to Art. 31 of the 1969 Vienna Convention on the Law of Treaties[37], headed "General rule of interpretation," when interpreting the Convention's terms "in their context and in the light of its object and purpose," the Tribunal may need to refer to provisions of other international treaties, since the latter may assist in interpreting the relevant obligations under the 1982 Convention. Nevertheless, according to French international lawyers, the functionality of ITLOS, in turn, does not include the possibility of interpreting obligations under international treaties other than the Convention. Moreover, France considered that if the Tribunal were to be allowed such interpretation, it would be equal to granting the judicial body unlimited *ratione materiae* jurisdiction, which would be contrary to the Convention itself and to the Statute and Rules of Procedure of ITLOS.[38] The authors cannot completely agree with the stated point, since in their opinion, the interpretation of the postulates of the Convention will still be paramount in this case, and reference

[34] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 76.

[35] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 18.

[36] ITLOS, Judgment from 10 April 2019, The M/V "Norstar" Case (Panama v. Italy), ITLOS Reports 2019, Para. 136. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no. 25/case_no_25_merits/C25_Judgment_20190410.pdf [Accessed 02.02.2024].

[37] Vienna Convention on the Law of Treaties: adopted on 23 May 1969. Available at: https://www.ilsa.org/Jessup/Jessup17/Batch%201/Vienna%20Convention%20on%20the%20Law%20of%20Treaties.pdf [Accessed 02.02.2024].

[38] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 18.

to the contents of another international treaty is an auxiliary tool for fulfilling the main task.

In conclusion, the French party resumes that while any valid reasons for the Tribunal not to undertake its advisory jurisdiction are lacking (unless ITLOS itself decides otherwise), all of the above factors must be taken into consideration with the purpose to determine exactly how such jurisdiction would be carried out in this particular request.[39]

Of equal interest in this regard is China's written statement, which also reflects skepticism about the existence of the ITLOS jurisdiction. The representatives of that State presented the following arguments.

(1) China fundamentally disagrees with the Tribunal's view that the phrase "all matters" encompasses advisory opinions. Their respective rationale, by analogy to their French counterparts, relies heavily on the general rules of interpretation contained in Art. 31 and 33 of the Vienna Convention on the Law of Treaties. Article 31 provides that international treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty" of the provisions of the treaty, whereas "all matters" generally refers to the basis of the Court's *ratione materiae* jurisdiction and not to the competence or anything else, so that advisory opinions cannot in any way come under the scope of that concept.[40] In turn, under Art. 33 of the Vienna Convention, "the terms of the treaty shall be presumed to have the same meaning in each authentic text." Presented wording is of utmost importance, inasmuch as it is through it the accurate interpretation of the Art. 21 of the Statute can be exercised — the thing is, the direct equivalent of the word "matters" ("matières") is never used in the second half of the French version of the article, while there is a unique passage "toutes les fois que cela,"[41] in return making a reference to the line "all disputes

[39] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 20.

[40] ITLOS, Request for an advisory opinion submitted by the COSIS, Written statement of the People's Republic of China, 2023, Para. 12. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-8-China__transmission_ltr._.pdf [Accessed 02.02.2024].

[41] Statut du Tribunal International du Droit de la Mer, 1982, Art. 21. (In French). Available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_fr.pdf [Accessed 02.02.2024].

and applications" from the beginning of the article. As it is seen, given that the Statute through its French translation does not comprise any record of an advisory opinion and that the English and French versions of the Statute have the same degree of authenticity, the notion "matters" by no means imply advisory opinions either, especially according to the primary treaty interpretation rules.[42] The authors, for their part, consider it fully appropriate to agree with this point of view while also finding quite interesting the fact that it was China and not France who discerned this peculiar variance within the two authentic texts of the Statute.

Article 31 of the 1969 Vienna Convention provides that "a special meaning shall be given to a term if it is established that the parties so intended." On this point, China's statement made certain comments on the *travaux préparatoires* of the 1982 Convention. Thus, it was mentioned that some States (in particular, the United States and Germany, among others) had indeed made proposals to grant the full Tribunal advisory jurisdiction, but none of them were ultimately included in the final text of the Convention, reflecting the Parties' lack of intention to grant the Tribunal such jurisdiction.[43]

(2) China's next observation concerns the fact that advisory jurisdiction cannot be conferred on ITLOS on the basis of "implied powers." ICJ has characterized this kind of power as a "subsidiary" power of international organizations, which they possess "to achieve their purposes."[44] Thus, the exercise of this power is limited by the essential need to give effect to the already existing functions of the judicial body, and the presence of implied powers cannot, in turn, be used to expand the jurisdiction (competence) of the Tribunal.[45] It seems appropriate to

[42] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 14.

[43] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 17.

[44] ICJ, Advisory Opinion, 8 July 1996, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996, Para. 25. Available at: https://www.icj-cij.org/sites/default/files/case-related/93/093-19960708-ADV-01-00-EN.pdf [Accessed 02.02.2024].

[45] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 21.

agree with this statement, since in reality there is no direct indication in any international legal instrument of the advisory jurisdiction of the full Tribunal and such cannot in any way be an implied one.

(3) In China's view, the Rules of ITLOS cannot in any way exceed the "authorization" contained in the Convention as well as the Statute as an integral part thereof. Accordingly, in the absence of an indication to that effect in its constitutive documents, ITLOS itself is not entitled to confer advisory jurisdiction on the full Tribunal, nor to prescribe preconditions for the exercise of that jurisdiction.[46] That is a totally valid point where the authors stand, as it would be absurd if the rules of procedure of an organization could so drastically modify its functions in comparison to the ones enshrined in the constituent document. Nonetheless, certain international lawyers contravene this take, for example, Carlos Espósito assumes the following: "The possibility of this kind of consensual (advisory) jurisdiction is in harmony with the general freedom to choose a means of dispute settlement provided for in Art. 280 of the Convention, and more specifically with Art. 288(2) which refers to international agreements related to the purposes of the Convention as valid grounds for the jurisdiction of the Tribunal" (Espósito, 2011, p. 6).

Based on all of the foregoing, China concluded that the full Tribunal is incompetent to consider COSIS's request for an advisory opinion.

The position contained in the written statement of Italy is also of interest. According to the document, the Conference of the Parties to the 1982 UN Convention on the Law of the Sea approved without objection the Report through which ITLOS notified the adoption of the Rules containing Art. 138. In this, they believe, there is an implicit manifestation of the acceptance by the Parties of the possibility for the Tribunal to exercise full advisory jurisdiction.[47]

[46] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 24.

[47] ITLOS, Request for an advisory opinion submitted by the COSIS, Written statement of Italy, 2023, Para. 7. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-7-Italy-rev_s.pdf [Accessed 02.02.2024].

Commenting on the above thesis, it shall be stressed that "Art. 138 of the ITLOS Rules did not appear in any of the draft of the Rules prepared by the ITLOS Preparatory Commission, and no such proposal was made in that context. Rather, it was added first by the Tribunal in 1996" (Prölss, 2017, p. 2381). Already in 1998, as noted in Italy's declaration, the States Parties to the 1982 Convention adopted a Report in which the Parties took note "with appreciation" (rather than approving, as indicated by Italy) the Tribunal's Report[48] in which ITLOS announced the adoption of the Rules of Procedure.[49] However, in this context, the authors also think it is worth emphasizing that none of the mentioned reports specifically refers to such an innovation of the Tribunal as Art. 138, which is quite interesting given the ambiguous nature of its provisions. In the end, in the view of some experts, it was "rather contentious whether the adoption of Art. 138 of the ITLOS Rules has been a lawful exercise of the regulatory powers conferred to the Tribunal under Art. 16 Annex VI" (Prölss, 2017, p. 2381).

Some international lawyers, however, see the above-mentioned article of the ITLOS Rules in a distinct light as a *motu proprio* act of ITLOS. They argue that "the extension carried out by the Tribunal has not been done 'against' the Convention but 'beyond its contents;'" among other things, they also suggest that in this way the ITLOS is filling a lacuna in the law (García-Revillo, 2015, p. 311). If we refer to the dissertation of Ousmane Diouf, there it was claimed that such mechanism invented by ITLOS is "an important procedural novelty which introduces a supple and fresh approach to the issue of entities entitled to request advisory opinions" (Diouf, 2014, p. 37).

Moreover, there are specialists who present yet another rendition of the ITLOS advisory function by citing the ICJ which underlined 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

[48] Report of the ITLOS for the period 1996–1997, SPLOS/27, 23 April 1998, Para. 42–48. Available at: https://www.itlos.org/fileadmin/itlos/documents/annual_reports/ar_199697_e.pdf [Accessed 02.02.2024].

[49] Report of the eighth meeting of States Parties, SPLOS/31, 4 June 1998, Para. 14. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/161/23/PDF/N9816123.pdf?OpenElement [Accessed 02.02.2024].

power to interpret for this purpose the instruments that govern the jurisdiction" while adding that neither UNCLOS nor the Statute fix for the Tribunal any kind of restriction in terms of exercising advisory jurisdiction (Platjouw and Pozdnakova, 2023, pp. 241–242).

To summarize, interestingly, the Tribunal's own determination of the actual existence of the necessary jurisdiction (competence) to issue advisory opinions has elicited a very contradictory reaction from the States Parties to the 1982 UN Convention. Thus, a number of countries, including France and Italy, although they did not come to the unequivocal conclusion that ITLOS had no such jurisdiction, outlined certain aspects that should be taken into consideration by the Tribunal when establishing its own jurisdiction. However, there were also those States (China) that completely rejected the existence of the Tribunal's jurisdiction, mainly referring to the excesses of the jurisdiction of ITLOS under the Convention, the inconsistency with the general rule of interpretation and the non-applicability of the "implied powers" doctrine. It is also reasonably outlined that the Tribunal has not in any way taken into account the Convention's *travaux préparatoires* in justifying the existence of its advisory competence, which makes the reasoning of ITLOS much less convincing, as supported by the opinion of a number of specialists. The authors of this research, however, mostly agree with the position of China, who found that there are enough compelling reasons to state the lack of advisory jurisdiction of the Tribunal in its full. It seems necessary to agree with Jonh E. Noyes on that "because the ITLOS is not a judicial arm of any international oceans organization with broad powers, its lack of general advisory jurisdiction is unsurprising" (Noyes, 1999, p. 137). To crown it all, as Yoshifumi Tanaka has put it, "overall it is debatable whether Art. 21 of the Rules of the Tribunal, along with the 'other agreement' conferring jurisdiction on ITLOS, can provide an adequate legal basis for the advisory opinion of the full Tribunal" (Tanaka, 2015, p. 328).

III. Role of Future Advisory Opinions of the International Tribunal for the Law of the Sea in Filling Legal Gaps in the International Legal Responsibility of States for Non-Compliance with Climate Commitments

With regard to the discussion of the advisory opinion of ITLOS under consideration, the following may be stated by the authors. Despite some States having justly underscored in their written statements a substantially questionable character of the full ITLOS jurisdiction to present advisory opinions, it is anyhow quite likely that the Tribunal will issue one. Such an assumption is justified mainly by the fact that global warming caused by climate change has recently acquired the status of a planetary issue. Accordingly, if the Tribunal were to refuse to deliver an advisory opinion on climate change, citing its lack of jurisdiction (competence), this would inevitably cause a wave of public outcry and such a decision by ITLOS would be severely criticized.

Moreover, it seems possible to take into account another interesting aspect — the lack of discretion of the judicial body in question to abandon the formulation of an opinion. If we discuss the algorithm in the Seabed Disputes Chamber, it does not possess discretionary powers due to the fact that it is expressly prescribed that the Chamber "shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities" and, moreover, "such opinions shall be given as a matter of urgency."[50] In comparison, Art. 65 of the ICJ Statute postulates "the Court may give advisory opinions," vividly illustrating the Court's ability to refuse to formulate the latter. Thus, the Tribunal in the present case could potentially invoke the same principle of lack of discretion to give an advisory opinion.

With an understanding that the opinion sought will nevertheless be rendered, it is worth outlining the importance attached to advisory opinions in defining international legal norms. The International Law Commission in Chapter 7 of its Report adopted at the end of the 74th session in 2023 explains that "judgments of courts and tribunals,"

[50] United Nations Convention on the Law of the Sea: adopted on 10 December 1982, Art. 191.

as a supplementary to the determination of rules of international law category, "include not only final judgments rendered by a court, but also advisory opinions and any orders issued in collateral or interlocutory proceedings."[51] Consequently, the authors of the article suppose that the Commission essentially equates advisory opinions with judicial decisions in terms of their potential influence on the formation and clarification of the essence of international legal rules.

Turning to the anticipated impact of the future ITLOS advisory opinion at the COSIS request, we can agree with the viewpoint of L.P. Baars, who distinguishes its direct and indirect aspects. To the former she attributed those legal adjustments that directly result from the clarification of rules of law. Thus, in her view, if the Tribunal adopts an integrated approach, it will actually be able to clarify the coveted communication of international law of the sea and international legal regulation of climate change, which will in turn constitute a progressive development of international law (Baars, 2023, p. 598).

L.P. Baars also includes in this cohort "the clarification and contextualisation of States' obligations under Part XII of the LOSC [UNCLOS]" which "can encourage States to adopt or amend their domestic policies to bring them in line with the advisory opinion, especially in States that want to be regarded as responsible international actors" (Baars, 2023, p. 598). Such behavior by States would be quite natural, since "this aspiration to 'conform' to advisory opinions has been observed after both previous ITLOS advisory opinions, in both requesting and non-requesting States" (De Herdt and Ndiaye, 2019, pp. 374–375). We believe that it would also be reasonable to include here the hypothetical possibility of ITLOS providing some clarity as to the mechanism for holding accountable States that fail to fulfill in any way the obligations under the Convention specified by the Tribunal — this may also constitute progressive development progressive development of international law, since at present there are no similar algorithms in the international law.

[51] Report of the International Law Commission, 74th session, 2023, Chapter VII "Subsidiary means for the determination of rules of international law." Available at: https://legal.un.org/ilc/reports/2023/english/chp7.pdf [Accessed 02.02.2024].

L.P. Baars mentions the following as likely indirect aspects of the influence of the forthcoming advisory opinion (Baars, 2023, pp. 599–600). Firstly, the act drawn up by the Tribunal will serve as a springboard for detailed discussions and negotiations on the topic of reducing harmful greenhouse gas emissions, the outcome of which can positively affect the marine environment condition. Secondly, to date, three international judicial bodies (ITLOS, ICJ and the Inter-American Court of Human Rights) have been asked to issue "climate-related" opinions, and it is clear from all available evidence that ITLOS will be the first in delivering a climate-related advisory opinion. Therefore, in her view, the Tribunal will be able to open the way for the other two courts to rely on its ideas in formulating their own opinions (Baars, 2023, p. 600).

It seems reasonable for the authors to agree with this statement, but it is nevertheless impossible not to mention the flip side of the coin, which may well occur in this case. ICJ and ITLOS present different views on the obligations of States within the meaning of the 1982 UN Convention on the Law of the Sea in this situation. Such circumstances are not new in practice, an example being the *Mox Plant* case, which was heard by the European Court of Justice[52] in parallel with the two arbitrations established by the 1982 UN Convention on the Law of the Sea and the 1992 OSPAR Convention.[53] Such an outcome has the potential to integrate into the so far ongoing process of international law fragmentation, which could effectively make a contribution to some additional legal uncertainty in the area. Consequently, in case the International Court of Justice does not follow the path completely alien to the view expressed by the Tribunal the result, as appears, will be more favourable. By contrast, according to Ye. S. Orlova, "the negative effects of intra-branch competition of jurisdiction to issue advisory opinions in the field of international law of the sea between the UN International

[52] The Mox Plant Case (Ireland v. United Kingdom). Case 2002-01. Instituted in November 2001 and terminated through a tribunal order issued on 6 June 2008.

[53] Kto zaplatit za izmeneniye klimata? Mezhdunarodnyy sud OON vyskazhetsya ob otvetstvennosti gosudarstv. Available at: https://zakon.ru/blog/2023/7/14/kto_zaplatit_za_izmenenie_klimata_mezhdunarodnyj_sud_oon_vyskazhetsya_ob_otvetstvennosti_gosudarstv (In Russ.). [Accessed 02.02.2024].

Court of Justice and the International Tribunal for the Law of the Sea should not be expected, due to the special role of the Tribunal in issuing advisory opinions and because, in the field of international law of the sea, these international judicial bodies operate under the same treaty-law regime" (Orlova, 2020, p. 148). Orlova also considers that as ITLOS is *de facto* the exclusive judicial body to formulate advisory opinions on the matters of international maritime law, which is confirmed by its successful practice, the level of jurisdictional competition between the conventional international judiciary bodies within the industry is therefore reduced (Orlova, 2020, p. 148). Our point of view lies somewhere in between, as despite the rationality of Orlova's take on the matter, it would be erroneous to state that there is an established hierarchy between the judicial organs in the field of international maritime law.

With regard to the possible conclusions that the judicial bodies may reach in the framework of advisory opinions, we want to highlight the following. It is known that ICJ has the power to award material compensation in inter-State disputes, and this has occasionally happened, as evidenced by the judgment rendered on the claim filed by the Democratic Republic of the Congo against Uganda.[54] Accordingly, if the Court were to recognize the liability of major greenhouse gas emitting States towards small island developing countries, the latter would have a strong legal basis to bring subsequent compensation claims before the same ICJ or other international judicial bodies. However, given the small number of proceedings before ICJ, which resulted in material compensation being awarded to a party to the dispute, this march of events should be recognized as hardly admissible.

The authors believe that another possible scenario, although much less likely, is that climate change commitments could be given the status of *erga omnes*, "common concern for all States," and the norms establishing this category of commitments could become peremptory norms of *jus cogens*. For example, this was realized by the previously mentioned Inter-American Court of Human Rights with

[54] 2022: itogi mezhdunarodnogo pravosudiya. Available at: https://zakon.ru/blog/2022/12/29/2022_itogi_mezhdunarodnogo_pravosudiya (In Russ.). [Accessed 02.02.2024].

regard to a significant number of norms relating to various human rights[55] (prohibition of slavery and discrimination, the right to access to justice, etc.) (Kadysheva, 2022, p. 223). However, as I.I. Sinyakin and A.Yu. Skuratova rightly emphasize, despite the fact that international legal science lacks both a list of such norms and clear criteria for their classification, it is extremely unlikely that the provisions on the responsibility of states for the global increase in the earth's temperature can be put on a par with other *jus cogens* norms (Sinyakin and Skuratova, 2018, p. 531). There are several basic reasons for this, but in this case, it is sufficient to focus on two of them.

The first is that the inadmissibility of evading peremptory norms is based on "universal ideas that have never been criticized, questioned, reevaluated or denied among States and therefore objectively determine the quality of international law as jus cogens" — climate change mitigation does not fully meet the criteria sought, since authors presume it would be wrong to claim that this idea has never been at least questioned in the international community. For example, according to the Global Climate Intelligence Group, an authoritative group of global warming researchers, the current climate situation is not an emergency at all, because natural and anthropogenic factors have a symmetrical effect on the global warming process and, in general, the Earth's temperature is rising much less rapidly than predicted.[56]

The essence of the second justification, according to I.I. Sinyakin and A.Yu. Skuratova, is that it is all about the absence of essential divergences among the actors of the world community regarding the foundations of this concept, thanks to which its uniform understanding has managed to be established (Sinyakin and Skuratova, 2018, p. 542). Consequently, one comes to the conclusion that by the present moment, there is simply no clear need for the progressive development of the

[55] Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-18/03 de 17 de septiembre de 2003, Solicitada por Los Estados Unidos Mexicanos, Condición Jurídica y Derechos de los Migrantes Indocumentados. Available at: https://www.refworld.org/pdfid/4f59d2a52.pdf (In Span.). [Accessed 02.02.2024].

[56] World Climate Declaration "There is no climate emergency:" adopted on August 2022. Available at: https://clintel.org/wp-content/uploads/2022/06/WCD-version-06272215121.pdf [Accessed 02.02.2024].

system of *jus cogens* postulates, and thus it stands to reason the extreme unlikelihood of that peremptory international law norms will in the nearest future be replenished by the terms on States' responsibility for insufficient efforts in tackling climate change.

Another factor that we assume needs to be analyzed in detail is the political dimension of the impact of a future advisory opinion — it is easy to assume that states favored by the perception of the Tribunal's findings will actively refer to it, while dissenting countries will somehow try to boycott its status and relevance. A prime example of the tendency is one of the advisory opinions of ICJ ("Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory"), the circumstances of which predetermined that "the Court notes that Israel is first obliged to comply with the international *obligations it has breached* by the construction of the wall in the Occupied Palestinian Territory."[57] The Court also observed that "Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, having found that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, ICJ claims that cessation of those violations entails in practice the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem."[58] "Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned."[59] Such findings provoked an opposing reaction from the Israeli Supreme Court, which, while noting that the Court's opinions should be given appropriate weight, also stated that the factual data on

[57] International Court of Justice, Advisory Opinion, 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, Para. 149. Available at: https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [Accessed 02.02.2024].

[58] International Court of Justice, Advisory Opinion, 9 July 2004, Para. 151.

[59] International Court of Justice, Advisory Opinion, 9 July 2004, Para. 152.

which ICJ based its opinion was incomplete (Kadysheva, 2022, p. 222). In addition, the Israeli Supreme Court concluded that the construction of the Wall was justified by military necessity, and that the construction must be analyzed based on a breach of the principle of proportionality (Kadysheva, 2022, p. 222). In view of all of the above, the ICJ opinion has been characterized by some experts as a "Pyrrhic victory" (Schmid, 2006, p. 455), since all the work done by the ICJ judges in formulating it was subsequently *de facto* overturned by the highest national court of the state opposing the opinion, shattering its respectability. States that disagree with ITLOS's opinion may behave in a similar manner in the context of the request under consideration in this study.

In summarizing the above, the following conclusions can be drawn. First of all, the importance of the Tribunal's issuance of an advisory opinion at the request of the COSIS organization should be noted in view of the widespread resonance acquired by the problem of global warming. Given that the International Law Commission referred to advisory opinions as an auxiliary means of determining international legal norms, it is useful to outline the potential effect of the Tribunal's previously mentioned opinion, in which it is worth distinguishing between direct and indirect aspects. The former includes the Tribunal's interpretation of the scope of the obligations of the States Parties to the 1982 UN Convention on the Law of the Sea with respect to combating climate change, as well as the potential clarification of possible mechanisms to hold these countries accountable in case of disregard of these obligations — all of which would be a progressive development of international law. The second group of aspects includes the intensification of the negotiation process on the subject among all interested players in the international arena, as well as the "pioneering" function of ITLOS as apparently the first judicial body to form an opinion on climate change problematic. However, this depends on the outcome of all the international courts to which requests for "climate-related" advisory opinions have been submitted. It is also reasonable to assume the possibility of attempts to sabotage the opinion by those States that are not satisfied with the Tribunal's position on the issue sought.

IV. Conclusion

Advisory opinions of international judicial bodies represent an interpretation of legal issues distinct from judicial decisions — they are not binding. Nevertheless, because they are issued by the most authoritative international judicial bodies, they are highly respected in the international community. In addition, this year's report of the International Law Commission introduced the concept of the term "judgment" as an auxiliary instrument for the definition of international legal rules, as provided for in Art. 38 of the ICJ Statute.

There are all bases to suggest that ITLOS has advisory jurisdiction. In its earlier opinion ITLOS declared the full ITLOS advisory jurisdiction by means of simultaneously interpreting Art. 21 of the Statute and Art. 138 of the Rules as a whole. Nevertheless, some States Parties to the UN Convention on the Law of the Sea were not sufficiently convinced by this very justification, resulting in them expressing their objections in relevant written statements within the framework of the advisory procedure. In our opinion, it seems reasonable to agree that the arguments of ITLOS on the issue of its advisory jurisdiction in its entirety cannot be called sufficiently convincing, since there are certain aspects of it that need to be clarified.

In predicting the significance of forthcoming advisory opinions on climate issues, it should be emphasized that, despite the ambiguity of the ITLOS advisory jurisdiction, there is full confidence that the Tribunal due to the sensitive nature of the subject matter involved will ultimately render an advisory opinion. At the same time, there are both potential beneficial effects of an opinion formulated by an international judicial body (contribution to the progressive development of international law, stimulation of general discussion and negotiation) and possible future difficulties (divergence in the approach of the courts, leading to further fragmentation of international law and explicit expressions of disagreement by certain States with the advisory opinion issued).

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