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

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Abstract
In the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, the International Tribunal for the Law of the Sea (ITLOS) was called upon to clarify the existence of its advisory jurisdiction as a full Tribunal under the UN Convention on the Law of the Sea (UNCLOS). ITLOS unanimously upheld its advisory jurisdiction, yet its reasoning is not convincing. ITLOS’s interpretation of Article 21 of its Statute appears unpersuasive. The article discusses the interpretation of Article 21 ITLOS Statute pursuant to the rules on interpretation of the Vienna Convention on the Law of Treaties (Arts. 31–33). First, the article addresses the article's textual reading, and criticizes the Tribunal's interpretation of the term 'matters'. Second, the article considers the interpretation of Article 21 according to the subsequent practice of the parties, argued by some states but not addressed by ITLOS. Third, the travaux préparatoires of the UNCLOS are examined, with a view to understanding whether the drafters intended the Tribunal to have advisory jurisdiction. Fourth, the six authentic texts of UNCLOS are compared in order to highlight potential differences that may help understand the exact meaning of the provision. Fifth, the article discusses the relationship between advisory jurisdiction and state consent. The conclusion is that the basis for ITLOS’s advisory jurisdiction under UNCLOS seems weak. Some general considerations conclude the article, together with a possible solution that takes stock of ITLOS’s decision.

Key words
ITLOS; UNCLOS; advisory jurisdiction; treaty interpretation; state consent

1. INTRODUCTION: PUSHING THE BOUNDARIES OF ADVISORY JURISDICTION

The jurisdiction of international tribunals is a matter to be treated with caution: it is problematic to base a tribunal’s jurisdiction without an express legal rule providing for it. Yet, this exercise seems possible in Hamburg. No conventional instrument clearly provides for the advisory jurisdiction of the International Tribunal for the

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Law of the Sea (ITLOS or the Tribunal): both the United Nations Convention on the Law of the Sea\(^1\) and the Statute of the Tribunal\(^2\) are silent on this issue. Nevertheless, the Tribunal held that it possesses advisory jurisdiction in its opinion of 2 April 2015, concerning the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (the *Fisheries Commission Advisory Opinion*).\(^3\)

The *Fisheries Commission Advisory Opinion* was requested to the full Tribunal by the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC), a regional fisheries organization headquartered in Dakar.\(^4\) The request was aimed at clarifying the obligations of flag states for illegal, unreported and unregulated fishing (IUU fishing) conducted in the exclusive economic zone (EEZ) of third states, as well as the extent of the liability for breach of the obligations connected with IUU fishing.\(^5\) Prior to addressing the substantive issues raised by the SRFC, ITLOS dealt with the question of its jurisdiction to render the advisory opinion requested. Numerous states and international organizations filed written statements and participated in the oral proceedings. While various among them argued that only the Seabed Disputes Chamber of ITLOS, and not the full Tribunal, has advisory jurisdiction,\(^6\) others argued in favour of the full Tribunal’s jurisdiction to render advisory opinions.\(^7\) ITLOS finally held unanimously that it had jurisdiction;\(^8\) however, the Tribunal’s reasoning is not fully convincing.

The present article discusses the advisory jurisdiction of ITLOS as a full tribunal, using the *Fisheries Commission Advisory Opinion* as a starting point (Section 2). The article subsequently turns to the interpretation of the UNCLOS provisions on jurisdiction (Section 3) and discusses the relationship between advisory jurisdiction and state consent (Section 4). The last section suggests some tentative (and normative) conclusions (Section 5).\(^9\)

\(^2\) Annex VI UNCLOS (ITLOS Statute).
\(^4\) The SRFC member states are: Cape Verde, Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra Leone and The Gambia.
\(^5\) For the four questions asked by the SRFC, see *Fisheries Commission Advisory Opinion*, supra note 3, para. 2.
\(^6\) Argentina, Australia, China, France, Ireland, Spain, Thailand, United Kingdom, Unites States of America. The Netherlands and Portugal did not take a clear position on jurisdiction, but argued only for a cautious approach in the exercise of such jurisdiction should the Tribunal uphold its advisory jurisdiction.
\(^7\) Chile, Cuba, Germany, Japan, Micronesia, Montenegro, New Zealand, Saudi Arabia, Somalia, Sri Lanka, Switzerland. Most international organizations supported the advisory jurisdiction of the full Tribunal (Caribbean Regional Fisheries Mechanism, Forum Fisheries Agency, International Union for the Conservation of Nature, OSPESCA, SRFC), while the UN and the FAO did not address the question of jurisdiction, but simply discussed the multilateral instruments negotiated or adopted under their auspices and relating to IUU fishing. The EU did not address the jurisdictional question: it dealt with the substance of the questions in its statements, leaving individual EU member states to argue the jurisdictional point.
\(^8\) *Fisheries Commission Advisory Opinion*, supra note 3, para. 69. Judge Cot alone expressed some reservations on the exercise of advisory jurisdiction in the specific instance.
2. The *Fisheries Commission Advisory Opinion* of 2 April 2015

In the *Fisheries Commission Advisory Opinion*’s reasoning on jurisdiction, the Tribunal first recalled the arguments that states had put forward in favour or against its advisory jurisdiction.\(^{10}\) States principally argued their views on the basis of three legal provisions: Article 138 of the ITLOS’s Rules of Procedure (ITLOS Rules), Article 288 UNCLOS and Article 21 ITLOS Statute.

Under Article 138(1) ITLOS Rules, ‘[t]he 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’. The Tribunal explained that its advisory jurisdiction could not be based on Article 138 ITLOS Rules:

> [t]he argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal … is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.\(^{11}\)

Therefore, the Tribunal shifted its analysis to Article 288 UNCLOS\(^ {12}\) and Article 21 ITLOS Statute. Article 21 ITLOS Statute, entitled ‘Jurisdiction’, provides that ‘[t]he 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’. Some states had contended that Article 21 ITLOS Statute should be read as subordinate to Article 288 UNCLOS, since the latter is the central jurisdictional provision in the main text of the Convention. However, the Tribunal stated that pursuant to Article 318 UNCLOS ‘the Statute enjoys the same status as the Convention’,\(^ {13}\) and that ‘[a]ccordingly,
article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention'. ITLOS based its advisory jurisdiction on Article 21 of the Statute, implicitly confirming that Article 288 UNCLOS does not provide for the Tribunal’s advisory jurisdiction. The crux of the issue was the use in Article 21 ITLOS Statute of the words ‘disputes’, ‘applications’ and ‘matters’. ITLOS held that ‘[t]he use of the word “disputes” … is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word “applications” refers to applications in contentious cases’. However, in the crucial passage of the opinion ITLOS observed that:

[...] the words all “matters” … should not be interpreted as covering only “disputes”, for, if that were to be the case, article 21 of the Statute would simply have used the word “disputes”. Consequently, it must mean something more than only “disputes”. That something more must include advisory opinions, if specifically provided for in “any other agreement which confers jurisdiction on the Tribunal”.

The Tribunal held that its advisory jurisdiction is not based solely on Article 21 ITLOS Statute, but on the combination of Article 21 with ‘any other agreement which confers jurisdiction on the Tribunal’. According to ITLOS, ‘[a]rticle 21 and the “other agreement” conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal’. ITLOS concluded that it ‘has jurisdiction to entertain the Request submitted to it by the SRFC’. However, ITLOS further held that ‘the jurisdiction of the Tribunal in the present case is limited to the exclusive economic zones of the SRFC Member States’. This limitation of jurisdiction *ratione loci* stemmed from the consideration that ITLOS’s advisory jurisdiction was based on Article 21 ITLOS Statute as well as on the treaty under which the advisory opinion had been sought, which is in force only between the SRFC member states.

### 3. Interpreting the UNCLOS Provisions on Jurisdiction

#### 3.1. Textual analysis: Article 31(1) VCLT

A discussion on ITLOS’s advisory jurisdiction must build upon the provisions of the Convention. Regrettably, the *Fisheries Commission Advisory Opinion* lacks a stringent examination of the relevant legal provisions pursuant to the rules on interpretation set forth in the Vienna Convention on the Law of Treaties, rules which are widely

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14 Ibid.
15 Ibid., at para. 55.
16 Ibid., at para. 56.
17 Ibid., at para. 58.
18 Ibid., at para. 69.
19 Ibid.
20 The agreement in question is the Convention on the definition of the minimum access conditions and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC Member States [www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf) (MCA Convention) (accessed 11 September 2015).
regarded as reflecting customary international law.22 Therefore, the following analysis examines the Convention’s provisions that endow or are said to endow the competent judicial organs with advisory jurisdiction in accordance with Articles 31–33 VCLT.

The starting point is interpretation pursuant to Article 31(1) VCLT.23 UNCLOS contains various jurisdictional clauses, both in the main text and in the annexes. In the main text, only two rules expressly provide for advisory jurisdiction, namely Articles 191 and 159(10). Article 191 states that:

[the Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council (of the International Seabed Authority) on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.]

Article 159(10) provides in relevant part that:

[upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber.]

Both provisions constitute an express grant of advisory jurisdiction. However, that grant is limited to the Seabed Disputes Chamber of ITLOS, which excludes the full Tribunal.24 In the relevant annex, the ITLOS Statute, Article 40(2) refers to advisory jurisdiction, yet only in respect of the Seabed Disputes Chamber; Article 21 does not expressly mention the full Tribunal’s advisory jurisdiction.

As noted in the Fisheries Commission Advisory Opinion, the central jurisdictional clause in the Convention, Article 288 UNCLOS, does not afford a basis on which the advisory jurisdiction of ITLOS could be upheld. An analysis based on the plain reading of the text of Article 288 confirms such a view. Paragraphs 1 and 2 only mention ‘disputes’, which is a reference to the contentious jurisdiction of the Tribunal. Paragraph 3 is solely concerned with the jurisdiction of the Seabed Disputes Chamber and of the other judicial organs referred to in Article 188 UNCLOS, namely a special chamber of the Tribunal (Art. 188(1)(a)), an ad hoc chamber of the Seabed Disputes Chamber (Art. 188(1)(b)) and commercial arbitration (Art. 188(2)(a)). Paragraph 4


23 Art. 31(1) VCLT provides: [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

states that any judicial organ having jurisdiction under the Convention possesses the *compétence de la compétence*. If Article 288 provided for advisory jurisdiction, such provision could be deemed valid not only for ITLOS, but for all judicial organs mentioned in Article 287 UNCLOS.²⁵ Notably, paragraph 3 does not refer to ‘disputes’, as paragraphs 1 and 2, but to ‘matters’. This change in language could be significant, insofar as the ‘matters’ referred to in Article 288(3) also comprise advisory opinions requested to the Seabed Disputes Chamber in accordance with the Convention. However, the *Fisheries Commission Advisory Opinion* does not state that the change in the language of Article 288 UNCLOS guided the Tribunal’s interpretation of the term ‘matters’ in Article 21 ITLOS Statute, leading the Tribunal to decide that ‘matters’ in the latter provision also included advisory opinions. In any event, Article 288(3) mentions ‘matters’ in connection with the jurisdiction of specific organs, among which the full Tribunal is not included. Therefore, it would seem incorrect to transfer the meaning of ‘matters’ under Article 288(3) UNCLOS to ‘matters’ under Article 21 ITLOS Statute.

Article 21 ITLOS Statute is the bone of contention. The textual reading of the provision in accordance with Article 31(1) VCLT does not suggest that the Tribunal could base its advisory jurisdiction on it.²⁶ As noted in the *Fisheries Commission Advisory Opinion*, Article 21 ITLOS Statute mentions three distinct elements of the Tribunal’s jurisdiction: ‘disputes’, ‘applications’ and ‘matters’.²⁷ The first two elements refer to the contentious jurisdiction of the Tribunal, and it is not certain that the term ‘matters’, in its vagueness, includes advisory jurisdiction. The Tribunal’s reasoning appears to lack cogency where, in paragraph 56 of the *Fisheries Commission Advisory Opinion*, ITLOS concluded that since ‘matters’ must mean something more than disputes, then that something more ‘must include advisory opinions’.²⁸ Curiously, a commentary to the ITLOS Rules suggests that it is not the word ‘matters’ which could afford a basis for the full Tribunal’s advisory jurisdiction, but rather the term ‘application’.²⁹ Overall, the English text of Article 21 ITLOS Statute is quite inconclusive as to the existence of the full Tribunal’s advisory jurisdiction. The term ‘matters’ is too vague to convey clearly that it also encompasses advisory jurisdiction, as noted by Judge Cot in his declaration.³⁰ Article 31(1) VCLT also refers to interpretation in accordance with the object and purpose of the treaty, which is linked to the idea of teleological interpretation.³¹ The question is whether a consideration of the object and purpose of the Convention could warrant the conclusion that

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²⁷ *Fisheries Commission Advisory Opinion, supra* note 3, para. 54.
²⁸ Ibid., at para. 56.
ITLOS has advisory jurisdiction. The main problem of teleological interpretation is its ‘overt “legislative” character’, since it could lead to conclusions not foreseen by the parties when concluding the treaty concerned. Article 31(1) VCLT displays a degree of internal tension: interpretation oscillates between the parties’ original intent and the consideration of the treaty’s object and purpose, which do not necessarily coincide. The object and purpose of the ITLOS Statute is further considered below (Section 3.4). Suffice it to say that a restrained and cautious approach appears preferable when dealing with the jurisdiction of international courts and tribunals, which emphasizes interpretation according to the parties’ intent over teleological interpretation. As written by Sir Humphrey Waldock, ‘the interpretation of a treaty must always have its source in, and be consistent with, the intention of the parties at the time of its conclusion’. Such an approach would also strengthen the legitimacy of ITLOS’s decisions, which would be firmly grounded on the jurisdiction the states parties to UNCLOS intended to confer on the Tribunal.

3.2. The subsequent practice of the parties: Article 31(3)(b) VCLT

Judge Kateka has written that ‘article 21 of the ITLOS Statute provides the legal basis for the elaboration of article 138 of the Rules concerning the Tribunal’s advisory role’. One could argue that the word ‘matters’ in Article 21 ITLOS Statute should be interpreted in light of the subsequent practice of the states parties to the Convention, in particular the acquiescence of said parties to Article 138 ITLOS Rules. Since the states parties to UNCLOS never objected to Article 138 ITLOS Rules between 1997 and 2014, the word ‘matters’ in Article 21 ITLOS Statute should be interpreted as encompassing the Tribunal’s advisory jurisdiction. Before ITLOS, the United Kingdom argued that:

... reference has been made to “a general movement amongst States in favour of the Tribunal’s jurisdiction to issue advisory opinions” and we have been told that article 138 has been mentioned on various occasions and that no firm objection has been made. ... Even if there were such a “movement” or support, that could not establish a jurisdiction that did not otherwise exist. ... Nor could such a “movement” amount to a subsequent agreement between all the parties to UNCLOS regarding the interpretation

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34 See Kateka, supra note 9, at 167.
35 On subsequent practice, see J.-P. Cot, ‘La conduite subséquente des parties à un traité’, (1966) 70 RGIDP 632. On the relationship between subsequent practice and evolutionary interpretation of treaties, see E. Bjorge, *The Evolutionary Interpretation of Treaties* (2014), 76–83. ITLOS did not address the argument, having already decided the jurisdictional point on a different basis. Tanaka appears to make two contradictory points concerning the advisory jurisdiction of ITLOS as a full tribunal and Art. 138 ITLOS rules: while in one instance he wrote that ‘article 138 of the ITLOS Rules confers advisory jurisdiction on ITLOS itself’ (see Tanaka, supra note 24, at 444), soon after he argued that ‘article 138 of the Rules of the Tribunal does not provide a basis for the advisory jurisdiction of ITLOS as a full court’ (Y. Tanaka, ‘Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: the ITLOS Advisory Opinion of 2015’, (2015) 14 *Law and Practice of International Courts and Tribunals* 318, at 324).
of UNCLOS, within the meaning of article 31, paragraph 3(b), of the Vienna Convention on the Law of Treaties.\footnote{ITLOS/PV.14/C21/3, at 20 (United Kingdom).}

The first question is whether interpretation under Article 31(3)(b) VCLT could support the view that ITLOS possesses advisory jurisdiction, a question the Tribunal did not (need to) address in its advisory opinion. Under Article 31(3)(b) VCLT, in the interpretation of a treaty ‘[t]here shall be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. There are two obstacles to considering that acquiescence to Article 138 ITLOS Rules has influenced the interpretation of the ITLOS Statute. First, Article 31(3)(b) VCLT requires that subsequent practice be in the ‘application’ of the treaty.\footnote{Third report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, 1964 YILC, Vol. 16 II, at 61, para. 32. Arato argued that ‘[t]his requirement is broad, and applies to the application of the treaty as a whole – it need not be limited to the application of the particular provision being interpreted’, but recognized that this is not necessarily the case in all instances. See J. Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’, (2010) 9 Law and Practice of International Court and Tribunals 443, at 459.} While it is certain that Article 21 ITLOS Statute has been applied, and there has therefore been practice, in relation to the Tribunal’s contentious jurisdiction, it could be said that the first application of the provision with regard to advisory jurisdiction was exactly with the \textit{Fisheries Commission Advisory Opinion}. Second, subsequent practice is certainly not uniform, and does not show a common intention of the parties concerning the interpretation of UNCLOS.\footnote{Sixth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, 1966 YILC, Vol. 18 II, at 99, para. 18. See also A. Feldman, ‘Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement’, (2008–2009) 41 New York University J. Int’l L. & Pol. 655, at 663.} According to the International Law Commission’s (ILC) Special Rapporteur on the law of treaties, Sir Humphrey Waldock, ‘to amount to an “authentic interpretation”, the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally’.\footnote{M. Villiger, ‘The 1969 Vienna Convention on the Law of Treaties: 40 Years After’, (2009) 344 RCADI 9, at 122. See also T. Treves, \textit{Diritto Internazionale – Problemi Fondamentali} (2005), 387.} Similarly, Villiger suggested that:

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\text{[t]he active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.}\]

In the present instance, it is difficult to admit that subsequent practice is frequent and that no state has objected to it. In the advisory proceedings numerous states opposed an interpretation of Article 21 ITLOS Statute which included the full Tribunal’s advisory jurisdiction. Moreover, states may have been opposed to Article 138 ITLOS Rules since its inception, but knew they could challenge that provision once a request for an advisory opinion would have been filed. This \textit{modus operandi} may have seemed more suitable than a challenge in the abstract.

The second question is whether the subsequent practice of the parties could amount to a modification of the ITLOS Statute. One could argue that interpreting...
the word ‘matters’ in Article 21 ITLOS Statute as including advisory jurisdiction would not be mere interpretation, but would be tantamount to modification.41 It appears accepted in the literature that subsequent practice could have the effect of modifying treaty provisions.42 However, the ICJ in its decisions seems more cautious. For instance, while the ICJ considered the subsequent practice of the states parties in the interpretation of Articles 27 and 12 UN Charter, respectively in the Namibia Advisory Opinion43 and in the Wall Advisory Opinion,44 it stopped short of recognizing an actual modification of the Charter.45 In the more recent case concerning Navigational and Related Rights, the ICJ held that ‘subsequent practice of the parties, within the meaning of Article 31(3)(b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement’.46 The meaning of this passage is not entirely clear as to whether subsequent practice could warrant the modification of a previously concluded treaty, as underscored by the ILC.47 The ILC Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Georg Nolte, commented that ‘while raising the possibility that a treaty might be modified by the subsequent practice of the parties, the Court has so far not explicitly recognized that such an effect has actually been produced in a specific case’.48 In light of the ICJ’s restrained judicial practice, ITLOS would probably have refrained from admitting that acquiescence to Article 138 ITLOS Rules could be the basis for a modification of the ITLOS Statute so as to grant advisory jurisdiction to the full Tribunal. Surely, the Tribunal is not bound to follow the ICJ’s practice. However, nothing in the circumstances of the Fisheries Commission Advisory Opinion would have justified a departure from the ICJ’s restrained approach. In any event, modification appears unlikely given the conclusion reached above that the subsequent practice invoked was not uniform and frequent enough to warrant an extensive interpretation under Article 31(3)(b) VCLT. If such practice is insufficient for the extensive interpretation of Article 21 ITLOS Statute, it is a fortiori insufficient for its modification.

41 Third report on the law of treaties, supra note 37, at 60, para. 25.
48 Ibid., at 55, para. 129.
3.3. Drafting history: Article 32 VCLT

The meaning of Article 21 ITLOS Statute as interpreted pursuant to Article 31 VCLT appears ‘ambiguous or obscure’. This conclusion warrants resort to supplementary means of interpretation under Article 32 VCLT, especially the drafting history of Article 21 ITLOS Statute. In the Fisheries Commission Advisory Opinion, ITLOS did not analyse the travaux préparatoires. There is one mention to the Tribunal’s advisory jurisdiction in the drafting history of UNCLOS, in Article 34 of the Revised Single Negotiating Text. However, that reference is to the Seabed Tribunal, which subsequently became the Seabed Disputes Chamber. The travaux préparatoires of Article 21 show consistency in the wording of that provision, from the early drafts to its final text. Article 22 of the Informal Single Negotiating Text provided that ‘[t]he jurisdiction of the Tribunal shall comprise all disputes submitted to it in accordance with this Convention and all matters specifically provided for in any other international agreement, public or private, which confers jurisdiction on the Tribunal’. Similarly, Article 23 of the Revised Single Negotiating Text stated that ‘[t]he jurisdiction of the Tribunal shall comprise all disputes and applications submitted to it in accordance with the present Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal’. The same formulation was retained in the Informal Composite Negotiating Text. However, the various drafts of what became Article 21 ITLOS Statute suffer from the same ambiguity and vagueness of the end product.

The drafting history of the ITLOS Statute highlights a link between Articles 20(2) and 21, which could clarify the meaning of ‘any other agreement’ in the latter provision, and thus be a clue as to the existence of the Tribunal’s advisory jurisdiction. According to the Virginia Commentary, the words ‘any other agreement’ have the same meaning under Articles 20(2) and 21. Article 20(2), concerning jurisdiction ratione personae, opens access to ITLOS to entities other than states parties, such as private entities parties to a contract with a state. Article 20(2) was increasingly broadened in scope, in accordance with the paramount goal of ensuring that ‘the common heritage of mankind would be used for the benefit of all the peoples of the world’. All qualifications of the term ‘agreement’ were progressively deleted,

49 Under Art. 32 VCLT ‘[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to ... determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure ...’.
51 Rosenne and Sohn, supra note 12, at 378–9.
55 Art. 20(2) ITLOS Statute states that ‘[t]he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case’.
56 Rosenne and Sohn, supra note 12, at 378.
57 Ibid., at 376.
in order to encompass instruments other than treaties which could confer jurisdiction on the Tribunal.\(^{58}\) The jurisdiction conferred in this respect is contentious in character. Article 20(2) ITLOS Statute uses the word ‘case’, generally used in relation to contentious proceedings; moreover, earlier drafts of that provision used the uncontroversial term ‘dispute’.\(^{59}\) The meaning of ‘any other agreement’ under Articles 20(2) and 21 ITLOS Statute appears thus linked to contentious jurisdiction. This entails that the agreement referred to in Article 21, which the Tribunal saw as potentially conferring advisory jurisdiction, would in fact be linked to contentious jurisdiction.

Moreover, Article 21 ITLOS Statute was inspired by Article 36(1) of the Statute of the International Court of Justice (ICJ or the Court).\(^{60}\) This link between the ITLOS Statute and the Statute of the ICJ was confirmed by the President of the Third UN Conference on the Law of the Sea, who stated that ITLOS’s ‘powers are on the lines of the Statute of the International Court of Justice and other international judicial tribunals’.\(^{61}\) Article 36(1) of the ICJ’s Statute does not concern advisory jurisdiction: as argued by the United Kingdom, Article 21 ITLOS Statute should not cover advisory jurisdiction either.\(^{62}\)

The analysis of UNCLOS’s travaux préparatoires does not warrant the conclusion that the parties intended to confer advisory jurisdiction on the Tribunal. While the drafts of Article 21 ITLOS Statute were always ambiguous, the meaning of ‘any other agreement’ seems unrelated to advisory opinions, and would point towards the lack of advisory jurisdiction. Based on Article 32 VCLT it seems difficult to affirm unquestionably that ITLOS possesses advisory jurisdiction. On the contrary, the meaning of ‘any other agreement’ could be a clue as to the lack of ITLOS’s advisory jurisdiction. In any event, as noted by Judge Cot, UNCLOS’s drafting history does not seem conclusive.\(^{63}\)

### 3.4. The authentic languages of the Convention: Article 33 VCLT

Given the obscurity of the English text of Article 21 ITLOS Statute and the degree of ambiguity of the travaux préparatoires, one may resort to other authentic languages to seek a clarification of the meaning of the provision, in accordance with Article 33 VCLT. Under Article 33(4) VCLT, when confronted with treaty texts authenticated in different languages an international tribunal should follow the text that best reconciles the possible interpretations in the various languages. In Mavrommatis Palestine Concession, the Permanent Court of International Justice (PCIJ) held that:

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59 Informal Composite Negotiating Text, supra note 54, at 59 (Art. 21).

60 You, supra note 9, at 362.


62 ITLOS/PV.14/C21/3, at 22 (United Kingdom).

63 Fisheries Commission Advisory Opinion, Declaration of Judge Cot, supra note 30, para. 3.
... where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, [the Court] is bound to adopt the more limited interpretation which can be made to harmonise with both versions.64

Building on this statement, ILC Special Rapporteur Sir Humphrey Waldock wrote that:

[a] term of the treaty may be ambiguous or obscure because it is so in all the authentic texts, or because it is so in one text only but it is not certain whether there is a difference between the texts, or because on their face the authentic texts seem not to have exactly the same meaning. But whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties [i.e., Arts. 31–32 VCLT].65

The application of the ‘standard rules of interpretation’ to Article 21 ITLOS Statute yields different results depending on the language of the Statute. The application of Article 31 VCLT to most of the authentic texts of the Convention leaves much room for ambiguity, since the terms used are equivalent to the English ‘matters’, and thus do not clarify whether ITLOS has advisory jurisdiction. The Spanish text uses the vague ‘cuestiones’, and the Russian version resorts to the equally vague ‘вопросы’. In Arabic the term used is ‘امَّانَال،’ which also refers to a vague ‘question’ or ‘issue’. The analysis of the travaux préparatoires in accordance with Article 32 VCLT is not wholly conclusive as to the existence of ITLOS’s advisory jurisdiction either. However, the Chinese and French texts of Article 21 ITLOS Statute are clearer than in the other authentic languages. The Chinese text does not use the word ‘matters’, and only mentions ‘申請’ (‘applications’), which strongly suggests that Article 21 is limited to contentious jurisdiction. However, it is the French text of Article 21 that appears decisive. According to that provision:

[le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal.

In French there is no equivalent to the word ‘matters’ of the English text. The key word in the French text is ‘cela’. ‘Cela’ should be interpreted as referring to ITLOS being ‘compétent … conformément à la Convention’. This interpretation would exclude advisory jurisdiction, as Article 288 UNCLOS does not provide for the advisory jurisdiction of the full Tribunal. According to this interpretation, the sentence ‘toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal’ would mean that the Tribunal has jurisdiction when an agreement other than UNCLOS provides for the submission of a ‘différend’

64 Mavrommatis Palestine Concession (Greece v. United Kingdom), Judgment of 30 August 1924, PCIJ Rep Series A No 2, at 19.
or a ‘demande’ in accordance with the Convention. Therefore, that phrase would not constitute a grant of advisory jurisdiction. As argued by the United Kingdom in the oral proceedings:

[i]f one reads the Statute as a whole and in the various languages, it is clear that “matters” refers back to “disputes and applications” and that article 21 deals not with advisory proceedings but with contentious cases.66

The suggested interpretation of the French text could seem to create a hierarchical relationship between Article 21 ITLOS Statute and Article 288 UNCLOS, with the former being subordinate to the latter.67 However, this is not the case, since the French text as interpreted above would only create a hierarchical relationship between the Convention and the agreement other than the Convention conferring jurisdiction on the Tribunal in accordance with the Convention. In this sense, the agreement other than the Convention could confer jurisdiction on ITLOS, but only so long as that agreement conforms to the jurisdictional provisions of UNCLOS. The Tribunal rightly rejected a relationship of subordination between Article 21 ITLOS Statute and Article 288 UNCLOS,68 apparently accepting that the two provisions are complementary, as argued by some states.69 However, and in light of the French text of Article 21 ITLOS Statute, it would seem more correct to conclude that Article 288 UNCLOS and Article 21 ITLOS Statute cover the same ground in respect of jurisdiction ratione materiae, without at the same time being in a hierarchical relationship.

The suggested interpretation of the French text of Article 21 ITLOS Statute finds ‘the meaning which best reconciles the texts, having regard to the object and purpose of the treaty’, in accordance with Article 33(4) VCLT,70 and is supported by the textual reading of UNCLOS’s Chinese text. As argued, the French version of the ITLOS Statute shows that states did not intend to grant advisory jurisdiction to the full Tribunal, and that Article 21 ITLOS Statute is solely concerned with contentious jurisdiction.71 While in four versions of Article 21 (English, Spanish, Russian and Arabic) the linguistic ambiguities could lead one to conclude both in favour and against the existence of advisory jurisdiction, the French and Chinese versions only allow one to conclude that there is no advisory jurisdiction. Those two versions are the ones which best reconcile all authentic texts of the Convention,72 and should thus be preferred. The suggested interpretation of the French and Chinese texts is also in accordance with the object and purpose of the ITLOS Statute. The object and purpose of the Statute of the Tribunal could be said to be same, mutatis mutandis, as the object and purpose of the Statute of the ICJ, as spelled out in LaGrand: ‘[t]he object and purpose of the Statute is to enable the Court to fulfil the functions provided for

66 ITLOS/PV.14/C21/3, at 23 (United Kingdom).
68 Fisheries Commission Advisory Opinion, supra note 3, para. 52.
69 Ibid., at para. 48.
70 On the interpretation of treaties authenticated in different languages, see Treves, supra note 40, at 393–7.
71 Contra, see Fisheries Commission Advisory Opinion, Declaration of Judge Cot, supra note 30, para. 3.
72 See Villiger, supra note 42, 459–60.
therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions. ITLOS’s basic function is the ‘judicial settlement of international disputes by binding decisions’, which excludes advisory opinions. Furthermore, the functions of ITLOS under the Statute only provide expressly for advisory opinions to be given by the Seabed Disputes Chamber, which is thus the only judicial organ having advisory jurisdiction under the ITLOS Statute. This conclusion is the more restrictive vis-à-vis upholding the full Tribunal’s advisory jurisdiction. Nevertheless, it is in accordance with the interpretative canon laid out by the PCIJ under which ‘if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted’. When dealing with jurisdiction of inter-state tribunals, a cautious approach ought in principle to be favoured, and balanced with the application of the principle of effectiveness in the interpretation of jurisdictional clauses. Caution fosters the states’ goodwill: due to the consensual basis of the jurisdiction of international courts and tribunals, an audacious stance on jurisdiction could result in the loss of cases. Writing about the ICJ, Lauterpacht stated that notwithstanding the fact that the Court has a duty to render advisory opinions, there are certain limits to such a duty. Lauterpacht explained that:

...these limits are of a legal character; they are determined by the fact that the Court is the judicial organ of the United Nations and that in acting in an advisory capacity it must act in accordance with its judicial character, the requirements of its Statute, and the principles of international law.

The lack of a legal provision empowering ITLOS to render advisory opinions appears to be one of the legal limits to advisory jurisdiction mentioned by Lauterpacht.

4. The Tribunal’s Advisory Jurisdiction and State Consent

The assertion of jurisdiction by ITLOS in the Fisheries Commission Advisory Opinion raises the question of the relationship between advisory jurisdiction and state consent. For a state to be a party to contentious proceedings before an international tribunal there must exist an expression of that state’s consent. However, the question is different in respect of advisory jurisdiction. Advisory opinions are not the outcome of contentious proceedings and have no binding force. Certain states
pleading for the Tribunal's advisory jurisdiction expressly recalled the lack of binding force of ITLOS's advisory opinions in support of their arguments. For instance, Germany argued that 'advisory opinions, by their very nature, are delivered only to the requesting party; they do not involve any other parties, nor are they binding on any party'. The argument put forward by such states was that, since ITLOS advisory opinions would not have binding force on the states parties to UNCLOS, there is no need for states to express their consent to the Tribunal's advisory jurisdiction. Connected to the lack of binding force and the issue of consent, certain states invoked the Eastern Carelia principle. According to that principle, an international tribunal may not give an advisory opinion when the opinion requested relates to an on-going dispute between two states, one of which has not expressed its consent to the tribunal's jurisdiction. Germany contended that:

... in the 1923 Status of Eastern Carelia case the Permanent Court of International Justice declined to issue an advisory opinion on questions involving a pending dispute without the consent of all parties to the dispute. However, the Court did not rule that, as a matter of law, it could not interpret international conventions without the prior consent of all parties to these conventions. ... Moreover, the Eastern Carelia case or doctrine has undergone considerable changes in more recent case law. In its 1950 Peace Treaties and 1975 Western Sahara advisory opinions, the International Court of Justice has established “that the absence of an interested State’s consent to the exercise of the Court’s advisory jurisdiction does not concern the competence of the Court, but the propriety of the exercise” of its advisory jurisdiction.

This analysis is a sound description of the Eastern Carelia doctrine and of its evolution from a question of jurisdiction to one of admissibility. Nevertheless, the arguments based on the lack of binding character of advisory opinions and on the Eastern Carelia principle seem to miss the point in respect of advisory jurisdiction of the full Tribunal under UNCLOS. First, concerning the Eastern Carelia argument, a distinction should be drawn between two different kinds of consent. Consent in relation to ITLOS’s advisory jurisdiction is not consent to be a party to advisory proceedings; a state needs not give its consent in order for an international tribunal to render an advisory opinion, so long as the tribunal concerned is empowered to do so under its constitutive instrument. The notion of consent relevant in the present discussion is a more fundamental one, relating to consent in treaty-making. UNCLOS, ITLOS’s constitutive treaty, does not contain any provision clearly endowing the full Tribunal with advisory jurisdiction: in this sense states have not consented to the Tribunal exercising advisory jurisdiction. Second, the fact that advisory opinions do not have binding force is irrelevant for the purposes of establishing whether the Tribunal has advisory jurisdiction. Despite not being binding, advisory opinions are authoritative statements of what the law is, and could have important legal effects.

80 ITLOS/PV.14/C21/2, at 5 (Germany). See also Ibid., at 25 (Chile); ITLOS/PV.14/C21/3, at 5 (Micronesia).
81 This argument is clear in Germany’s oral statement, see ITLOS/PV.14/C21/2, at 5 (Germany).
83 ITLOS/PV.14/C21/2, at 5–6 (Germany).
for states. By way of example, in the *Certain Expenses Advisory Opinion* the ICJ upheld the legality under the UN Charter of peacekeeping operations authorized by the UN General Assembly pursuant to the *Uniting for Peace Resolution*. Similarly, the *Genocide Convention Advisory Opinion* had a remarkable influence on the development of the law of reservations, which culminated in the codification in the VCLT of the criteria laid down by the court in the advisory opinion. In his dissenting opinion in *Continental Shelf (Libya/Malta)*, Judge Sir Robert Jennings wrote that ‘it would be unrealistic even in consideration of strict legal principle, to suppose that the effects of a judgment are thus wholly confined by Article 59 [of the ICJ’s Statute]’. The same could be said for advisory opinions: although not binding on states, they are nevertheless bound to have legal effects on state behaviour.

One could also frame the question of consent to advisory jurisdiction as a matter of conferral of powers from states on international organizations. International organizations are governed by the principle of speciality, as expressed by the PCIJ in *European Commission of the Danube*. ITLOS, which has international legal personality, was endowed with certain powers by the states parties to UNCLOS. Such powers, as argued above, do not include the power to render advisory opinions. In this perspective, if the Tribunal gave an advisory opinion under the current legal framework, it would exceed the powers conferred on it by the states parties to UNCLOS; it would act *ultra vires*. One could counter-argue that an institution having international legal personality also has implied powers, as suggested in the oral proceedings before ITLOS.

However, this argument does not stand up to scrutiny. In *Reparations for Injuries*, the ICJ held that ‘[u]nder international law, the Organization must be deemed to have
those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. The question is whether the power to give advisory opinions is ‘essential to the performance’ of the Tribunal's duty as a judicial organ. While it may be desirable that ITLOS possesses advisory jurisdiction, it cannot be said that such jurisdiction is ‘essential’. Reparations for Injuries sets a high bar for the recognition of implied powers to a non-state entity having international legal personality, namely that the presence of those implied powers must be ‘essential’ for the performance of the entity's mission. In the case of ITLOS, the result of the exercise of advisory jurisdiction could be achieved also by exercising contentious jurisdiction. The legal questions posed by the SRFC to the Tribunal could have been answered in contentious proceedings brought by a SRFC member state against the flag state of a vessel seized when committing IUU fishing in that SRFC member state's EEZ. As argued by Australia before ITLOS:

... it is a sine qua non of adjudication by international courts and tribunals that it is based upon the consent of States. This applies as much to advisory opinion competence as it does to contentious cases. Jurisdiction to adjudicate is always the subject of express conferral. It is not to be implied.

Paraphrasing Lord Bingham of Cornhill, ‘it is an elementary principle that anyone purporting to exercise a [conventional] power must not act beyond or outside the limits of the power conferred.’

In addition to doubting that jurisdiction could be considered an implied power based on ITLOS's international legal personality, one could also doubt the soundness of viewing advisory jurisdiction as an inherent power based on ITLOS’s character as an international judicial organ. Seemingly following such a line of argument, Judge Cot observed that ‘nothing in the Convention prohibits the Tribunal from exercising advisory jurisdiction’. Between the lines, Judge Cot appeared to suggest that the judicial function of the Tribunal, coupled with the lack of an express prohibition in UNCLOS, would justify the assertion of advisory jurisdiction. However, the simple fact that nothing in the Convention prevents the full Tribunal from rendering advisory opinions cannot be a basis for such advisory jurisdiction. Judge Cot's argument, which assumes a normative vacuum in the Convention, suffers from the same weakness as the reasoning of the Fisheries Commission Advisory Opinion: the lack

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95 ITLOS/PV.14/C21/2, at 13 (Australia).
98 Fisheries Commission Advisory Opinion, Declaration of Judge Cot, supra note 30, para. 4.
of a legal provision endowing the full Tribunal with advisory jurisdiction. The states left a legal vacuum in respect of the Tribunal’s power to render advisory opinions. The mere absence of any rule prohibiting the Tribunal’s advisory jurisdiction does not mean that the states intended the Tribunal to have advisory jurisdiction.

Furthermore, it has been authoritatively argued that advisory jurisdiction is not an inherent power based on a tribunal’s character as a judicial organ: advisory jurisdiction must be clearly and explicitly conferred by the tribunal’s constitutive instrument. Advisory jurisdiction was first conferred on the PCIJ, and it was an innovation in international dispute settlement. At the San Francisco conference, which marked the transition from the PCIJ to the present Court, states debated the propriety of endowing the newly-instituted ICJ with advisory jurisdiction. Some contended that the advisory function was ‘incompatible with the true function of a court of law, which was to hear and decide disputes’. Advisory jurisdiction was not codified in the Statute of the PCIJ because it was inherent in the international judicial function. Furthermore, despite the repeated use of advisory opinions during the PCIJ’s years, some states argued that advisory jurisdiction would not be fully compatible with the ICJ’s judicial function. Similarly to the ICJ, ITLOS could not possess advisory jurisdiction unless it were granted to it by UNCLOS. The drafting history of the Convention does not show that states intended to confer advisory jurisdiction on ITLOS as a full tribunal (see above 3.3). On the contrary, it emerges that advisory jurisdiction was only intended to be conferred on the Seabed Disputes Chamber.

Generally, international courts and tribunals having jurisdiction to render advisory opinions are expressly empowered to do so under their constitutive instruments. The prime example is that of the ICJ. Pursuant to Article 96 UN Charter:

(1) [t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. (2) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Under Article 47 of the European Convention on Human Rights, the European Court of Human Rights ‘may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the

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102 Treves wrote that the Convention does not confer advisory jurisdiction on the full Tribunal, while it expressly confer it on the Seabed Disputes Chamber. See T. Treves, Le controversie internazionali – Nuove tendenze, nuovi tribunali (1999), 107–8.

103 1945 Charter of the United Nations, XV UNCIO 335.
Protocols thereto’. The Inter-American Court of Human Rights possesses advisory jurisdiction pursuant to Article 2 of its Statute, which provides that ‘[t]he Court shall exercise adjudicatory and advisory jurisdiction’ and that ‘advisory jurisdiction shall be governed by the provisions of Article 64 of the [American Convention on Human Rights]’. Advisory opinions may be given by the African Court of Human and Peoples’ Rights under Article 4(1) of the Protocol establishing the Court, which provides that ‘at the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments’. In all these cases, international courts and tribunals are expressly empowered to render advisory opinions under their constitutive instrument. As the United States noted in its written statement filed with the Tribunal, ‘it appears that all major international courts and tribunals that have rendered advisory opinions have done so pursuant to express authority found in a statute or other governing legal document’. In this perspective, ITLOS could not rely on any precedent in order to interpret its Statute so extensively as to conclude that it possesses advisory jurisdiction.

Probably to counterbalance the assertion of advisory jurisdiction, ITLOS decided to limit its jurisdiction to the EEZs of the SRFC member states. Probably, this decision was prompted by the consideration that consent to its jurisdiction had been manifested only by the SRFC member states through the MCA Convention. However, the Tribunal also addressed the responsibilities and liabilities of flag states. In relation to the first question posed by the SRFC, ‘the term “flag State” . . . refers to a State which is not a member of the SRFC’. The limitation of the Tribunal’s advisory jurisdiction ratione loci may be seen to have been a fiction. While the Tribunal expressed the wish to discuss IUU fishing in respect of the marine spaces under the jurisdiction of the SRFC member states, the questions posed de facto expanded the reach of the Tribunal’s jurisdiction beyond SRFC member states. Furthermore, the application of the legal principles set out in the ITLOS advisory opinion will not remain strictly confined to the SRFC member states simply by virtue of the Tribunal’s limitation of jurisdiction ratione loci.

Absent a clear legal provision endowing the Tribunal with advisory jurisdiction, ITLOS’s reasoning appears to lack cogency. The lack of binding character of advisory opinions and the Eastern Carelia principle are irrelevant to establish ITLOS’s advisory jurisdiction. The appraisal of the powers conferred by the states parties to UNCLOS on the Tribunal, as well as the consideration of the Tribunal’s implied and inherent powers, do not warrant the conclusion that ITLOS has advisory jurisdiction.

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105 1979 Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the Organization of American States at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No. 448).
108 Fisheries Commission Advisory Opinion, supra note 3, para. 69.
109 Ibid., at para. 88.
practice of other international tribunals in the exercise of advisory jurisdiction supports this conclusion.

5. CONCLUSION: A NORMATIVE SOLUTION

One could say that ITLOS ‘employed textual and teleological reasoning to reach a pre-determined result’.110 From a normative standpoint, it may be desirable that ITLOS be endowed with advisory jurisdiction. The delivery of the Fisheries Commission Advisory Opinion enabled the Tribunal to address certain key issues relating to IUU fishing. As the UN Secretary-General has stated, ‘[i]llegal, unreported and unregulated fishing is a global problem which occurs in virtually all capture fisheries, including beyond areas of national jurisdiction’.111

Nevertheless, ITLOS’s reasoning on jurisdiction is not fully convincing. The Tribunal should arguably have refrained from exercising advisory jurisdiction, and should have requested the Meeting of the states parties to make the necessary amendments to the Convention in accordance with Article 41 ITLOS Statute, in order to clearly confer advisory jurisdiction on the Tribunal.112 Under Article 41(3) ITLOS Statute, ‘[t]he Tribunal may propose such amendments to this Statute as it may consider necessary, by written communications to the States Parties for their consideration in conformity with paragraphs 1 and 2’. The proposed amendments would then follow the simplified procedure provided for in Article 313 UNCLOS.113 However, the simplified procedure is not without obstacles: a single state could in fact stop the amendment process simply by raising an objection.

Speaking at the UN General Assembly as ITLOS President, Vladimir Golitsyn declared that:

[t]he Tribunal’s jurisdiction is certainly not limited to contentious cases. As the Assembly is aware, the Tribunal can also exercise advisory functions, pursuant to article 21 of its Statute. Under this provision, the Tribunal’s jurisdiction comprises all matters

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112 Under Art. 41(1) and (3) ITLOS Statute, ‘[t]he Tribunal may propose such amendments to this Annex, other than amendments to section 4, may be adopted only in accordance with article 313 or by consensus at a conference convened in accordance with this Convention. . . . (3) The Tribunal may propose such amendments to this Statute as it may consider necessary, by written communications to the States Parties for their consideration in conformity with paragraphs 1 and 2’.

113 Art. 313 UNCLOS provides that ‘[1][a] State Party may, by written communication addressed to the Secretary-General of the United Nations, propose an amendment to this Convention, other than an amendment relating to activities in the Area, to be adopted by the simplified procedure set forth in this article without convening a conference. The Secretary-General shall circulate the communication to all States Parties. (2) If, within a period of 12 months from the date of the circulation of the communication, a State Party objects to the proposed amendment or to the proposal for its adoption by the simplified procedure, the amendment shall be considered rejected. The Secretary-General shall immediately notify all States Parties accordingly. (3) If, 12 months from the date of the circulation of the communication, no State Party has objected to the proposed amendment or to the proposal for its adoption by the simplified procedure, the proposed amendment shall be considered adopted. The Secretary-General shall notify all States Parties that the proposed amendment has been adopted’. 

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specifically provided for in any other agreement which confers jurisdiction on the Tribunal.\textsuperscript{114}

Under the current legal framework, this statement is not persuasive. However, it could become so if the states parties to the Convention decided to take stock of ITLOS’s decision to uphold its advisory jurisdiction, and made a formal amendment to the ITLOS Statute to expressly confer advisory jurisdiction on the Tribunal under appropriate and clearly specified conditions. In light of the significant challenges states face relating to the law of the sea, it is desirable that ITLOS be clearly and expressly endowed with advisory jurisdiction. The Tribunal has already upheld its advisory jurisdiction, but has done so in an unconvincing manner. It is now up to the states parties to the Convention to put things right.

\textsuperscript{114} 67\textsuperscript{th} Plenary Meeting of the UN General Assembly of 9 December 2014, Sixty-ninth Session of the UN General Assembly, UN Doc. A/69/PV.67 (2014), at 19.