

THE EVOLVING FUNCTION OF ADVISORY OPINIONS IN THE UNCLOS DISPUTE SETTLEMENT 'COMPLEX'

DISPUTE SETTLEMENT MECHANISMS: UNCLOS'
INDISPENSABLE GUARDIANS,
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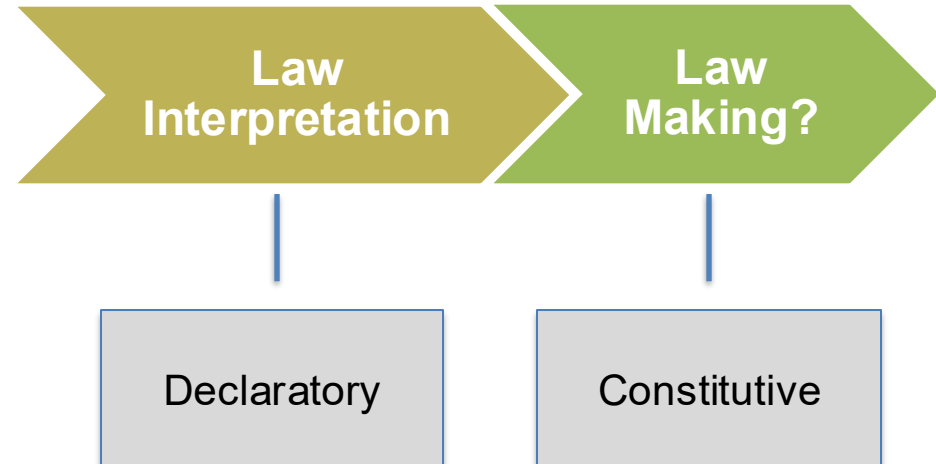
JUDICIAL FUNCTION OF INTERNATIONAL COURTS AND TRIBUNALS

2 Core Aspects of Judicial Function

Dispute Resolution



Law Development



HISTORICAL DEVELOPMENT OF ADVISORY OPINIONS – NATIONAL COURTS

- Advisory opinions in national courts historically referred to as a legal opinion delivered by one or more judges in their official capacities but outside the ordinary process of litigation
- English judges routinely gave legal advice to the Crown – judge's task was to find existing law and make it known
- The practice of giving advisory opinions declined in the common law world in the 18th century due to:
 - concerns about such opinions being influenced by political considerations;
 - separation of powers between the judiciary and the executive;
 - objections to court giving views on a matter that does not determine the rights of the litigants
- Advisory opinions have been historically used in civil law countries

HISTORICAL DEVELOPMENT OF ADVISORY OPINIONS – PCIJ

Article 14, Covenant of the League of Nations 1919

- The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a **Permanent Court of International Justice**.
- The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.
- The Court may also give an **advisory opinion** upon any dispute or question referred to it by the Council or by the Assembly.

Article 65, Statute of the PCIJ (amended in 1929)

- **Questions** upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

HISTORICAL DEVELOPMENT OF ADVISORY OPINIONS – INTERNATIONAL COURT OF JUSTICE

Article 96, UN Charter (1945)

1. The 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.”

Article 65, Statute of ICJ

- 1. The Court may give an advisory opinion on **any legal question** at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

ADVISORY OPINIONS IN THE THE UNCLOS DISPUTE SETTLEMENT “COMPLEX” (1982)

General Dispute Settlement Mechanisms in Part XV

Disputes on the interpretation or application of UNCLOS

Other Regional,
Bilateral and
General
Agreements

Non-Binding
Procedures

Negotiations

Voluntary
Conciliation

Compulsory
Procedures Entailing
Binding Decisions

ICJ

ITLOS

Annex VII Arbitral
Tribunal

Annex VII Arbitral
Tribunal

Compulsory
Procedures
Entailing Non-
Binding Decisions

Compulsory
Conciliation

ADVISORY OPINIONS IN THE THE UNCLOS DISPUTE SETTLEMENT “COMPLEX” (1982)

Specialized Dispute Settlement Mechanisms in Part XI, Section 5

**Disputes with respect to activities in the
Area (Arts 186 – 189)**

**Legal Questions Arising within the
scope of the activities of ISA Council
or Assembly (Art 191)**

Seabed Disputes
Chamber

Special Chamber of
ITLOS

Seabed Disputes Chamber

Ad Hoc Chamber
of Seabed Disputes
Chamber

Binding Commercial
Arbitration

ADVISORY OPINIONS IN THE THE UNCLOS DISPUTE SETTLEMENT “COMPLEX” (1982)

- Explicit legal authority for advisory opinions only given to the Seabed Disputes Chamber on **legal questions** arising within the scope of activities of the ISA Council or Assembly in relation to activities in the Area in Article 191
- Rationale for advisory opinions related to the specific characteristics of Part XI and activities in the Area, the involvement of non-state actors and the communitarian nature of the regime
- **Seabed Disputes Chamber Advisory Opinion 2011 (para. 26)**

In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority's organs operate, but its task within that system is to act as an independent and impartial body.

ADVISORY OPINIONS IN THE THE UNCLOS DISPUTE SETTLEMENT “COMPLEX” (1982)

- No explicit authority given to ITLOS or other dispute settlement bodies to render advisory opinions
- Judge Wolfrum “The drafters of the UN Convention on the Law of the Sea were rather reluctant to entrust the Tribunal, including the Chamber for Deep Sea-bed Disputes, with competences to give advisory opinions equivalent to the ones of the ICJ” (*International Dispute Settlement: Room for Innovation* Springer, 2013)
- **Article 21, ITLOS Statute, Annex VI, UNCLOS:**

The jurisdiction of the Tribunal comprises all **disputes** and all **applications** submitted to it in accordance with this Convention and ***all matters*** specifically provided for in any other agreement which confers jurisdiction on the Tribunal

ADVISORY JURISDICTION CONFERRED ON ITLOS IN 1997 RULES OF PROCEDURE

No explicit authority given to ITLOS to render AOs BUT:

Article 16, ITLOS Statute, Annex VI, UNCLOS:

The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down the rules of procedure

Article 21, ITLOS Statute, Annex VI, UNCLOS:

“The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters* specifically provided for in any other agreement which confers jurisdiction on the Tribunal

Article 138, ITLOS Rules (adopted by ITLOS)

- (1) The Tribunal may give an advisory opinion on a **legal question** if an **international agreement** related to the purposes specifically provides for the submission to the Tribunal of a request for such an opinion.
- (2) A request for an advisory opinion shall be transmitted to the Tribunal by whatever **body** is authorized by or in accordance with the agreement to make the request to the Tribunal.

OBJECTIONS TO ITLOS ADVISORY JURISDICTION

- **Sub-regional Fisheries Commission Advisory Opinion 2015**

- SRFC is a regional fisheries organisation comprising 7 West African member States
- In 2013, the SRFC Conference of Ministers adopted a resolution authorising the SRFC Permanent Secretary to request an AO from ITLOS
- SRFC States were concerned about the prevalence of illegal, unreported and unregulated (IUU) fishing in the region
- SRFC filed a request for an AO with ITLOS (Case No 21)
- Asked four questions
- Many states objected to ITLOS jurisdiction



CONFIRMATION OF ITLOS ADVISORY JURISDICTION

- **Sub-regional Fisheries Commission Advisory Opinion 2015**
- Article 21, ITLOS Statute (Annex VI):

“The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters* specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”
- “All matters” must include something more than just “disputes” — it must include AOs
- “In terms of article 21 of the Statute, it is the ‘other agreement’ which confers such jurisdiction on the Tribunal. When the ‘other agreement’ confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to ‘all matters’ specifically provided for in the ‘other agreement’”
- Article 138 of the Rules of ITLOS 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.”

CONFIRMATION OF ITLOS ADVISORY JURISDICTION

- **Sub-regional Fisheries Commission Advisory Opinion 2015**
- ITLOS found that there were 3 pre-requisites to its advisory jurisdiction
 1. “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”;
 2. “the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above”; and
 3. “such an opinion may be given on ‘**a legal question**’”
- All 3 elements satisfied in *SRFC* Advisory Opinion
- Additional element of “discretionary power” – Tribunal has discretion to refuse to render an AO – request for an AO should not be refused except for compelling reasons

- 2024 ITLOS Advisory Opinion on Climate Change:
 - ITLOS noted that most participants in the current proceedings expressed the view that the Tribunal has jurisdiction to render the advisory opinion requested by the Commission.
- 2023 BBNJ Agreement specifically provided that the Conference of Parties may request an advisory opinion from ITLOS

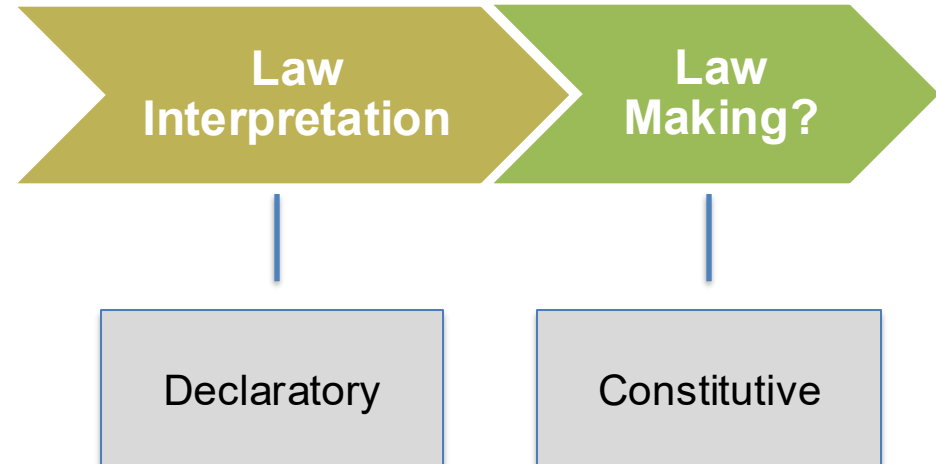
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Dispute Resolution



Law Development



**ITLOS Advisory
Opinions?**

THE FUNCTION OF ADVISORY OPINIONS IN THE UNCLOS DISPUTE SETTLEMENT 'COMPLEX'

- Presently, the function of ITLOS Advisory Opinions is **Law Development**
- **2015 SFRC Advisory Opinion:**
 - ITLOS noted that the object of the request by the SRFC is to seek guidance in respect of its own actions
 - By answering the questions it will assist the SRFC in the performance of its activities and contribute to the implementation of UNCLOS
- **2024 Climate Change Advisory Opinion**
 - An Advisory Opinion is given to the requesting entity, which considers it desirable in order to obtain enlightenment as to the course of action it should take.
 - The Tribunal further finds that the Request is compatible with its judicial functions, as it is called upon to clarify and provide guidance concerning the specific obligations of States Parties to the Convention by interpreting and applying the provisions of the Convention, in particular the provisions of Part XII, and other relevant rules of international law.

THE FUNCTION OF ADVISORY OPINIONS IN THE UNCLOS DISPUTE SETTLEMENT COMPLEX

- Is there a role for advisory opinions in the **settlement of disputes** on the interpretation and application of UNCLOS?
- **Mauritius / Maldives ITLOS Case:**
 - Recognized that advisory opinions of the ICJ cannot be considered legally binding but that an advisory opinion entails an authoritative statement of international law on the questions with which it deals and that judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ of the UN with competence in matters of international law.
 - It went on to state that the determinations made by the ICJ with respect to issues of the decolonization of Mauritius in the Chagos advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago.
- Advisory opinions could facilitate the settlement of disputes by providing authoritative weight on certain legal issues reducing the need for contentious dispute settlement proceedings

THE FUNCTION OF ADVISORY OPINIONS IN THE UNCLOS DISPUTE SETTLEMENT COMPLEX

- Could ITLOS' advisory jurisdiction on "legal questions" be used as disguised contentious proceedings to litigate disputes – this has been an increasing concern on the use of ICJ advisory jurisdiction
- **Judge Cot Separate Declaration in SRFC Advisory Opinion:**
 - *The dangers of abuse and manipulation, if the Tribunal does not provide a procedural framework by exercising its discretionary power, are evident. States could, through bilateral or multilateral agreement, seek to gain an advantage over third States and thereby place the Tribunal in an awkward situation*
- This possibility has been minimized - ITLOS has developed a consistent legal framework on the requirements for the submission of advisory opinion requests and has also discretionary power to refuse to accept advisory opinion requests

THE END
QUESTIONS?
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