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SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS

THREE GOALS OF STATES AS THEY SEEK ADVISORY OPINIONS FROM ITLOS

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In most international tribunals, states alone can submit requests for advisory opinions.[1] This is also true of requests to the International Tribunal for the Law of the Sea (ITLOS) sitting in plenary composition. The United Convention on the Law of the Sea (UNCLOS)[2] does not expressly confer advisory jurisdiction on ITLOS. In practice, the Tribunal's advisory jurisdiction is governed by Article 138 of its Rules of Procedure, under which international agreements can empower entities to request advisory opinions of the Tribunal. The process leading to the making of advisory requests to ITLOS includes the drafting of legal questions and is largely political.[3] In this process, sponsoring states have three goals: first, get requests before ITLOS; second, ensure that requests are not thrown out on grounds of jurisdiction or discretion; third, mobilize the constituency having stakes in the requests. This essay explores each of these goals.

Goal 1: Get Requests Before ITLOS

Even if states want to request an advisory opinion, an opinion may not actually be requested at all, much less in the form envisaged by its sponsors. This uncertainty is apparent from requests for advisory opinions before the International Court of Justice (ICJ). Article 96 of the United Nations Charter provides that advisory opinions can be requested by the General Assembly, the Security Council, and other organs and specialized agencies authorized by the Assembly.[4] It is the Assembly that has requested most advisory opinions,[5] and it is in the Assembly that states have had to undertake subsequent rounds of talks to agree on questions to ask by way of an advisory opinion. The emphasis is on coalition-building and political bargaining. The most recent example is Vanuatu's initiative for an advisory opinion on climate change and international law.[6] The substance on which Vanuatu's questions touched has largely remained the same since their inception but their exact formulation has changed, reflecting the

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[1] The exception is the African Court on Human and Peoples' Rights, where advisory opinions can be requested by non-governmental organizations. See Article 4 of the 1998 Protocol to the African Charter on Human and Peoples' Rights.

[2] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3. Articles 159(10) and 191 of UNCLOS confer advisory jurisdiction on ITLOS's Seabed Disputes Chamber.

[3] Alain Pellet, Kosovo—*The Questions Not Asked: Self-Determination, Secession, and Recognition*, *in* THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 268 (Marko Milanović & Michael Wood eds., 2015).

[4] Charter of the United Nations, June 26, 1945, 59 Stat. 1031.

[5] Out of twenty-seven advisory opinions, the General Assembly has requested seventeen.

[6] Margaretha Wewerinke-Singh, Jorge E. Viñuales & Julian Aguon, *The Role of Advocates in the Conception of Advisory Opinion Requests*, 117 AJIL UNBOUND 277 (2023).

need to build consensus by meeting the concerns of other states in order to secure their support in the General Assembly.

The contours of the political process just outlined are different for ITLOS advisory opinions because Article 138 of the Rules differs considerably from Article 96 of the Charter. The procedure to request advisory opinions under Article 96 is complex because it requires involving as many states in the General Assembly as possible. Conversely, Article 138 only requires, first, that there be an agreement and, second, that the agreement "specifically provides" for the submission of an advisory opinion to ITLOS. Satisfying the second requirement simply means that states must include a provision in an agreement empowering some entity to request an advisory opinion from ITLOS. The first requirement is more complex. An Article 138 agreement can be made by as few as two states, as is the case of the pending opinion requested by the Commission of Small Island States on Climate Change and International Law (COSIS) on climate change obligations under UNCLOS.[7] Only Antigua and Barbuda and Tuvalu signed the agreement establishing COSIS. Moreover, nothing in the text of Article 138 requires advisory requests to come from international organizations.

Satisfying the requirements of Article 138 is thus much easier than satisfying the requirements of Article 96 of the Charter. In cases where ITLOS's narrower jurisdiction overlaps with the ICJ's broader one, Article 138 allows states to request advisory opinions from ITLOS to circumvent the demanding political negotiations that are unavoidable in getting advisory requests before the ICJ. This aspect might explain why COSIS requested ITLOS for an advisory opinion even though, at the time of the request, it was well-known that Vanuatu's initiative to turn to the ICJ, which also concerned obligations under UNCLOS, would succeed. Given that it had few member states, COSIS would also have retained greater control over the request compared to Vanuatu which had to build consensus, and presumably make concessions, in the General Assembly. For UNCLOS-related questions, the complexity of securing advisory requests before the ICJ makes those requests, if not less viable, at least less appealing than the ones that can be made through the more easily accessible ITLOS procedure. The risk is forum shopping. Competition might ensue between the ICJ and ITLOS to attract advisory requests on matters over which both may have jurisdiction. The best-case scenario is that this competition serves to promote the ICJ and ITLOS as agencies for settling disputes and providing advice to states and international organizations.

Goal 2: Ensure That Requests Are Not Thrown Out on Grounds of Jurisdiction or Discretion

Various questions concerning advisory jurisdiction may arise before ITLOS. For instance, a question may concern whether an Article 138 agreement is "related to the purposes of [UNCLOS]." Like the need to show that an agreement "specifically provides" for the submission of an ITLOS advisory opinion, proving that it is "related to the purposes of [UNCLOS]" is not overly challenging. Where this is not evident from the subject-matter of the agreement, states can argue to this effect based on the broadly formulated purposes of UNCLOS. An example is the agreement which was the basis of the advisory opinion requested by the Sub-Regional Fisheries Commission (SRFC) on illegal, unreported, and unregulated fishing.[8] ITLOS found that the agreement giving it advisory jurisdiction, the Convention on Minimal Conditions of Access, related to the purposes of UNCLOS because its preamble stated that it concerned fisheries and aimed to implement UNCLOS.[9]

Careful drafting of advisory requests is important to satisfy the jurisdictional requirement that the questions are "legal." The ICJ has adopted a relaxed approach to this requirement, as shown by the *Kosovo* advisory opinion.

[7] *See* ITLOS, List of Cases.

[8] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries commission (SRFC), Advisory Opinion, 2015 ITLOS Rep. 4 (Apr. 2).

[9] *Id.*, paras. 62–63.

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In that case, the General Assembly asked: "[i]s the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[10] However, declarations of independence are not governed by international law.[11] The question as drafted was not "legal" as such. Even so, the ICJ reformulated the question to highlight two underlying legal issues: the identity of the makers of the declaration of independence and the meaning of "in accordance with international law."[12] The ICJ saved the request through reformulation. This relaxed approach downplays the need for states to focus on the "legal" requirement in negotiating the formulation of questions. ITLOS is likely to follow the ICJ's approach, although the need for negotiation would be even more limited since Article 138 envisages that very few states could be involved in making an advisory request. States should at least refer generally to international law in their questions, as COSIS did in its advisory request,[13] to ensure that those questions satisfy the "legal" requirement.

ITLOS and the ICJ have been very reluctant to exercise their discretion not to render advisory opinions. A problem in the *COSIS* opinion could concern ITLOS's discretion not to answer the questions as formulated on the ground that the answers may interfere with ongoing political processes. The argument is that ITLOS would make determinations *de lege ferenda* that are properly the province of states. However, the likelihood of ITLOS declining to render the opinion requested remains low.[14] In the *SRFC* opinion, ITLOS disposed of such an argument simply by stating that "it does not take a position on issues beyond the scope of its judicial functions."[15] This statement is a superficial "trust me, I know what I am doing" argument, but it is an approach that ITLOS will likely repeat in the *COSIS* opinion.

More serious problems of discretion would arise if states take advantage of the lax requirements under Article 138 and use an Article 138 agreement in an abusive manner.[16] For example, states could easily make advisory requests to ITLOS that in reality concern pending interstate disputes in relation to which a state has not accepted binding third-party settlement. The *Eastern Carelia* doctrine requires ITLOS, and the ICJ, not to render advisory opinions relating to such disputes because to do so would circumvent the principle of consent.[17] This possibility is not so far-fetched. In *Chagos Marine Protected Area*, the Annex VII arbitral tribunal found that it lacked jurisdiction to decide whether Mauritius or the United Kingdom (UK) was the "coastal state" in respect of Chagos under Article 56 of UNCLOS, as deciding on that issue would have determined which state had sovereignty over Chagos. Mauritius eventually requested an advisory opinion from the ICJ,[18] but it could equally have asked ITLOS, for instance, to set out the conditions for an entity to qualify as a "coastal State" under UNCLOS. The use of the advisory procedure where disputes are involved is even more likely if an international agreement empowers individual states to request advisory opinions of ITLOS. If so, any dispute could come to ITLOS disguised as an advisory opinion regardless of the relevant states' consent.

[10] GA Res. 63/3 (Oct. 8, 2008).

[11] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2019 ICJ Rep. 95, para. 5 (Feb. 25) (sep. op., Yusuf, J.).

[12] *Id.*, paras. 52–56.

[13] Benoit Mayer, *International Advisory Proceedings on Climate Change*, 44 MICH. J. INT'L L. 41, 91 (2023).

[14] *Id.* at 94–95.

[15] SRFC Opinion, *supra* note 8, para. 74.

[16] Yoshifumi Tanaka, *The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility*, 32 REV. EUR. COMP. & INT'L ENVTL. L. 206, 210–11 (2023).

[17] Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (Ser. B) No. 5, 28–29 (July 23).

[18] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95 (Feb. 25).

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The underlying idea is that advisory opinions are unsuitable for use by individual states because they should be requested only to obtain answers to questions of common interest.[19] On this view, advisory requests by international organizations established only by two states would raise a similar problem. This problem is unlikely to arise in the *COSIS* opinion as anthropogenic climate change *is* a question of common interest. Future advisory requests may not be as clear-cut in this regard, and in those cases the formulation of questions may tip the scales for or against giving an opinion. If individual states were to ask questions on matters that are genuinely of common interest, there is a plausible argument that ITLOS should provide answers in the interest of states and other entities. These would include questions of environmental law and global commons, such as those in the *SRFC* opinion.

Conversely, if a state asked questions on matters that are not of common interest, the argument for not exercising advisory jurisdiction is stronger. The questions asked of the ICJ in the *Chagos* and *Wall* advisory request may well fall in this category, because they were framed in the language of common interest but with the likely aim to bring bilateral disputes before the ICJ. This is also the case for the pending ICJ advisory opinion on the legal consequences of the occupation, settlement, and annexation by Israel of the Palestinian territory.[20] This request touches on a bilateral dispute between Israel and Palestine, but it is framed in terms of self-determination. Possibly, this framing is a way for the sponsors to capitalize on the ICJ's decision, in *Chagos*, to render an advisory opinion framed in terms of self-determination even though there were strong indications that the underlying request aimed to bring before the Court a bilateral dispute without the UK's consent. It would be simplistic to think that, where the questions as formulated refer to issues of common interest, they necessarily concern matters of common interest. This approach would artificially separate advisory requests from the context from which they originate. That context may indicate, sometimes strongly, whether advisory requests really aim to obtain advice on matters of common interest. In *Chagos*, the context could have indicated that the request did not concern matters of common interest, at least not entirely, as Judge Donoghue wrote in her dissenting opinion.[21]

Goal 3: Mobilize the Relevant Constituency

Advisory requests can mobilize entities that have a stake in the relevant issues and, by doing so, foster political change. This aim can underlie contentious cases where "smaller" powers sue "bigger" ones to promote compliance with international law.[22] In such cases, legal argument can mobilize compliance partners, which can put pressure from outside the courtroom on respondent states to comply.[23] Legal argument can most readily achieve this effect where applicants frame disputes as concerning community, not individual, interests and as having a legal, rather than political, character.[24] Use of legal argument to frame questions and foster political change can apply just as well to advisory proceedings. Some questions referred for advisory opinions are less multilateral than

[19] Requests from individual states are possible before the Inter-American and African human rights courts. In that context no problems of discretion arise as such requests are expressly allowed under the respective constitutive treaties.

[20] *See* Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem.

[21] Whether disputes are "bilateral" also links with issues of structural bias and international law's colonial origins, thus their classification as such is not necessarily clear-cut. *See* Victor Kattan, *The* Chagos *Advisory Opinion and the Law of Self-Determination*, 10 Asian J. Int'l L. 12 (2020).

[22] Benedict Kingsbury, *International Courts: Uneven Judicialisation in Global Order*, *in* The Cambridge Companion to International Law 217–218 (James Crawford & Martti Koskenniemi eds., 2012).

[23] Douglas Guilfoyle, *Litigation as Statecraft: Small States and the Law of the Sea*, Brit. Y.B. Int'l L. 1, 16–17 (advance access).

[24] *Id.* at 20.

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others, which may limit the potential of certain proceedings to mobilize the relevant constituency. However, even in *Chagos*-like situations, the sponsors of advisory requests aim to multilateralize non-multilateral questions by attaching them to matters of common interest. This is the case of the pending advisory request on Palestine. While this request touches upon a bilateral dispute, its sponsors have sought to multilateralize it by framing it in terms of self-determination and, therefore, of obligations *erga omnes* of interest to all states.[25]

Certain questions are genuinely multilateral, such as those in the *Nuclear Weapons* opinion.[26] In such cases, the political change that sponsoring states aim to foster is less about promoting compliance and more about developing, in a certain direction, international or domestic law concerning the matters raised in the requests. To achieve this goal, questions must be drafted to speak to the constituency capable of bringing about the desired political change. This requires framing questions precisely enough for answers to be useful. The COSIS and Vanuatu requests are meant to speak to states, as the questions specifically ask ITLOS and the ICJ to set out the obligations of states concerning climate change. Non-governmental organizations and civil society may also be mobilized to create change. Awareness that the relevant constituency goes beyond states emerges from Vanuatu's request, as suggested by its reference to harm caused to "[p]eoples and individuals of the present and future generations" and the citation, in its *chapeau*, to the main human rights treaties adopted within the UN framework. These references can extend the reach of the ICJ's opinion beyond states. The opinion can provide an argumentative framework from which to borrow when engaging in climate discourse. Climate advocates could borrow from the ICJ's opinion to influence policymakers in international fora, such as the Paris Agreement's Conference of Parties. Advocates could also use the language of the ICJ's opinion to lobby national lawmakers to pass environmental legislation. National lawmakers themselves could use that language in parliamentary debates and political rhetoric.

Climate advocates and other interested parties will be able to use the argumentative framework of the ICJ's opinion, depending of course on the content of that opinion. It is not a foregone conclusion that the ICJ will provide a useful framework to achieve the political change desired by the request's proponents. Although the questions in the advisory request aim to involve a constituency of actors broader than states, they are framed at a high level of generality. While the generality of the questions is not a reason for declining to render an advisory opinion, it can reduce the usefulness of the answers.

Conclusion

States play a major role in the making of advisory requests. In fulfilling that role, they pursue three aims: getting a request to the judicial body concerned; ensuring that all jurisdictional and admissibility requirements are satisfied; and speaking to the relevant constituency. Despite being center-stage, states are not the only entities having a key function in making advisory requests. Civil society and non-governmental organizations are just as important, if not sometimes even more so. For better or for worse, statutory limitations mean that non-state entities cannot avoid engaging states to ensure that advisory requests are made. It would require changing the legal framework of advisory opinions to prescind from states but, at the moment, that seems wishful thinking more than a real prospect.

[25] *See* Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, *supra* note 20.

[26] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8).

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