Understanding the Advisory Jurisdiction of the International Tribunal for the Law of the Sea

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> an opportunity has been missed. The Tribunal has taken a remarkable action by affirming its advisory jurisdiction on the basis of unpersuasive reasoning. Yet it could have demonstrated imagination and established a coherent system guaranteeing the rights of members of the international community in judicial proceedings.[1]

The advisory jurisdiction of the Tribunal is a potential avenue that practitioners (including those working for the Authority and other international organizations) may wish to consider when advising clients. In doing so, they need to be able to understand the scope of the Tribunal's jurisdiction to give advisory opinions, the limitations thereon, and applicable procedures.

The Tribunal has two distinct advisory jurisdictions: first, the advisory jurisdiction of the Tribunal's Seabed Disputes Chamber, which is expressly provided for in the Convention; and second, the advisory jurisdiction of the full Tribunal, which, it has been said, "was essentially created out of the blue by the Tribunal itself through the introduction of Article 138 of the Rules, 15 years after the signing ceremony in Montego Bay."[2] In considering the issues from the point of view of the practitioner, I shall focus on the latter, that is on advisory opinions which may be given by the full Tribunal, under article 21 of its Statute combined with other agreements.

The two Advisory Opinions given so far by the Tribunal relate in turn to each of these two distinct heads of jurisdiction: *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (*Request for Advisory Opinion submitted to the Seabed Disputes Chamber*),[3]

1 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, Declaration of Judge Cot, ITLOS Reports 2015*, p. 4, at p. 75, para. 13.

2 T. Ruys & A. Soete, "'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea", 29 *Leiden Journal of International Law* 1 (2016) pp. 155–176, at p. 173.

3 *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 (hereafter "*Responsibilities and obligations of States Opinion*").

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and *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*).[4] They offer only limited guidance as regards the advisory jurisdiction of the full Tribunal.

The Secretary-General of the United Nations has written, of advisory proceedings in general, that they "carry great weight and moral authority, often serving as an instrument of preventive diplomacy and contributing to the clarification of the state of international law."[5]

Advisory opinions, as such, have no binding force, though they may be binding under a separate agreement. But in any event, they carry considerable authority; they most certainly have legal effects. Advisory opinions undoubtedly have the potential to contribute to the rule of law. Their role in the settlement of disputes may be indirect,[6] yet by clarifying the law they promote legal certainty, an important aspect of the rule of law.

There remain real concerns about how appropriate advisory proceedings may be in some circumstances. Distinguished authors have referred to the "current health"[7] or "uses and abuses"[8] of advisory opinions. The report of the 1943/44 Informal Inter-Allied Committee that considered the establishment of the ICJ (the London Committee) makes interesting reading.[9] Some members of the Committee:

4 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 (hereafter "*SRFC Opinion*").

5 "Strengthening and coordinating United Nations rule of law activities" Report of the Secretary-General, 20 August 2010, UN Doc. A/65/318, para. 25.

6 As the ICJ has said, "[t]he purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion", *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 236, para. 15.

7 R. Higgins, "A Comment on the Current Health of Advisory Proceedings", in V. Lowe & M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), pp. 567–581, reprinted in R. Higgins, *Themes and Theories. Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009), pp. 1043–1055.

8 F. Berman, "The Uses and Abuses of Advisory Opinions", in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), pp. 809–828. See also A. Aust, "Advisory Opinions", 1 *Journal of International Dispute Settlement* (2010), pp. 123–151.

9 Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, February 10, 1944, 39 *AJIL* 1 (1945) Supplement, pp. 1–42.

> were inclined to think at first that the Court's jurisdiction to give advisory opinions was anomalous and ought to be abolished, mainly on the ground that it was incompatible with the true function of a court of law, which was to hear and decide disputes. It was urged that the existence of this jurisdiction tended to encourage the use of the Court as an instrument for settling issues which were essentially of a political rather than of a legal character and that this was undesirable. Attention was drawn to instances of this which had occurred in the past. Subsidiary objections were that the existence of this jurisdiction might promote a tendency to avoid the final settlement of disputes by seeking opinions, and might lead to general pronouncements of law by the Court not (or not sufficiently) related to a particular issue or set of facts.[10]

However, the Committee also saw "no objection to allowing two or more States, acting in concert, to apply direct to the Court for an advisory opinion"[11] and stated:

> [w]e are also agreed that, provided the necessary safeguards can be instituted, there would, for the reasons given in paragraph 68, be considerable advantage in permitting references on the part of two or more States acting in concert. Applications by an individual State ex parte could not be permitted, for, given the authoritative nature of the Court's pronouncements, ex parte applications would afford a means whereby the State concerned could indirectly impose a species of compulsory jurisdiction on the rest of the world. In addition, the Court must have an agreed basis of fact on which to give its opinion.[12]

The procedure for advisory proceedings raises serious questions. On one view, the fact that their purpose is to advise, not to decide a dispute, and the frequent absence of disputed facts, mean that the court or tribunal is able to be more ambitious in its abstract statements of the law, which might be less appropriate in a contentious case; yet that is not the real purpose of advisory opinions. Another view is that the absence of a dispute rooted in tested facts, and the absence of genuine adversarial pleadings, reduces the ability of the court or tribunal to give a well-considered and focused view of the law. This can to some extent be mitigated through procedural arrangements, as was

10 *Ibid.*, p. 20, para 65.

11 *Ibid.*, p. 22, para 71.

12 *Ibid.*, p. 23, para 74. This suggestion was not accepted at San Francisco.

done in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.[13]

Requests for advisory opinions often seem abstract; the court or tribunal does not have the benefit of seeing a legal question through the prism of concrete facts. Or, conversely, in some cases where there are real facts before the Tribunal, the advisory procedure may not allow their proper consideration, or be appropriate for addressing any underlying dispute. Then there is the inappropriateness, to put it no higher, of addressing a dispute between States without each party's consent. At the very least, these matters require careful attention to the procedure in advisory proceedings, and a readiness to tailor it to the particular circumstances of the case. For example, there is the almost random order of presentation at the oral hearing, dictated by the alphabet, often the French alphabet. In the *Responsibilities and obligations of States* case this meant that the main protagonists came way down the batting order.

There is, unfortunately, not much guidance on the Tribunal's advisory jurisdiction. There are the provisions of the Convention: articles 159, paragraph 10, 191 and, it now appears, Annex VI, article 21, which reads: "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters ("*toutes les fois que cela*" in French) specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

Article 138 of the Rules of the Tribunal provides as follows:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
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.
3. The Tribunal shall apply mutatis mutandis articles 130 to 137.[14]

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13 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403. In *Kosovo* there were two rounds of written pleadings, and the main protagonists – Serbia and Kosovo – addressed the Court at the outset of the oral hearing, and were given significantly more speaking time.

14 Judge Cot seemed to regard the adoption of this rule, and the absence of objection thereto by States, as conclusive for the jurisdiction of the Tribunal to give advisory opinions (*Declaration of Judge Cot, ITLOS Reports 2015*, p. 73, para. 4). That rather overlooks diplomatic and legal realities. States may well not react to such a rule in the abstract, on the

The reasons for including article 138 in the Rules adopted in 1997 are unknown,[15] and its legal basis was unspecified. It might simply have been that the judges wanted to expand the work of the Tribunal at a time when there seemed little immediate prospect of contentious cases, or even just to make the Tribunal more competitive with the ICJ, which had a relatively thriving advisory practice.[16]

Regard may be had, within limits, to the practice of other international courts and tribunals. But caution is required. Each court and tribunal and its advisory jurisdiction (if any) is distinct, with its own context, characteristics and statutory provisions. Even the Tribunal's Seabed Disputes Chamber and the full Tribunal are very different. It cannot simply be assumed that the case-law and experience of, say, the ICJ can be transposed to the Tribunal.

There are also extensive writings on advisory proceedings, though again this mostly concerns courts other than the Tribunal and needs to be treated with prudence.

The full Tribunal's power to give advisory opinions remains controversial.[17] Faced with the Tribunal's *SRFC Opinion*, "it is difficult to suppress a feeling of unease"[18] and it is hard not to share the view that the Advisory Opinion, and particularly its paragraph 56, is "not fully convincing".[19]

The issue eventually turned on the interpretation of article 21 of the Statute. Paragraph 56 of the Advisory Opinion reads:

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assumption that they can question its validity if and when it is sought to be applied in practice.

15 There is an almost complete lack of transparency in the adoption of the Rules of the Tribunal, which may be regretted. The same is true of the Rules of the ICJ (by contrast with the Rules of the PCIJ).

16 As was hinted by Judge Wolfrum at a conference in 2010: R. Wolfrum, "Final Remarks and Conclusions" in R. Wolfrum & I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2013), p. 445.

17 Even within the EU: In Case C-73/14, the CJEU (Grand Chamber) noted that the neutral position expressed in the European Commission's Written Statement to the Tribunal concerning the issue of the Tribunal's jurisdiction to give the Advisory Opinion sought in Case No. 21 "was dictated by its concern to take into account, in the spirit of sincere co-operation, the divergent views on that issue expressed by the Member States within the Council." Judgment of Grand Chamber of 6 October 2015 – *Council of the European Union* v. *European Commission*, para. 88.

18 T Ruys & A.Soete, *supra* at note 2, at p. 162.

19 M. Lando, "The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*", 29 *Leiden Journal of International Law* 2 (2016), pp. 441–461, at p. 442.

> The words all "matters" ("toutes les fois que cela" in French) 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".

It is difficult not to agree with Judge Cot's view of the weakness of the Tribunal's "convoluted reasoning".[20] The Tribunal's affirmation of its advisory jurisdiction has been described as "regrettably succinct".[21] Nevertheless, on jurisdiction the Opinion was unanimous, and it would be a brave advocate who sought to persuade the Tribunal to change its mind.

The Tribunal offered little guidance on the circumstances in which it would be prepared to assert a jurisdiction to give advisory opinions, though it was encouraged to do so by many of those participating in the proceedings. It said:

> 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 21 and the "other agreement" conferring jurisdiction on the Tribunal are interconnected

20 *Declaration of Judge Cot, ITLOS Reports 2015*, p. 73, para. 2. As Judge Cot explained at para. 3: "The Tribunal considers its advisory jurisdiction to be founded on the combined provisions of an international agreement, the MCA Convention, and article 21 of its Statute. In my view this interpretation is misguided, as it is contrary to the rules codified in the 1969 Vienna Convention on the Law of Treaties. It presupposes that there is a plain meaning which can be ascribed to the article and that the term 'matters' is more precise than it actually is. Quite a number of States participating in the proceedings skilfully advocated an opposite and equally plausible interpretation. The ambiguity of the provision is blindingly obvious. Reference should have been made to the *travaux préparatoires* for the Convention, which in no way confirm the interpretation adopted by the Tribunal. I would add that that interpretation does not allow the different language versions to be reconciled. The French version does not refer to 'matters' and does not translate that term by '*matières*', which would have been the case had the Convention drafters intended to confer upon the term the special meaning encompassing a reference to advisory jurisdiction." However, Judge Cot's own reasons for accepting the Tribunal's jurisdiction are if anything even less convincing (*Declaration of Judge Cot, ITLOS Reports 2015*, p. 73, para. 4).

21 T. Ruys & A. Soete, *supra* at note 2, p. 173.

> and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.[22]

Yet it is important for practitioners to be able to understand the scope of and "prerequisites" for the jurisdiction of the full Tribunal referred to in article 138. The Tribunal has only set out these prerequisites in the most formal terms, in a single paragraph (para. 60) of its 2015 Advisory Opinion:

> These prerequisites are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on "a legal question".

It would have been helpful if in its Opinion the Tribunal had given more explanation of these prerequisites and the limits of its advisory jurisdiction. These matters were discussed extensively in many of the written and oral pleadings in the case. Judge Cot's words of caution are well founded:

> 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 position.[23]

And then there is the question of discretion. "The Tribunal *may* give an advisory opinion", as article 138 of the Rules says. In the 2014 Advisory Opinion, the Tribunal "[took] refuge behind the jurisprudence of the International Court of Justice and [stated] that it is well settled that a request for an advisory opinion should not in principle be refused except for 'compelling reasons' (para. 71)."[24] Yet it is not obvious that the approach of the ICJ would be appropriate, given the great differences between the ICJ and the Tribunal.[25]

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22 *SRFC Opinion*, para. 58.

23 *Declaration of Judge Cot, ITLOS Reports 2015*, p. 74, para. 9.

24 *Ibid.*, para. 5.

25 *Ibid.*, para. 7: "The Tribunal's position in advisory proceedings is very different from that of the Court. The advisory procedure in the International Court of Justice is governed by a tight framework. An opinion may be requested only by the General Assembly or the

I have tried to highlight the potential importance of the Tribunal's advisory jurisdiction, and some possible difficulties. As you may have gathered, and as I have indicated in the *Festschrift Wolfrum*,[26] I am in two minds about the value of advisory opinions. At the very least, they need to be approached with "prudence and caution".

Security Council or with their authorization. The request is the subject of a preliminary discussion within a body in which all interested parties are represented. Each State concerned is thus involved in drafting the questions asked."

26 M. Wood, "Advisory Jurisdiction: Lessons from Recent Practice" in Hestermeier et al. (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (Brill, 2012), pp. 1833–1849.