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PUSHING THE LIMITS OF THE JUDICIAL FUNCTION: ADVISORY OPINIONS AS INSTRUMENTS OF DISPUTE SETTLEMENT

This panel was convened at 12:00 p.m. on Thursday, March 30, 2023, by Freya Baetens, of the University of Oxford, who introduced the panelists: Catherine Amirfar of Debevoise & Plimpton LLP; Laurence Boisson de Chazournes of the University of Geneva; and Peter Tzeng of Foley Hoag LLP.

Introductory Remarks by Freya Baetens*

After a time of relative dormancy from the 1980s to the 2000s, advisory opinions have gained center stage in states' litigation strategies starting with the 2004 *Wall* opinion. This trend has become more prominent with the request, in 2017, of an advisory opinion of the International Court of Justice (ICJ or Court) on the decolonization of Chagos.

The increasingly common fragmentation of jurisdictional clauses in treaties and the need to bring together multiple aspect of broader interstate disputes have made requests for advisory opinions appealing to those states that have been wishing to raise certain questions of international law in judicial fora. This phenomenon can be seen as a reaction to what has been called "disaggregation of disputes," which denotes the separation of broader disputes into smaller ones for the purpose of bringing such smaller disputes before different international tribunals.

Our panel focused on the uses, actual and potential, of advisory jurisdiction as an instrument to foster the settlement of international disputes. The speakers discussed the most recent developments concerning advisory opinions in matters of climate change, but also covered fundamental questions such as the effects of advisory opinions, their link with contentious proceedings, and whether they can be valuable instruments to foster dispute settlement. Five questions in particular were discussed.

First, can advisory opinions be valuable instruments to promote dispute settlement? Is there anything in the advisory procedure which prevents them from being instruments of dispute settlement (e.g., *Eastern Carelia* doctrine)? Beyond the realm of "can," "should" advisory opinions be instruments of dispute settlement (as they were, for example, under the Covenant of the League of Nations)? What would the benefits and drawbacks be?

Second, what, if any, is the link with contentious proceedings? For example, has the 2021 judgment of the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS or Tribunal) in *Mauritius/Maldives* changed how we assess the level of bindingness of advisory opinions? If so, how? In light of the literature arguing for advisory jurisdiction as referral jurisdiction: is there any scope for advisory opinions to become similar to a preliminary reference mechanism to seek answers to be used in deciding later contentious cases?

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Third, considering the recent developments concerning advisory opinions on climate change, could it be seen as either problematic or adding value that requests for advisory opinions concerning similar topics are submitted to different institutions at the same time?

Fourth, to what extent, could or should these institutions consult each other before issuing a response? Is it even possible for these institutions to consult one another, based on their statutory and regulatory framework?

Fifth, how could compliance with advisory opinions be improved or promoted? Is there even a question of compliance, given that advisory opinions are not binding in principle? Moreover, a lot depends on whether the opinions make determinations which can be implemented.

Our speakers were: Laurence Boisson de Chazournes, Peter Tzeng, and Catherine Amirfar.

The Advisory Function of the International Court of Justice: Various Facets

*By Laurence Boisson de Chazournes**

In this short presentation, I will address three topics, i.e., the links between advisory opinions and interstate disputes, the multiplicity of requests for an advisory opinion related to a similar topic, and compliance with advisory opinions.

I. Advisory Opinions and Interstate Disputes

Behind a large number of requests for an advisory opinion to the International Court of Justice (ICJ or Court), there has often been an underlying contentious dispute between two or more states. Advisory opinions can contribute to the settlement of these disputes. It is interesting to note that the resolution of bilateral disputes was foreseen by the negotiators in the Statute and Rules of the Court, for example with the nomination of judges *ad hoc*. That said, it is important to not mix and misunderstand the scope and contours of the judicial function of the Court. As Georges Abi-Saab noted, the Court in its advisory opinion states what the law is. At the very least, advisory opinions may settle any disagreements states or international organizations may have on the application or interpretation of international law. That said, states retain the power to resolve the disagreement diplomatically, outside the realm of legality.

The 2019 *Chagos* advisory opinion offers a good example. The Court did not deal with the bilateral dispute between the United Kingdom (UK) and Mauritius *per se*. However, after the adoption by the United Nations General Assembly of a resolution endorsing the advisory opinion of the Court and asking the UK to implement the principle of self-determination, and after the judgment on preliminary objections of the International Tribunal for the Law of the Sea (ITLOS) Special Chamber in the *Mauritius/Maldives* dispute, both countries started negotiations in November 2022 to settle the dispute.

There are links between advisory proceedings and contentious proceedings in the sense that advisory opinions can have a persuasive effect on subsequent contentious proceedings. In some cases, the legal reasoning and conclusions reached in an advisory opinion may be used as a precedent or guide in later contentious cases. However, advisory opinions are not binding on the parties or the court, and they do not create a legal obligation for the parties to comply with the opinion. In this regard, the above-mentioned ITLOS Special Chamber's 2021 judgment in the *Mauritius/Maldives* dispute considered it necessary to draw a distinction between the "binding character"

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and the "authoritative nature" of an advisory opinion of the ICJ.[1] An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. Nonetheless, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigor and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law."[2] The Special Chamber, therefore, held that "determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding."[3] In sum, the Court can influence and shape the behavior and conduct of the states by declaring what the law is. It can also help in dispelling any doubt that states may have regarding their obligations.

With respect to the impacts and effects of an advisory opinion, it may be important to take into consideration the fundamental nature of the principles at stake in advisory opinions. For instance, in the *Chagos* advisory opinion, the Court held that "since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right."[4] It seems that it would be difficult for the ITLOS Special Chamber not to have taken into account the *erga omnes* effect of this principle.

Through declaring or clarifying international law, advisory opinions set legal benchmarks that should be respected. For instance, in the *Wall* advisory opinion, the ICJ clarified that:

> the "wall" in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel ("fence") or by the Secretary-General ("barrier"), are no more accurate if understood in the physical sense.[5]

The Court held that "the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality."[6] Moreover, the Court also noted, *inter alia*, that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem."[7]

That said, there are also certain drawbacks or risks of the advisory function. One of the drawbacks is the very lack of binding nature of the advisory opinions. This means that a state would have to commit itself voluntarily to comply with the opinion. This is in stark contrast with the contentious proceedings, which by their very nature are obligatory and the judgment is binding on the states.

II. Multiple Advisory Opinions on Similar Subject Matters

In recent times, there have been multiple advisory opinion requests before multiple fora on the urgent issues faced by the insufficient protection of the climate system. Requests for advisory opinions on a similar topic to different international courts and tribunals at the same time could create some potential problems, such as risks of conflicting opinions or interpretations of the law, which

[1] Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Merits, Judgment, 2020–2021 ITLOS Rep. 17, para. 203 (Jan. 28).

[2] *Id.*

[3] *Id.*, para. 205.

[4] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, para. 180 (Feb. 25).

[5] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, para. 67 (July 9).

[6] *Id.*, para. 162.

[7] *Id.*, para. 159.

could create confusion and undermine the credibility and authority of international courts and tribunals. Additionally, conflicting opinions on the same issue could complicate efforts to find an effective solution to addressing a problem. Nevertheless, this strategy could also add value in several ways. First, it could increase the visibility of the issue because several courts and tribunals would be deliberating on the issue. Second, it could encourage a more comprehensive analysis of the legal issues at stake, as different perspectives and expertise of courts would be considered.

One important aspect here is that different courts and tribunals will be deciding the legal questions based on different bodies of law but also on similar ones. For ITLOS, it will be the United Nations Convention on the Law of the Sea[8] and general international law. In the ICJ context, the General Assembly requested the Court to deliver an advisory opinion on the questions by taking into account the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, or the Paris Agreement, among other instruments, as well as general international law. For the Inter-American Court of Human Rights, it will be the Inter-American Convention on Human Rights and aspects of general international law.

I think that the plurality of dispute settlement mechanisms is part of the fabric of the international system. Plurality is a choice. As said, there are currently three pending requests related to climate change. There might be room for judicial dialogue and cross-fertilization as there will be some overlap among the answers to be given to the questions. Moreover, there will be room for informal consultations between judges of different international courts and tribunals.

III. Advisory Opinions and Compliance

Advisory opinions can have significant authority and may influence the behavior of states and other actors. It depends a lot on the questions that are asked to international courts and tribunals. To improve compliance with advisory opinions, the opinion needs to be well-reasoned and persuasive. Advisory opinions can help to raise awareness of issues and promote international cooperation and dialogue on important issues.

In addition, there are a few examples from the United Nations where specific organs were established to contribute toward compliance with ICJ advisory opinions. In the *Western Sahara* advisory opinion, the ICJ found that the people of the territory had a right to self-determination.[9] Following the opinion, the UN General Assembly established the United Nations Mission for the Referendum in Western Sahara (MINURSO) to organize a referendum on the future status of the territory. Similarly, in the example of *Wall* advisory opinion, the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD), a subsidiary organ of the United Nations General Assembly was established. It is mandated to serve as a "record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the Israeli West Bank barrier by Israel in the Palestinian territories, including in and around East Jerusalem." General Assembly Resolution ES-10/17, which established UNRoD, noted the conclusions made by the Court in its *Wall* advisory opinion. The setting up of these organs helps stresses the need for compliance and provides the means for recording problems arising from non-compliance with advisory opinions.

[8] 1833 UNTS 3.

[9] Western Sahara, Advisory Opinion, 1975 ICJ Rep. 12 (Oct. 16).

Advisory Opinions on Disputes and the Principle of Consent

*By Peter Tzeng**

The International Court of Justice (ICJ) has repeatedly held that it should not give an advisory opinion if doing so "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[1] This holding—branded "the *Eastern Carelia* doctrine" by scholars—has never prevented the Court from rendering an advisory opinion. But the doctrine remains part and parcel of the Court's advisory jurisprudence.

What if this doctrine were to be abandoned? What if the Court were to welcome requests for advisory opinions directly on disputes pending between states, such that giving the opinions would have the effect of circumventing the principle of consent? This hypothetical is not as extreme as it might at first seem: the Covenant of the League of Nations expressly authorized the Court's predecessor to "give an advisory opinion upon any dispute or question."[2] In fact, the majority of the Permanent Court's advisory opinions were given on disputes pending between states.

Unlike the Covenant, however, the Charter of the United Nations authorizes the present Court to "give an advisory opinion on any legal question"[3]—the reference to "dispute" was removed. This fact, combined with the well-established principle of consent and the Court's repeated affirmations of the *Eastern Carelia* doctrine, might lead one to conclude that it is simply not appropriate for the Court to give an advisory opinion directly on a pending dispute. But putting aside these legal constraints, the hypothetical is still worth asking: What if the Court were to give advisory opinions directly on disputes pending between states in a manner that effectively circumvents the principle of consent? Would this be beneficial to the international legal order? Or would it be detrimental?

There would certainly be some benefits to abandoning the *Eastern Carelia* doctrine.[4] The large majority of international legal disputes pending between states today are not subject to a compulsory third-party dispute settlement mechanism, and often there is at least one party to the dispute that is not willing to consent to such a mechanism. Abandoning the doctrine would potentially allow such disputes to be submitted to the Court for an advisory opinion. And while the opinion would not be legally binding, the parties might nonetheless feel compelled to comply with it given the Court's authority. Indeed, many of the Permanent Court's advisory opinions relating to pending disputes between states were in fact complied with by the parties to the disputes.[5]

Furthermore, even if the parties do not feel compelled to comply, the advisory opinion could still provide authoritative legal guidance for the parties that might aid in their settlement negotiations.

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[1] Western Sahara, Advisory Opinion, 1975 ICJ Rep. 33 (Oct. 16); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, para. 47 (July 9); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, para. 85 (Feb. 25); *see also* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 ICJ Rep. 65, 72 (Mar. 30).

[2] Covenant of the League of Nations, Art. 14, June 18, 1919, 1 League of Nations Off. J. 3 (emphasis added).

[3] Charter of the United Nations, Art. 96, June 26, 1945.

[4] *See* Massimo Lando, *Advisory Opinions of the International Court of Justice in Respect of Disputes*, 61 Colum. J. Transnat'l L. 67, § IV.B (2023).

[5] Leland M. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AJIL 738, 750–54 (1938).

Take, for example, the *Polish Nationality* advisory opinion rendered by the Permanent Court.[6] Poland had not supported the decision by the Council of the League of Nations to request the advisory opinion,[7] and abstained from voting on the Council's resolution adopting the opinion after it was rendered.[8] But ultimately, Germany and Poland settled their differences by concluding a convention that effectively incorporated the Permanent Court's holding.[9]

The legal guidance provided by the Court in its advisory opinion could also have value going beyond the particular dispute at hand, particularly if the Court is opining on a multilateral treaty or a rule of customary international law applicable to many if not all members of the international community. There are many areas of international law that have not been the subject of judicial assessment, and could thus very much benefit from elucidation by the Court through advisory opinions.

All this said, abandoning the *Eastern Carelia* doctrine would not be without its dangers. Giving an advisory opinion directly on a pending dispute in a manner that effectively circumvents the principle of consent could provoke backlash. Recent years have witnessed backlash by states with respect to perceived expansive exercises of jurisdiction by international adjudicatory bodies in various fields, such as investor-state arbitration,[10] the Inter-American human rights system,[11] as well as international criminal law.[12] The same could occur with respect to the Court's advisory jurisdiction.

True, the *Polish Nationality* case shows that a non-consenting state might come around to accepting the opinion in substance. But the *Mosul* case, also before the Permanent Court, shows the opposite.[13] There, Turkey had opposed referring the matter to the Permanent Court,[14] voted against the Council's acceptance of the opinion after it was rendered,[15] and ultimately settled the underlying dispute with the United Kingdom and Iraq in a manner inconsistent with the Permanent Court's opinion.[16] Still, one might consider the risk of wide-scale backlash to be low, considering the historical high rate of compliance with the Permanent Court's advisory opinions relating to disputes. But the reality is that in nearly all those cases, the relevant states had consented, or at least assented, to the Permanent Court's exercise of its advisory jurisdiction.[17] In the few cases where not all parties consented or assented—such as the *Acquisition of Polish Nationality*, *Mosul*, and *Eastern Carelia* cases—the record of compliance is not so clear.

The risk of widespread backlash is perhaps moderated by the fact that advisory opinions of the Court are not so easily requested. Most have been requested by the General Assembly, which

[6] Acquisition of Polish Nationality, Advisory Opinion, 1923 PCIJ (ser. B) No. 7 (Sept. 15).

[7] Council of the League of Nations, Twenty-Fifth Session, Twelfth Meeting (Public) (July 7, 1923), 4 LEAGUE OF NATIONS OFF. J. 930, 934–35 (1923).

[8] Council of the League of Nations, Twenty-Sixth Session, Nineteenth Meeting (Public) (Sept. 27, 1923), 4 LEAGUE OF NATIONS OFF. J. 1332, 1334–44 (1923).

[9] *See* German-Polish Convention Concerning Questions of Option and Nationality, Art. 7, para. 1(1), Aug. 30, 1924, 32 LNTS 331.

[10] *See* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010).

[11] *See* Jorge Contesse, *The Rule of Advice in International Human Rights Law*, 115 AJIL 367, § IV.C.2 (2021).

[12] *See* Henry Lovat, *International Criminal Tribunal Backlash*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 60 (Kevin Heller et al. eds., 2020).

[13] Article 3, paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 PCIJ (ser. B) No. 12 (Nov. 21).

[14] Council of the League of Nations, Thirty-Fifth Session, Fourteenth Meeting (Public) (Sept. 19, 1925), 6 LEAGUE OF NATIONS OFF. J. 1377, 1381 (1925).

[15] Council of the League of Nations, Thirty-Seventh Session, Fourth Meeting (Public) (Dec. 8, 1925), 7 LEAGUE OF NATIONS OFF. J. 120, 128 (1926).

[16] *See* Treaty Between the United Kingdom and Iraq and Turkey Regarding the Settlement of the Frontier Between Turkey and Iraq, Art. 1, June 5, 1926, 64 LNTS 379.

[17] Goodrich, *supra* note 5, at 751.

requires a majority vote in favor of the request. Almost all other opinions have been requested by another principal organ or a specialized agency of the United Nations, again requiring a majority vote in one form or another. In short, the Court's advisory jurisdiction is primarily reserved only for the most popular legal questions—those that are able to obtain a majority vote in some UN body. This is not unreasonable: it makes sense for the Court to direct its attention towards those legal questions on which a relatively large segment of the international community wishes to have an advisory opinion. But in the context of disputes pending between states, does it make sense to allow only popular states, and not unpopular ones, to initiate advisory proceedings before the Court?

As long as the *Eastern Carelia* doctrine remains in force, all these considerations might remain hypothetical. The Court today cannot be any clearer in repeatedly declaring that it should not give an advisory opinion if doing so "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." But on the intriguing policy question of whether this doctrine should or should not be abandoned, the jury is still out.