

Advisory Jurisdiction of ICJ and ITLOS

WU Jilu

China Institute for Marine Affairs (CIMA)

9 March 2011, Manila

Existing International Judicial Institutions

- International bodies that can make final decisions: about 125
- Typical international judicial bodies: about 20

International Courts or Tribunals

- International Court of Justice (ICJ)
- International Tribunal for the Law of the Sea (ITLOS)
- ☆ Seabed Disputes Chamber

International Court of Justice (ICJ)

- UN Charter
 - ☆ Chapter XIV The International Court of Justice
- Statute of the International Court of Justice
 - ☆ A component of the Charter (A93)

The Charter of the United Nations

- Article 92:
 - ☆ The International Court of Justice shall be the principal judicial organ of the United Nations.

- Article 93:
 - ☆ All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

- Article 96:
 - ☆ *The General Assembly or the Security Council* may request the International Court of Justice to give an **advisory opinion** on any **legal** question.

☆ *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.

The Statute of the International Court of Justice

5 Chapters , 70 Articles

- Chapter I: Organization of the Court
- Chapter II: Competence of the Court
- Chapter III: Procedure
- Chapter IV: **Advisory opinions**
- Chapter V: Amendment
- The jurisdiction of the Court

☆ **Article 36:** The **jurisdiction** of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

☆ Legal disputes

- Interpretation of a treaty
- Any question of international law
- The existence of any fact which, if established, would constitute a breach of an international obligation
- The nature or extent of the reparation to be made for the breach of an international obligation

Advisory opinions

- 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. (Article 65)
- Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question. (Article 65)
- In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable. (Article 68)

ICJ advisory opinions

○ 1946 -2010 : 25

○ The category of the questions involved in the ICJ advisory opinions :

- (1) The matters of **procedure** of international organizations and the legal questions arising within the scope of their activities of international organizations;
- (2) **Routine** legal questions;
- (3) The **deliberations** on decisions of the United Nations Administrative Tribunal;
- (4) **Disputes** between member States of same organization or institution;
- (5) **Disputes** between member States of the international organizations.

Interpretation of the treaties

○ Can it interpret the Charter? **_Yes**

☆ International Court of Justice can interpret the treaties; the Court can interpret the UN Charter since the UN Charter is a multilateral treaty

○ Can it interpret the **United Nations Convention on Law of the Sea?**

Effect of the ICJ advisory opinions

- Only respond to the questions raised in the request for advisory opinions
- It is of no exact legal binding on the requester
- The Charter, the Statute of ICJ and the Rule have not expressly pointed out if the requester must comply with or assume the obligations of the advisory opinions.
- Failure of implementation of the provisions in the advisory opinions can not be identified as violations of international law
- ICJ has never claimed that the advisory opinion should be binding

International Tribunal on the Law of the Sea (ITLOS)

- UNCLOS, Part XV, Settlement of disputes
- UNCLOS, Annex VI, Statute of the International Tribunal for the Law of the Sea
- Rules of the International Tribunal for the Law of the Sea

Jurisdiction

☆ All disputes and applications submitted to it in accordance with the Convention. (A21, Statute)

• Exceptions and limitations provided in Section 3, Part XV.

☆ All matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. (A21, Statute)

Reference of disputes subject to other agreements

If all the parties to a treaty or convention already in force, and concerning the subject-matter covered by this Convention so agree, any dispute concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal. (A22, Statute)

Advisory jurisdiction of the Tribunal

○ UNCLOS: no provisions

○ Statute of the International Tribunal for the Law of the Sea : no provisions

○ Rules of the International Tribunal for the Law of the Sea: Article 138

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.

Seabed Disputes Chamber

○ Under Section 4 of the Statute.

○ Exercises the jurisdiction in accordance with the provisions in section 5, Part XI of the Convention.

○ Enjoys special status within the framework of the Convention and the Statute, and has a close relationship with exploration and exploitation of the "Area" as well as the International Seabed Authority in effective exercise of its functions.

Advisory jurisdiction of the Chamber

○ Article 191 of the Convention

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council (of the Seabed Authority) on legal questions arising within the scope of their activities.

○ Article 37 of the Statute

The Chamber shall be open to the States Parties, the Authority and the other entities referred to in section 5, Part XI (Convention).

○ Article 40 (2) of the Statute

In the exercise of its functions relating to advisory opinions, the Chamber ...

☆ Case No. 17: Responsibility of sponsoring States

Difference on the advisory jurisdiction between the Tribunal and the Chamber

○ Documents providing for the advisory jurisdiction

☆ Tribunal: the Rules

☆ Chamber: the Convention, Statute and the Rules

○ The advisory matters

☆ Tribunal: Legal Issues

☆ Chamber: matters within the scope of activities of the Assembly or the Council of the Authority

○ Whether the advisory opinions are to be given

☆ The Tribunal may give advisory opinions

☆ The Chamber shall... give advisory opinions

Conclusions and Questions

○ The advisory jurisdiction of the Seabed Disputes is specified in the Convention, Statute and its Rules, the advisory jurisdiction of Tribunal is not expressly mentioned in the Convention or the Statute. Some authors referred to articles 21 and 22 of the Statute. But can advisory function of the Tribunal be inferred? Or its legal basis should be explicit?

○ The advisory jurisdiction of the Tribunal is solely based on the article 138 of the Rules which is developed by the Tribunal itself. Can the Rules of the Tribunal, per se, be sufficient for the tribunal to perform advisory function?

what is the rationale for such an additional function?

Is article 138 of the Rules in line with the practice of PCIJ or ICJ?

Why should it be different?

How can it be different?

