Advisory Opinions and the Furtherance of the Common Interest of Mankind

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As early as the beginning of the 20th century, and later with the creation of the International Court of Justice (ICJ), a need was felt to allow international organizations to request advisory opinions, first of the Permanent Court of International Justice (PCIJ), and then of the ICJ. While the PCIJ Statute did not provide for advisory opinions until its inclusion in the 1929 revised Statute which came into force in 1936, there was nonetheless a practice of requesting opinions before that revision, premised on the Rules of Court.¹

Despite the initial hesitation of States in the PCIJ era, Article 96 of the UN Charter providing for advisory opinions met with no objection in principle at San Francisco.² The practice of requesting advisory opinions has demonstrated that the procedure has been put to good use, with organs of the League of Nations and then UN organs and specialized agencies having, on a number of occasions, had recourse to this faculty.

In the context of the International Court of Justice, the advisory function was conceived as a means of promoting respect for the law both within the UN as well as within the broader UN system.³ This has been

¹ The history is traced in S. M. SCHWEBEL “Was the Capacity to Request an Advisory Opinion Wider in the Permanent International Court of Justice than it is in the International Court of Justice?” LXII BYIL (1991), 77 at 78-81.
³ For a list of the bodies and organisations authorized to request advisory opinions, see Report of the International Court of Justice to the General Assembly, 1 August 1999–31 July 2000, available on the ICJ’s website: http://www.icj-cij.org/icjwww/igeneralinformation.htm
the case as illustrated by the varying requests which have been made not only by the General Assembly and on one occasion by the Security Council,4 but also by the specialized agencies, notably the World Health Organization and UNESCO.5 The vast majority of the advisory opinions have essentially dealt with issues of a constitutional nature; namely ones relating to the existence and the powers of an institution, the sharing of responsibilities among the organs of the international organization or the extent of the privileges and immunities granted to agents of an international organization.6 These are all important features of the advisory function, all the more so, given that the number of international organizations has dramatically increased and will continue in all likelihood to do so. The advisory opinions of the principal judicial organ of the United Nations constitute a body of norms which forms a point of reference for those institutions and their members. In sum, advisory opinions are important traditionally as they can be referred to for the identification of important aspects of the corpus juris

5 For a detailed list see below note 6. On this point, see, in this book, Dominicé, and Romano pp. 19-25.

applicable to international organizations. In light of the evolving complexity of international institutions, even within a single organization, and the multiplication of diverse instruments and types of actors which it entails, the utility of the advisory function should increase.7

Notwithstanding this "constitutional" role, advisory opinions can also play an important role in identifying the law on policy issues which are of interest to the international community (Part 1). A second issue to be dealt with relates to the changes which are taking place in the international decision-making process (Part 2). There too is an issue of complexification as actors of different standing increasingly look to the ICJ as a means of identifying the applicable principles and rules.

ISSUES OF GLOBAL PUBLIC POLICY AND THE REQUEST FOR AN ADVISORY OPINION

Resort to the Court as a Means of Promoting the Common Interest of Human Kind

There are indeed numerous areas where issues of global public policy8 are at stake. As noted by Jonathan Charney, "... the international community ... is increasingly interdependent. It faces an expanding need to develop norms to address global concerns, e.g., global environment problems, weapons of mass destruction, international drug trafficking, international terrorism and human rights abuses."9 The international community at large (which includes States, international organizations, non-governmental organizations and other non-State actors) is searching for agreed policy positions in these areas. In this context, it is all the more important to identify the legal principles which can or could ground such developments and thus promote the common interest of human kind.

Advisory opinions constitute one of the channels through which legal considerations may find their way into the international debate. In rendering these opinions, the Court contributes to the clarification of the applicable law and in so doing helps to prevent disputes from arising. This role is important at all levels, be it local, transnational or international.

9 J. CHARNEY, "International Lawmaking—article 38 of the ICJ Statute Reconsidered," op cit at 176.
As a matter of fact there is an increasing permeability between fora of action and litigation: issues of an international character tend increasingly to be brought before national jurisdictions,\textsuperscript{10} while domestic authorities and individuals see the pathway of the international scene as a means of promoting interests, be it before dispute settlement fora or in negotiating arenas. For example, the World Bank Inspection Panel provides an institutional bridge for partners of different standing by enabling individuals to bring claims that the Bank has not complied with its own operational policies and procedures, thereby broadening accountability of the organization.\textsuperscript{11}

At a time of increased interdependence and complexity in the management of public affairs, the advisory function of the International Court should play an important role for furthering the common interest of human kind. In fact, the legalization of international discourse is to be seen as a means to this end.\textsuperscript{12} It is perhaps the legal discourse being engaged in, and applied to, non-state actors which is the most striking. An example can be found in the increased submission by civil society of \textit{amicus} briefs to courts and tribunals as a means of having their opinions heard when legal proceedings are instituted.\textsuperscript{13}

The opinions given by the International Court of Justice following the requests of the World Health Organization and the General Assembly on the legality of resorting to nuclear weapons are examples of this type of function.\textsuperscript{14} The answers to these particular requests are means for promoting an understanding of the legal regime applicable to policy issues, in this case pertaining to international security. The Court went beyond


\textsuperscript{12} This legalization of international discourse can be found in a number of fields. Of the multiple examples which can be cited, one can note UK Foreign Minister Jack Straw's recent comments that "Setting common standards at a global level requires legislation. The UK is encouraging other governments to ratify ILO Convention 182 on the worst forms of child labour." Jack Straw 'Local Questions, Global Answers'—Foreign Secretary's Speech on Globalisation. Speech given at the Museum of Science and Industry, Manchester, Monday 10 September 2001, available at http://www.fco.gov.uk/text_only//news/speechtext.asp?5281

\textsuperscript{13} On amicus curiae, see, in this book, Chinkin/Mackenzie.

a typical, although important, casuist approach, in stating the ratio legis\textsuperscript{15} to be taken into consideration when considering an issue of security pertaining both to the *jus ad bellum* and the *jus in bello* as well as covered by other corpuses of norms of international law. Significantly, in this advisory opinion, the Court reminded States to pursue in "good faith their obligation to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects."\textsuperscript{16} The Court's approach more generally highlighted the need for an integrated approach to the international legal order, in highlighting the linkages to be established between different areas of the law. This is all the more important at a time when policy issues arise with a global character and are trans-sectoral by nature.

As a matter of fact, in other areas also, the rule of law is being used as a vehicle for addressing issues of global concern. Thus in his attempt to bring within the system of global governance all actors on the international level, the UN Secretary General Kofi Annan has described his Global Compact, (a code of conduct addressed to the private sector), in the following terms: "The Global Compact . . . utilizes the power of transparency and dialogue to identify and disseminate good practices based on universal principles. The Compact encompasses nine such principles, drawn from the Universal Declaration of Human Rights, the ILO's Fundamental Principles on Rights at Work and the Rio Principles on Environment and Development . . . And it asks companies to act on these principles in their own corporate domains. Thus, the Compact promotes good practices by corporations; it does not endorse companies."\textsuperscript{17}

There are many global policy issues under discussion where a persistent question is what legal norms and rules are to be applied to such issues. There is, in other words, a quest for a legal answer to public policy concerns. The United Nations as well as its specialized agencies confront such issues on a daily basis in the course of their activities. For example, there is the question of the successive financial and economic crises since the mid-1990s and the visible need to bring more equity, not to say humanity, to the running of such affairs, concerns some would say, which are aptly reflected in the "public" demonstrations which are increasingly taking place in the concerned States as well as at international meetings and conferences. The rule of law should have a role to play in this context, with respect to equity effects, or issues of transparency in the management of these crises. An articulation of the legal regime applicable to the management of financial crises, might be clarified were the


\textsuperscript{16} op cit, p. 267, para 105F.

\textsuperscript{17} Available at http://www.unglobalcompact.org/un/gc/unweb.nsf/content/whatisthis.htm
Bretton Woods institutions to bring a request before the International Court of Justice on the interpretation to be given to some of the fundamental principles of international law. This would be a way of appeasing the sometimes "uncivilly" expressed, but perhaps legitimate, concerns of the international community at large. It might also be seen as a way to increase the legitimacy of the intervention of the financial institutions.

The question of the humanitarian consequences stemming from the resort to economic sanctions is another policy issue of keen interest to the international community. The legal regime of sanctions is being increasingly questioned, notably regarding its effects on the populations of countries which suffer from these collective measures. Human rights and humanitarian law are invoked by numerous States, international organizations and individuals in order to set limits to resorting to such measures. A request brought by the General Assembly or the Security Council to the International Court of Justice would be a means of clarifying the legal parameters applicable to sanctions. It would also contribute to building a common understanding of the role and function of collective measures in a world which is increasingly inter dependent and where the concept of maintenance of international peace and security is more and more broadly interpreted.

The struggle against the spreading of the HIV/AIDS pandemic is another such issue. Intellectual property rights and public health should also be resolved in a global public policy context. Bilateralism and litigation are not the best avenues for resolving conflicts in such a context. One can, for example, wonder why it was necessary to wait for the dispute over patent rights for generic drugs to combat HIV/AIDS to emerge between private companies and the government of South Africa before South African domestic jurisdictions or between the US and Brazil within the World Trade Organisation (WTO) in order to find ways to settle patent protection issues. The US finally withdrew its claim for the establishment of a WTO panel to examine infringements by Brazil of the TRIPS agreement. The private companies withdrew their claims in South Africa. These claims highlighted the public policy nature of such issues, an issue which was taken up by the WTO in Doha and multilateralized through a decision of the Ministerial Conference.

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18 For a more principled approach to IMF related issues see B. Brown, "IMF Governance, the Asian Financial Crisis and the New International Financial Architecture" in eds. Sielno Yee & Wang Tieya International Law in the Post-Cold War World: Essays in Memory of Li Haopei, 2000, 131 at 147.
21 See "Declaration on the TRIPS agreement and public health" adopted on 14
It is interesting to note that economists refer to the eradication of communicable diseases such as HIV/AIDS or indeed other scourges such as terrorism or narcotics trafficking, in terms of the promotion of global public goods (GPGs). GPGs are "commodities, resources, services—and also systems of rules or policy regimes with substantial cross-border externalities that are important for development and poverty-reduction, and that can be produced in sufficient supply only through co-operation and collective action to achieve them."22 The defining feature of GPGs is that they are impervious to frontiers and everyone benefits from their promotion. Other GPGs include the improvement of the environment. Lawyers transform this dialogue on GPGs into one on "common interests of the international community," although they often also attach a particular "normative weight" to these interests, in that they claim that the promotion of such interests warrants greater legal protection than other interests. One can query whether, given that the potential consequences for the breach of such rules is particular, there is not a greater need for them to be identified and elaborated upon by the Courts—for if their invocation is increasingly being made in international discourse, their actual nature, content and contours remain notoriously ambiguous.23 Thus the judge could provide a useful role (say in an advisory opinion) in further elaborating these public policy notions.

There is however, a fine line, as it is not ideal for the judge to elaborate where States lack the political will to do so.24 In these cases, even in advisory opinions, the judge sometimes sows the seeds of confusion rather than clarification. Thus in the Nuclear Weapons advisory opinion on request from the General Assembly, the ICJ introduced the idea of "intransgressible" principles and it was left to the International Law Commission in its commentary to its recently adopted articles on State responsibility to draw the consequences of such a characterisation.25

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25 The Commentary to article 40 of the ILC articles on State responsibility says: "In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflicts as "intransgressible" in character, it would also seem justified to treat these as peremptory" at para 5. See UN Doc. A/56/10 (2001) at 285.
Advisory Opinions and the Diversification of International Institutions and Dispute Settlement Mechanisms

To continue with the role of advisory opinions, it is interesting to note that in another context, that of the proliferation of dispute settlement mechanisms, advisory opinions can play a role. Specialization is an overwhelming trend; the preservation of the unity of the international system is all the more needed. There is a crucial need for consistency in the interpretation of core principles of international law in a world with numerous actors, institutions and dispute settlement procedures. It has been suggested that resorting to advisory opinions could be considered as a means of meeting this challenge.26 As noted by Judge Schwebel when he was President of the ICJ:

"In order to minimize such a possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law. . . . There is room for the argument that even international tribunals that are not United Nations organs, such as the International Tribunal for the Law of the Sea, or the International Criminal Court, when established, might if they so decide, request the General Assembly—perhaps through the medium of a special committee established for the purpose—to request advisory opinions of the Court."27

Another way might be for tribunals and dispute settlement bodies themselves to be able to submit requests to the International Court of Justice. These requests could be conveyed directly if they are able to do so or by the General Assembly, the Security Council or any one of the specialized agencies. As an example, it is interesting to note in this respect that in the course of the negotiation of a multilateral consultative process to be established under article 13 of the Framework Convention on Climate Change28 a possibility for requesting an advisory opinion of the ICJ was

put forward. As many questions would relate to the interpretation of the Convention, it was suggested that the Conference of the Parties and an ad hoc panel drawn from its members to be created could seek an advisory opinion from a panel of legal experts. The Conference of the Parties could also request an advisory opinion from the ICJ. In the end, this possibility was not retained. One could also consider amending the Statute of the Court so as to enable all tribunals and dispute settlement bodies established beyond the United Nations circle to make such requests directly.

The possibility of extending access to advisory opinions to international institutions other than the ones already granted such a right is important. This would strengthen international organizations as fora for promoting respect for the rule of law as well as increase the possibility for all concerned actors to have a say in the decision-making process. This is all the more true in a context of multiplication of regional organizations whose functions might overlap or create uncertainty as to their complementarity with those of universal organizations. There too an amendment of the ICJ Statute would be needed. It is interesting to note that some of the regional organizations of an economic character provide for dispute settlement mechanisms. The possibility for those organs to request advisory opinions on issues touching upon the interpretation and application of principles of international law would contribute to promoting a common understanding of the international legal system.

REQUEST FOR ADVISORY OPINIONS AND THE CHANGES IN THE INTERNATIONAL DECISION-MAKING PROCESS

Having dealt with global public policy issues which are in need of legal groundings and framework, another point to be made when looking at the role that advisory opinions can play in furthering the common interest of humankind relates to the changes which are taking place in the international decision-making process.

Public policy issues can be addressed in the context of contentious cases brought before the ICJ. Examples are many. One can refer to the issue of universal jurisdiction recently brought in the Arrest Warrant case, the respect of human rights as obligations erga omnes referred to in the Barcelona Traction case, and the respect of the right of self-determination.

30 Abi-Saab ibid at 929.
as an obligation *erga omnes* in the *East Timor* case. Although public interest norms can be raised in the context of the contentious procedure, advisory opinions should also be considered avenues for the enforcement of common interests, especially with respect to the possibility for members of the international community to express their views.

**Some Thoughts on the Openness of the Advisory Process**

The question of the adequacy of dispute settlement procedures for the development of global public policy is an important one. First, contentious procedures allow intervention by members of the international community in only a very restrictive manner. Intervention as a third party is notoriously difficult. In the context of advisory proceedings, article 66(2) of the ICJ Statute enables all member States of the organization which brought a request to make oral and written statements in the course of the procedure by means of a “special and direct communication.”

Moreover, advisory opinions can be given on legal questions “actually pending between two or more States.” This does not affect the consent rule concerning contentious procedures since the Court’s opinions are only advisory in nature. This leads us to consider the possibility of whether requests could be made by UN organs or specialized agencies on issues of public policy falling within the purview of their areas of competence even though the issue is part of a dispute between two States. Such a request would allow other States and international institutions and organizations to express their views on the legal matter at stake. This would be a way of de-bilateralizing a dispute allowing for an exercise of collective custodianship over public interest matters.

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33 Note also public policy nature of Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), *Merits, Judgement*, *ICJ Reports* 1986, p. 14 and the various *Cases Concerning the Use of Force* currently being brought by Yugoslavia against the various NATO States: see http://www.icj-cij.org/

34 See *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Application for Permission to Intervene, Judgement, ICJ Reports* 1981; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Application for Permission to Intervene, Judgement, ICJ Reports*, 1984, p. 3; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Application for Permission to Intervene, Judgement of 23 October 2001* available at http://www.icj-cij.org/

Contrast *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application for Permission to Intervene, Judgement, ICJ Reports* 1990, p. 3 where the Court allowed Nicaragua to intervene to a limited extent. On intervention see D. Greig “Third Party Rights and Intervention before the International Court” 32 *Virginia Journal of International Law* (1992), 285.


36 Note that if the PCIJ in the *Eastern Carelia* Case refused to give an opinion, it was because it was directly relative to a dispute pending between two States, *Status of Eastern Carelia* 1923 PCIJ Series B, No. 5. On this issue, see, in this book, Dominicé pp. 92-95.
International organizations and institutions (not only those who bring the requests before the ICJ) who are competent in the areas covered by a request may also submit written statements and make oral comments before the Court. Such was the case of the ILO, the Organisation of American States and indeed the UN Secretary General in the context of the request brought by the General Assembly on Reservations to the Genocide Convention. This aspect is all the more important in an era of increased interdependence where issues become linked to each other and need to be looked at in a more holistic manner.

The contribution of the judge to the development of international law, especially if it emanates from advisory opinions, has certain advantages, notably that it may reduce the undue influence of the most politically powerful States. This contributes towards a levelling of the playing field, as well as allowing all States to express their views. In the context of the requests on the legality of nuclear weapons brought by the WHO and the General Assembly, 42 States participated in the written phase of the pleadings, the largest number ever to join in proceedings before the Court. Among the participants to the written stage, four of the five States admitting to possess nuclear weapons participated, as did one “threshold” nuclear weapons state, NATO members, as well as many developing countries which had not previously contributed to proceedings before the ICJ.

From an institutional standpoint, what should also be noted is that the requests most often emanate from the General Assembly or other plenary bodies of specialized agencies which comprehend almost all States of the international community and where legitimacy is not undermined in the international system. This situation favors the existence of “a general presumption that the request reflects a profound concern of the international community requiring a judicial answer”.

Non-State Actors in the Consultative Process

Access given to non-State actors in consultative processes is still a point to be resolved. International law is no longer a field in which States have an absolute monopoly of interest and action. Although States undoubtedly retain a pre-eminent role in the “making” of international law and in its implementation and enforcement, the activities of other

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37 See Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951, p. 15 at p. 18. On this point, see also, in this book, Chinkin/Mackenzie pp. 143-144.
38 J. Charnley op cit at 182.
40 Ch Tomuschat op cit, 425.
actors—be they international organizations or non-State actors, such as private companies, NGOs or individuals—are increasingly relevant, either directly or indirectly.\(^4\)

International organizations, such as the UN or the ILO, not to mention the WTO, are called upon to be arenas for discussion involving States as well as non-State actors. This complexification of the world stage brings transformations in the decision-making process. The negotiations of the Rome Statute establishing the International Criminal Court and the negotiations of the Ottawa Convention on the elimination of landmines have revealed the increased role of non-State actors in the creation of international law. This has led some to consider that there is an increased politicization of the process with issues of legitimacy at stake.\(^4\)

The requests for advisory opinions on the legality of the resort to nuclear weapons have raised concerns in respect of the legitimacy of the process for requesting advisory opinions because of the intervention of non-State actors. Judge Guillaume commented upon this in his Separate Opinion in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons requested by the General Assembly, when he said:

"I am sure that the pressure brought to bear (by the NGOs, who in the last analysis initiated the request (did not influence the Court's deliberations, but I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which have adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible. However, I dare to hope that Governments and inter-governmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media. I also note that none of the States which appeared before the Court raised such an objection (emphasis added). In the circumstances I did not believe that the Court should uphold it proprio motu."\(^3\)

There is always a risk of politicization of the dispute-settlement process. During the Cold War, requests for advisory opinions were sometimes used to provide an arena in which to play out Cold War inter-State disputes.\(^4\) Today in a so-called globalized world, there is a need to address

\(^{41}\) See L. BOISSON DE CHAZOURNES and PH. SANDS, "Introduction" in (eds.) L. BOISSON DE CHAZOURNES and PH. SANDS \emph{op cit}, p. 8.

\(^{42}\) See S. SUR, "Ver un Cours pénal internationale: la Convention de Rome entre les O.N.G. et le Conseil de Sécurité," 103:1 \emph{RGIDP} (1999), 29.

\(^{43}\) \emph{Op. cit.} at 288.

\(^{44}\) See for instance the "Admissions Case" \emph{Competence of Assembly for the Admission to the United Nations, Advisory Opinion, ICJ Reports, 1950}, p. 4.
common problems requiring compromises by all in the name of the interests of all. In this context, new actors are making themselves more vocal and this may be considered as a politicising factor. Whilst this may be the case, States are still in the last analysis the entities which vote in the various UN organs in favour of a request for an advisory opinion. They are in no way deprived of their sovereign prerogatives to vote in favor or against a request for an advisory opinion as member States of an international organization. Political pressures may be different than they were in the 1950s. Today they are perhaps more oriented towards the furtherance of humankind. There is nonetheless nothing new in the fact that these requests may present political aspects.

From a historical viewpoint, it should be noted that the majority of the requests transmitted by the Council of the League of Nations to the Permanent Court were not in substantial terms requests of the Council. They were actually submitted at the instance of States or of an international organization other than the League of Nations. In the fourteenth Annual Report of the Permanent Court, 16 such requests are identified. Six are identified as deriving from the ILO, and interestingly enough, the Court’s report lists among the international organizations interested in the case not only the ILO but various non-governmental organizations, such as the International Confederation of Christian Trades Unions and the International Institute of Agriculture.

Other international organizations involved were the Mixed Commission for the Exchange of Greek and Turkish Populations and the Greco-Bulgarian Mixed Emigration Commission. What is interesting is that both of these institutions were neither permanent nor universal. In addition,

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46 S.M. SCHWEBEl, op cit, p. 81.
49 *International Labour Organization and the Conditions of Agricultural Labour; International Labour Organization and Methods of Agricultural Production.* See Fourteenth Annual Report of the Permanent Court of International Justice (June 15 1937-June 15 1938), PCIJ Series E, N\textsuperscript{o} 14 at 72-75.
the Council of the League of Nations acted as a conduit for putting requests for advisory opinions made by organizations which had not been formally authorized to do so. As can be seen the capacity to request an advisory opinion was generously applied.

CONCLUSION

As concluding remarks, it is interesting to raise the question of whether the protection of common interests may in fact be coming closer to the proper role of the advisory function. After all, the UN is the closest thing to a trustee of the common interest of humankind. Thus States gathered at the Millennium Summit reaffirmed their faith in the common values which the United Nations Charter is in their view said to contain, such as freedom, equality, solidarity and respect for the environment.

The advisory function of the Court is all the more needed in a world which is more complex and more diverse than when the first building blocks of an international system were put together early in the twentieth century. In this context, it is interesting to recall the practice regarding the request of advisory opinions which preceded the establishment of the International Court of Justice as the principal judicial organ of the United Nations. The Council of the League of Nations understood its role in requesting advisory opinions as a means for promoting respect for the rule of law for the benefit of a wide array of interested actors. It appears important to revive this role at a time when the international system is going through dramatic changes and there is a need for all actors to play by the "legal rules of the game."

50 S.M. Schwebel, op cit, p. 81.
51 See A755/L28 (Sept 2000).