

Climate Change Clarifications To Expect From World Court

By **Marney Cheek, Nikhil Gore and Minwoo Kim** (May 8, 2023, 2:02 PM EDT)

The International Court of Justice will issue an opinion on the legal obligations of states with regard to climate change and the legal consequences of those obligations, following a United Nations General Assembly resolution on March 1 requesting an advisory opinion from the court.

On April 25, the ICJ issued an order organizing the proceedings and inviting the U.N. and its member states to make submissions on the legal questions before the court by late October.

The ICJ's advisory opinion will contribute to the evolution of domestic and international climate change jurisprudence, and the ICJ's process provides an opportunity for input not only from sovereign states, but also from civil society and industries.

This article analyzes the questions the ICJ has been asked to address, the significance of any future ICJ advisory opinion, how the advisory opinion process is likely to unfold and practical takeaways for states and the private sector.

The U.N. General Assembly Resolution and the Questions Before the Court

The General Assembly resolution observes that "as temperatures rise, impacts from climate and weather extremes ... will pose an ever-greater social, cultural, economic and environmental threat." It asks the ICJ to issue its opinion on the following questions:

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:



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(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

The General Assembly resolution results from coordinated efforts by the Republic of Vanuatu along with a core group of states, including Antigua and Barbuda, Bangladesh, Costa Rica, the Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Samoa, Sierra Leone, Singapore, Uganda and Vietnam.

The efforts of the core group drew on grassroots and civil society support, and the resolution was ultimately cosponsored by more than 130 U.N. member states, although not the United States, Brazil, India, China or Russia.

The General Assembly resolution marks the latest effort to ask international courts and tribunals to clarify the legal obligations of states in relation to climate change.

In the last few months, similar requests for advisory opinions have been submitted to the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights.

Significance of the Requested Advisory Opinion

The ICJ — as the principal judicial organ of the U.N. — adjudicates certain contentious disputes between states. It also is empowered under the U.N. Charter to provide advice on legal issues to U.N. bodies, such as the General Assembly or U.N. Security Council.

Although advisory opinions are not legally binding, they are recognized as "authoritative statements of law" with "legal effect" and can carry great weight in international, regional and national courts and tribunals that are increasingly confronted with cases addressing the implications of climate change.[1]

The ICJ's advisory opinion in the present case could make important contributions to international and domestic environmental law. For instance, it may clarify the relationship between a state's legal obligations on climate change and its duties under international human rights law.

It may also influence the interpretive approach of domestic courts, which are increasingly referring to the same international agreements that the ICJ is expected to consider in the context of climate change, including, for example, the U.N. Framework Convention on Climate Change and the Paris Agreement of 2015.

The court's opinion may therefore serve as an important source that frames domestic decisions, although the extent of the court's influence will vary from country to country depending on the domestic legal system's openness to international law and influences.

In the United States, for instance, pronouncements and even judgments of the ICJ are not directly enforceable in the courts.[2] Nonetheless, authoritative statements of international law can still have influence, such as through the statutory interpretation principle that Congress is presumed to respect

the United States' international law obligations.[3]

The General Assembly also has asked the court about the obligations of states toward "[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change." This aspect of the ICJ's advisory opinion has the potential to be an influential authority that informs climate change cases brought by specifically affected groups or communities in national jurisdictions.

Further, the advisory opinion could affect international arbitration and the interpretation of investment treaties and trade agreements. It may, for instance, be a reference point for international arbitral tribunals tasked with examining state interests in pursuing measures aimed at addressing climate change, in circumstances where those measures affect foreign investment in the natural resources, utility, infrastructure or other relevant sectors.

Similarly, it might influence how a state's right to pursue and defend climate change measures is assessed against its international trade obligations under the World Trade Organization or preferential trade agreements.[4]

The advisory opinion is also likely to have an impact on the interpretation of climate treaties and other instruments explicitly referenced in the General Assembly resolution, which range from the U.N. Convention on the Law of the Sea to the Universal Declaration of Human Rights.

Notably, the resolution asks the court to account for general international environmental law principles such as the "principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment." The court's interpretation of such principles may have broader implications relating, for instance, to a state's obligations toward biodiversity or plastics pollution.

The court's opinion may also bring increased scrutiny to companies' public climate commitments, particularly to their greenhouse gas emissions reduction or net-zero targets.

Since the General Assembly has explicitly asked the court to take into account the Paris Agreement in its assessment, the court's opinion is likely to reference the Paris Agreement's global warming target of well below 2 degrees Celsius in its determination of states' international obligations or even the Paris Agreement's more ambitious goal of keeping the earth's warming to 1.5 C above preindustrial levels.

The way the court interprets states' obligations stemming from these warming targets may serve as a reference point when national regulators and courts assess what national law requires of businesses with respect their often publicly announced climate commitments.

Procedural Next Steps and Timing

The court's order of April 25 sets out a briefing schedule, inviting the U.N. and its member states to submit written statements by Oct. 20 and to comment on the statements submitted by others by Jan. 22, 2024. The ICJ also generally holds oral proceedings before deliberating and issuing its advisory opinion.

The ICJ has typically rendered advisory opinions within months to, in certain circumstances, a few years after receiving a request.

The latest advisory opinion by the ICJ in February 2019, which concerned the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, was rendered about 20 months after the adoption of a General Assembly resolution requesting an advisory opinion in that case, following two rounds of written pleadings.

If the court were to follow that timeline here, the ICJ would announce its opinion by the end of 2024 or early 2025. However, given the breadth of the issues and the number of states expected to participate, the court may take longer time.

Who Can Participate?

The statute of the ICJ empowers the court to seek written statements from states or international organizations that are likely able to "furnish information on the question."^[5]

Consistent with past practice, the court has interpreted this provision broadly, and it has invited all U.N. member states to make written submissions. The court may also consider that certain other international organizations are likely to have relevant information and give them the same opportunity.

While nongovernmental organizations do not have the right to submit formal written statements in ICJ advisory proceedings, since 2004, the court has allowed statements and documents from international NGOs to play a role.

The court's Practice Direction No. XII provides, inter alia, that, where an NGO submits a written statement and/or document in advisory proceedings on its own initiative, such statement and/or document "shall be treated as publications readily available" and may be referred to by states "presenting written and oral statements in the case."^[6]

The court has the discretion to decide which organizations qualify to submit written statements and/or documents pursuant to Practice Direction No. XII.

To date, the court has not clarified any criteria for such qualification, but has flexibility in this regard, especially considering that an NGO submission filed on its own initiative would not "be considered as part of the case file."^[7]

Given the scope of the questions asked and the significant implications of the court's opinion, a range of organizations may seek to contribute to the legal issues before the court.

Practical Takeaways

The court's advisory opinion will have broad ramifications and touch upon the international obligations of all U.N. member states.

In the words of U.N. Secretary-General António Guterres, the opinion has the potential to "assist the General Assembly, the United Nations and Member States to take the bolder and stronger climate action that our world so desperately needs" as well as "guide the actions and conduct of States in their relations with each other, as well as towards their own citizens."

For states, the advisory opinion proceedings provide a venue to state their views on their legal

obligations and liabilities in respect of climate change.

The court's clarification of the law may help establish more solid common ground on climate change responsibilities as parties to the Paris Agreement continue to implement their climate commitments.

For example, the court's opinion on state responsibility vis-à-vis states that are "injured or specifically affected" may be relevant to operationalizing funding arrangements discussed at the 2022 Conference of the Parties of the U.N. Framework Convention on Climate Change in Glasgow for responding to loss and damage associated with the adverse effects of climate change.[8]

Businesses and other private stakeholders should also monitor the advisory opinion process closely, including by considering ways to present their views in these proceedings, either through written statements and documents of nongovernmental organizations submitted to the court's registrar, or through engagements with domestic governments and international organizations that are participating in the court's proceedings.

The court's advisory opinion may well shape the legal and policy landscapes that businesses face across jurisdictions.

For instance, states may rely on the court's opinion in establishing and modifying domestic environmental regulations and corporate greenhouse gas disclosure requirements, justifying such rules under trade and investment treaties, and designing and establishing incentives for green investment.

In these ways, the court's framing of states' climate obligations will ultimately shape climate strategies, opportunities and compliance obligations of private entities in a swiftly changing global regulatory environment.

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[1] See, e.g., Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), ITLOS Judgment on Preliminary Objections of 28 January 2021, ¶¶ 202–206.

[2] *Medellin v. Texas*, 552 U.S. 491, 506 (2008).

[3] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

[4] For instance, the general exceptions in paragraphs (b) and (g) of Article XX of the General Agreement on Tariffs and Trade ("GATT"), respectively, can be invoked in defense of WTO-inconsistent measures that are "necessary to protect human, animal or plant life or health" or that relate "to the conservation of exhaustible natural resources." Preferential trade agreements often incorporate such relevant WTO provisions. See, e.g., U.S.-Mexico-Canada Free Trade Agreement, art 32.1 (incorporating mutatis

mutandis GATT Article XX).

[5] ICJ Statute, art. 66.

[6] ICJ Practice Direction XII of 30 July 2004.

[7] Id.

[8] Decision 2/CP.27 of the Conference of the Parties to the United Nations Framework Convention on Climate Change, available at: https://unfccc.int/sites/default/files/resource/cp2022_10a01_adv.pdf.