

WHAT AN ICJ CLIMATE OPINION COULD MEAN FOR GOV'TS, COS.

On March 29, 2023, the United Nations General Assembly (UNGA) adopted by consensus a [resolution](#) requesting an advisory opinion from the International Court of Justice (ICJ or the Court) on the obligations of States with respect to climate change. The resolution, mainly promoted by [Vanuatu](#), reflects the international community's concern about climate change and its differential effect on the more vulnerable, such as small island developing States, as well as the present and future generations. Should the ICJ decide to exercise its advisory jurisdiction in this case, the opinion to be delivered could have a far-reaching impact on the understanding of the scope and content of existing environmental law and human rights law obligations for States with respect to climate change.

UNGA posed two main questions to the ICJ: (1) what are the obligations of States under international law to ensure the protection of the environment, and (2) what are the legal consequences for States that have breached these obligations *vis-à-vis* other States, peoples, and individuals of the present and future generations. Implicit in these questions are two main objectives: to seek clarity as to the scope and content of existing environmental obligations for States—which are currently dispersed across a wide range of international treaties and customary law—and, ultimately, to determine whether there are grounds for compensation (under, for example, the “polluter pays” principle). On April 20, 2023, the ICJ [called](#) States and organizations to submit written statements on the questions posed by UNGA by October 20, 2023.

While the ICJ can decide whether to accept or reject UNGA's request for an advisory opinion, to date, it has only rejected one of the 30 advisory requests it has received (*see [Advisory Opinion requested by the WHO on the Legality of the Use by a State of Nuclear Weapons in an Armed Conflict](#)*). Assuming it decides to accept UNGA's request, in answering the first question the ICJ will probably analyze the obligations arising out of the [United Nations Framework Convention on Climate Change](#) (UNFCCC), the [Paris Agreement](#), and other environmental and human rights law instruments. Answering the second question will likely entail an analysis of potential grounds for compensation for those States that are particularly vulnerable to the adverse effects of climate change, including small island developing States, by high-emitting developed States that have a historic responsibility for the planet's warming.

Given the geopolitical ramifications of climate change, there are different approaches the Court can take—from a conservative approach limited to restating existing international environmental law obligations for States, to a more proactive approach that sets forth a comprehensive regime to address the issue of climate change, including reparation for vulnerable States and individuals.

Conservative Approach: Restating Existing Obligations

Under a conservative approach, the ICJ could limit its advisory role to restating existing obligations in various international treaties, such as the [Paris Agreement](#) and the [Kyoto Protocol](#), reaffirming the consensual character of international law. The ICJ may choose to exercise restraint as a way to prioritize States' sovereignty and preserve its legitimacy. A conservative approach would show that the ICJ is mindful of the varying interests and priorities of States and aware that a proactive ICJ approach may be seen as overreaching and intrusive on State sovereignty, which can lead to resistance or reluctance to follow the ICJ's decisions or even withdrawal from international legal mechanisms related to environmental protection – specially by States with significant industrial or economic interests, concerned about the potential impact of radical changes to the legal framework on their economies or national security.

The ICJ has assumed conservative approaches before, including in matters related to environmental protection, limiting itself to vague recognitions of general legal principles. These include the ICJ's recognition of (i) the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States (see [Legality of the Threat or Use of Nuclear Weapons](#)), (ii) the development of new norms and standards owing to new scientific insights and to a growing awareness of the risks for mankind (see [Gabčíkovo-Nagymaros Project](#)), and (iii) States' exercise of due diligence in case of risk of significant transboundary harm (see [Pulp Mills on the River Uruguay](#), [Certain Activities Carried Out by Nicaragua in the Border Area](#), and [Construction of a Road in Costa Rica along the San Juan River](#)).

Proactive Approach: Integrating Obligations and Reparation

Under a proactive approach, the ICJ could attempt to integrate piecemeal environmental obligations and to address the issue of reparation. The ICJ could assist in clarifying the obligations of polluting States, shedding light on an otherwise fragmented network of international agreements. Also, the Court could help to establish a legal framework for holding polluting States accountable, going beyond current environmental treaties that tend to include non-adversarial remedies for breach of environmental obligations.

The ICJ could decide to use a more expansive interpretation of international law by emphasizing the urgency of environmental protection and the need for collective action. By taking a proactive stance, the ICJ would join a larger trend of leveraging international law to advance the protection of the environment (see the [request](#) from the Commission of Small Island States on Climate Change and International Law before the International Tribunal for the Law of the Sea for an advisory opinion on the scope of the environmental obligations arising out of the United Nations Convention on the Law of the Sea, as well as Chile and Colombia's [request](#) for an advisory opinion from the Inter-American Court on Human Rights to clarify the scope of State obligations with regard to climate emergencies under international human rights law). This approach could be welcomed by States that are heavily impacted by environmental issues, environmental activists, and non-governmental organizations.

The ICJ has assumed a proactive approach before in matters of global importance, playing a crucial role in the evolution of novel areas of international law. For instance, the ICJ contributed to the development of human rights law by advancing erga omnes obligations in its rulings, i.e., obligations owed toward all States (*see [Barcelona Traction, Light and Power Company](#)*). The ICJ has also addressed issues of reparation when exercising its advisory jurisdiction. In the Wall advisory opinion, the Court stated that the construction of the wall by Israel in the Occupied Palestinian Territory was contrary to international law. Accordingly, in addition to the cessation obligations arising from Israel's internationally wrongful acts, the Court also stated that Israel was liable to make reparation for all the damages caused by the construction of the Wall in the Occupied Palestinian Territory. The Court also held that the United Nations, particularly the General Assembly and the Security Council, had to assess and determine the necessary steps to halt the unlawful situation arising from the construction of the Wall and its related system (*see [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#)*).

Global Shift towards Robust Environmental Protection

While the ICJ's advisory opinions are non-binding, they carry significant weight and can strongly influence the development of international law and the conduct of States. Although the ICJ has not been known for its advocacy in this area, it has certainly contributed to the development of international environmental law in a concrete manner through its decisions and advisory opinions, and many States have followed the Court's leadership in developing domestic regulations. If the Court assumes a conservative approach, the consequences may be limited, and we will continue to see the current fragmentation in the fight against climate change. On the contrary, a proactive approach could have a far-reaching impact on how the world tackles this issue going forward and how it deals with the negative impacts of climate change that have already materialized.

However, regardless of whether the Court assumes a conservative or proactive approach, the world is clearly moving towards more robust environmental protection, with both civil society and States pushing for and enacting more stringent regulations. The current fragmented norms often lead to inconsistencies and discrepancies in national environmental regulations, making it challenging for multinational firms to navigate compliance requirements, develop sustainable business practices, and assume compliance costs. The ICJ's proactive approach in unifying the current fragmented obligations could be beneficial for multinational companies. With a unified and coherent regime for environmental protection, multinational firms would gain clarity and predictability regarding their environmental obligations across different jurisdictions. This would level the playing field among global competitors, ensuring that responsible environmental behavior becomes a shared global standard.

As the international community faces the growing threat of climate change, it is essential to ensure that States fulfill their legal obligations to protect the environment and the rights of present and future generations. The resort to international courts and tribunals to define the

scope of State obligations and determine legal consequences for non-compliance is a positive step towards achieving this goal. The forthcoming ICJ advisory opinion will provide valuable guidance to States and other actors in the international community and the domestic sphere on how to address the urgent challenge of climate change.

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