Briefing: An International Court of Justice Advisory Opinion on Climate Change

Purpose:

To justify Pacific Island Forum governments supporting an International Court of Justice (ICJ) advisory opinion on climate change.

Background:

What is an International Court of Justice advisory opinion?

Pursuant to Article 96 of the Charter of the United Nations and Article 65(1) of the Statute of the International Court of Justice, UN organs and UN specialised agencies are eligible to request an advisory opinion from the ICJ. The UN General Assembly and the Security Council may request an advisory opinion in respect of “any legal question” while other UN organs and agencies may request an advisory opinion on “legal questions arising within their scope of activities”. States cannot request an advisory opinion from the ICJ directly.

Unlike judgments of the ICJ in contentious proceedings, advisory opinions are not binding at law. Nonetheless, due to the status of the ICJ as the highest court in the world they “carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help to keep the peace. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between states.”

For example, the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion confirmed the continued applicability of international human rights law during times of war, while the Reservations to the Convention on Genocide advisory opinion offered clarification of the use and effect of reservations to treaties (which was subsequently incorporated in Articles 19-21 of the 1969 Vienna Convention on the Law of Treaties). Perhaps the most relevant example, however, is the Threat or Use of Nuclear Weapons advisory opinion, which consolidated the principle that states are required to act to prevent significant transboundary harm where such harm is caused by a disposition over their territory.

The Court has received 28 requests for advisory opinions: 17 from the General Assembly, 1 from the Security Council and 10 from other UN bodies. It has declined to consider only one request.

Past proposal by the Republic of Palau

In 2011 President Toribiong announced that the Republic of Palau would ask the UN General Assembly to seek an ICJ advisory opinion: “It is time we determine what the international rule of law means in the context of climate change.” This was not actively pursued after 2012.

The Marshall Islands and Bangladesh have also, at various points in time, expressed their intention to pursue an ICJ advisory opinion on climate change. While neither of these states followed through on the initiative, the idea has been kept alive by a global

1 International Court of Justice: https://www.icj-cij.org/en/advisory-jurisdiction
movement led by youth from the Philippines and the world’s largest environment organisation, the International Union for the Conservation of Nature.

What Legal Questions Could Be Asked on Climate Change?

The question proposed by Palau was:

“What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?”

This question is explained and justified at pages 8-17 of the Yale University report Climate Change and the International Court of Justice [Attachment 3].

We advocate a different approach. While any future question must inevitably be the subject of extensive thought and negotiation, we suggest that a better question would seek the Court’s opinion upon all aspects of international law relevant to climate change with a focus on the protection of human rights. To illustrate, a rights-focused question could ask:

“What are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?”

Benefits:

Summarised below are the potential benefits of the ICJ providing an advisory opinion on a broad legal question of climate change:

Cementing consensus on the scientific evidence of climate change – an ICJ advisory opinion provides an excellent forum to endorse the best scientific findings on anthropogenic climate change, including the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5°C. The Court has recently demonstrated a willingness to engage with complex and competing scientific claims.\(^2\) Importantly, ICJ findings of fact on climate change “would be of great authority in proceedings before other international courts and tribunals, and before national courts”.\(^3\)

Providing impetus for more ambitious action under the Paris Agreement – the nature of the Paris Agreement is one in which states voluntarily commit to emissions reductions. Given the shortcomings of the commitments made to date, there remains the task of continually encouraging greater ambition. An ICJ advisory opinion on climate change is one method through which parties to the Paris Agreement may be further encouraged to commit to a level of emissions reductions that are in line with ultimate objective of the international climate change regime: preventing dangerous anthropogenic interference with the climate system.

In this we agree with Professor Sands: “The ICJ . . . can and does play a useful role in developing the law, and contributing to a change of consciousness, and these

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2 Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)
3 Philippe Sands, Public Lecture at the Supreme Court of the United Kingdom, 17/09/2015, 15.
Developments can in turn catalyse new and needed actions: by states, by international organisations, by the private sector, by NGOs, and by individuals. A clear statement by a body such as the ICJ – as to what is or is not what required by the law, or as to what the scientific evidence does or does not require - may itself contribute to change in attitudes and behaviour.”

Integrating areas of international law that are currently separate, such as human rights and environmental law – International law develops in an incremental and piecemeal fashion, leading to a separation between different areas of law. International climate change law arose from an environmental treaty process, but failure of that process to achieve its objectives now means that our human rights are threatened by a changing climate.

A core role of ICJ advisory opinions is developing and clarifying international law. The ICJ is the only global judicial body that can hear evidence of law and fact on the great range of critically important legal issues that are impacted by climate change and ultimately provide an opinion integrating consideration of them all. This would in turn enhance the effectiveness of the international legal system in tackling climate change, for example by bolstering the authority of human rights bodies to address climate change under their respective mandates.

Providing authoritative baselines for state action on mitigation and international cooperation and assistance – in view of all of the above, there is potential for an ICJ advisory opinion to provide, whether expressly or implicitly, authoritative baselines for state action on reducing greenhouse gas emissions based on their existing obligations to respect, protect and fulfil human rights and parallel obligations under international environmental law. An advisory opinion could also consolidate the specific obligations of developed States to assist developing States on climate action through finance for mitigation, adaptation and addressing loss and damage.

Providing impetus and guidance for domestic, regional and international adjudications – ICJ findings on climate science and law would be of great authority in any relevant future proceedings before other international courts and tribunals. While each domestic legal system adopts its own approach to international case law, such findings could also be influential both in encouraging claimants to bring matters before national courts, as well as in their ultimate determinations. An advisory opinion could therefore pave the way for successful litigation against governments and corporations that are responsible for climate change and its consequences. Such litigation could seek preventive action, compensation for losses and damages resulting from climate change, or both.

Risks:

Summarised below are potential risks of seeking an ICJ advisory opinion on a broad legal question of climate change:

Lack of international support – the most apparent risk is that effort could be expended upon putting this proposal to the international community only to encounter a level of

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opposition indicating no General Assembly resolution could pass. This risk can be mitigated by building a coalition of Pacific island states, other climate-vulnerable developing states, and like-minded developed states that is able to withstand predictable opposition.

It may inhibit or complicate other international processes - it can be expected that certain states would oppose consideration of the international legal implications of climate change by the ICJ for the same reasons they have opposed other issues of great importance or controversy being subject to the Court’s advisory procedure. The following is an excerpt from the written contributions of the United States for the Legality of the Threat or Use of Nuclear Weapons in Armed Conflict opinion.

“The question presented is vague and abstract, addressing complex issues that are the subject of consideration among interested States and within other bodies of the United Nations that have an express mandate to address these matters. An Opinion by the ICJ concerning the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an Opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization”.

These arguments, made by the US and others, will likely be re-stated in terms specific to climate change should the issue of an ICJ advisory opinion be placed on the international agenda. We note that the General Assembly and the Court has in the past not found them persuasive.

The Court may render a judgement that is unhelpful to Pacific island interests – this risk must be acknowledged. In response we note that it is considerably more likely that the weight of scientific and legal evidence on climate change supports stated Pacific island positions that states should be obligated to take stronger action to prevent and respond to all aspects of climate change. This is the reason why states with vested interests in supporting fossil fuel industries have sought to undermine previous efforts to pursue an advisory opinion.

Timing:

Now is the ideal time to seek an ICJ advisory opinion, for a number of reasons.

Firstly, it appears that since Palau first raised it, expert legal opinion has shifted away from opposing an ICJ advisory opinion on climate change, towards support for it. An illustration is eminent Professor Philippe Sands QC, who in 2012 advised UN Ambassadors against Palau’s proposal, then in 2015 gave a public lecture strongly supporting an ICJ climate change opinion. While a few will continue in their opposition, in 2019 it can now be expected that the expert legal community will welcome the ICJ considering climate change. Recent judgements, such as the advisory opinion of the Inter-American Court on The Environment and Human Rights indicate

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6 [1996] ICJ Rep 226; Written statements by the United States.
7 Philippe Sands, Public Lecture at the Supreme Court of the United Kingdom, Attachment 1.
that there are pathways opening in international law towards overcoming previous jurisprudential roadblocks.⁹

Secondly, in 2019 as climate change becomes a reality for people everywhere, public concern about climate change across the world is quickly rising. This is being demonstrated in many ways, such as student and youth strikes in more than 300 cities this year alone. Governments choosing to stand in solidarity with young people across the world, who hope merely for effective global action on climate change, are on the right side of history. We seek only to hear what the world’s highest court has to say about the world’s biggest problem.

Thirdly, US withdrawal from the Paris Agreement is undermining of multilateralism and the international rules-based order in relation to climate change, and will be particularly so should other parties follow that example. Seeking to place the suite of international legal questions raised by climate change before the ICJ signals strong Pacific Island Forum support for multilateral institutions and the rule of international law at this pivotal moment.

**Recommendations:**

1. All Pacific Island Forum members adopt a national policy position supporting a General Assembly resolution seeking an advisory opinion on climate change from the ICJ answering a question integrating all relevant aspects of international law.

2. In preparation for advocating for the resolution and providing written submissions to the Court, interested Pacific SIDS governments reach out through networks to expert legal and other technical advisors interested in supporting the initiative (as did Palau with Yale University and others).

3. In preparation for advocating for the resolution interested Pacific SIDS governments reach out through networks to civil society seeking broad support for the proposition that: ‘It is time for the world’s highest court to consider the world’s biggest problem!’

**Attachments (e-copies):**

3. Yale University Center for Environmental Law and Policy, *Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court*, 2013.

⁹ See Campbell and Atapattu.