

CLIMATE CHANGE LAW NETWORK BLOG POST #6 (2022)

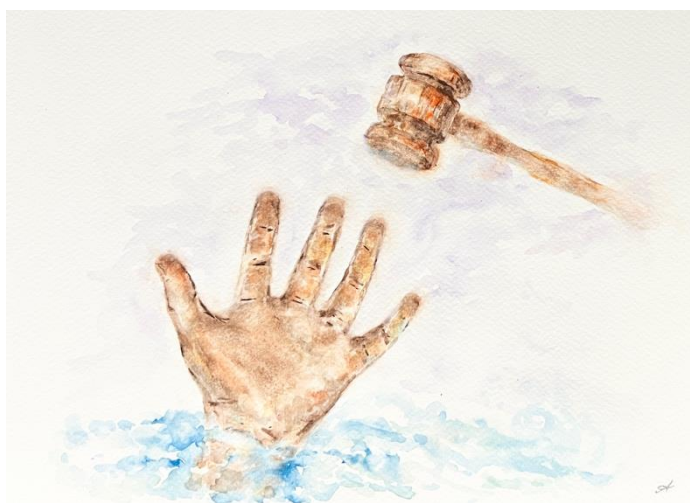
VANUATU'S PROPOSED REQUEST FOR AN ADVISORY OPINION

In this short blog post, [Aleksandra Balyasnikova-Smith](#), a member of the IUCN WCEL Climate Change Law Network, shares her thoughts and analysis on Vanuatu's Zero-draft of the ICJAO Initiative Resolution.

This blog post is part of a series of other blog posts that aims to map the different conferences, events and panels related to Climate Change Law around the year.

On [9th December 2022](#), Vanuatu, on behalf of a [group of States](#), presented a draft Resolution containing a request for an advisory opinion (AO) from the International Court of Justice (ICJ). For the full text and background of the document, see [the Initiative's page](#).

Although the document's operative paragraph refers to the question in a singular form, there are at least three questions in the draft Resolution:



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- (1) What are the obligations of States under the [applicable treaties and rules of general international law] to ensure the protection of the climate system and other parts of the environment for present and future generations?
- (2) What are the legal consequences under [the abovementioned] obligations for States which... have caused significant harm to the climate system and other parts of the environment with respect to Small Island Developing States and other [injured, specially affected, or vulnerable] States?
- (3) What are the legal consequences under [the abovementioned] obligations for States which... have caused significant harm to the climate system and other parts of the environment with respect to peoples and individuals of the present and future generations affected by the adverse effects of climate change?

Provided that States with vested interests in fossil fuels do not undermine the Initiative (see e.g., [Beck & Burleson](#), 2014 at 26) and the United Nations General Assembly (UNGA) passes the proposed Resolution, this blog explores the prospects of the ICJ dealing with the questions.

Will the ICJ accept to give the AO?

This depends on the Court's findings concerning its jurisdiction and discretion (see [Chagos AO](#), para 54). Firstly, the ICJ will consider whether (i) the body requesting the AO is authorized to make the request (see [Statute of the ICJ](#), art 65), (ii) the AO requested relates to a "legal question". The UNGA is authorized to request an AO on any legal question (see [UN Charter](#), art 96). Indeed, the UNGA "has competence in any event to seize the Court" (see [Nuclear Weapons AO](#), para 11). Moreover, questions "framed in terms of law and raise problems of international law... [are] questions of a legal character" (see [Western Sahara AO](#), para 15). In the present case, the questions require the determination of the obligations of States under international law and the implications of those obligations. Thus, the jurisdiction of the Court will likely be founded.

Secondly, the Court will use its discretionary power by looking at compelling reasons, if any, to refuse to exercise the jurisdiction. Those reasons may be raised by the participants in the advisory proceedings (see e.g., [Kosovo AO](#), paras 29–48). The wording of the proposed questions does not seem to raise compelling reasons for rejection. Moreover, with the track record of the ICJ's [advisory proceedings](#), the proposed request will likely be accepted.

What will be the probable conclusions of the AO?

Despite the ICJ being a conservative court, the attitudes of international judges tend to be sympathetic to environmental objectives (for the environment-related observations of the ICJ see e.g., [Patronos, 2022](#)). The drafters of the proposed AO hope that it will [clarify](#) the obligations of States, encouraging them to [take stronger action](#) regarding climate change. The problem is that under the [Paris Agreement](#), nationally determined contributions (NDCs) are worded as political commitments, not legal obligations. This means that the Court will likely describe the duty to curb emissions only in general terms (see e.g., [Barnes, 2022](#) at 27) while deferring political matters to States. Even if the Court particularizes the responsibility of States which caused significant harm to the climate system and other parts of the environment, it may be problematic to pursue in practice. This is due to the difficulty of establishing causation (see e.g., [Maljean-Dubois in Mayer & Zahar, 2021](#) at 24) and the unsuitability of the adversarial approach to achieving global cooperation.

A positive aspect is that the [scientific consensus](#) on climate impacts, the recent recognition of [the human right to a clean, healthy, clean, and sustainable environment](#), the [Torres Strait Decision](#), and the agreement to establish the [Loss and Damage Fund](#),—arguably equip the Court to clarify the obligations of States, the principle of common but differentiated responsibilities, the principle of intergenerational equity, and the relationship between human rights and environmental protection. Even if the Court does not confirm the legal duties to curb emissions, to compensate vulnerable States,

and/or duties owed to peoples and individuals concerning the environment, the proposed AO may help the international community to recognize and action the need for urgent protection of the most vulnerable.