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Benoit Mayer

The Chinese University of Hong Kong

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INTERNATIONAL ADVISORY PROCEEDINGS ON CLIMATE CHANGE

*Benoit Mayer**

ABSTRACT

Several island states are expected to be severely harmed by climate change and rising sea levels. In late 2021, several island states launched two legal initiatives aimed at requesting advisory opinions of international courts on the law applicable to climate change. In the hope of fostering more action to combat climate change, these states are asking international courts to clarify the obligations of states to cut greenhouse gas emissions and pay reparations for harm already caused.

This article provides the first comprehensive assessment of the feasibility and desirability of international advisory proceedings on climate change. It analyzes recent developments and engages critically with the main substantive and procedural aspects of potential advisory proceedings. This article demonstrates that, contrary to the prevailing view, these well-intended initiatives are almost certain to fall short of their goals and may even be counterproductive.

The likely failure of advisory proceedings on climate change results from several factors, including jurisdictional challenges and questions of judicial propriety. A court tasked with adjudicating such an advisory proceeding would find it difficult to determine the law applicable to key aspects of the questions presented, including modalities of burden-sharing in global climate change mitigation efforts. And even if a court were to offer a meaningful advisory opinion, it is highly uncertain whether powerful states would comply. These factors raise the risk that the issuance of an advisory opinion would further erode the credibility of international institutions, undermining the foundations of future cooperation combating climate change.

* Associate Professor, Faculty of Law, The Chinese University of Hong Kong, bmayer@cuhk.edu.hk. The author is grateful to Massimo Lando, Steve Lorteau, Noam Noked, and Catherine Redgwell for their useful comments and to the editors of the Michigan Journal of International Law for their help in improving the article.

INTRODUCTION

States have long expressed their concern about the impact of human activities on the climate system,¹ and they have recognized the “urgency” of mitigating climate change.² The Paris Agreement sets a collective objective of reaching “global peaking of greenhouse gas [“GHG”] emissions as soon as possible” and achieving net zero GHG emissions “in the second half of this century.”³ The parties thus aim to keep global warming “well below” 2°C and as close to 1.5°C as possible.⁴ So far, however, states have not agreed on the regulatory means. In particular, the current nationally determined contributions (“NDCs”) and long-term mitigation strategies under the Paris Agreement fall short of the level of ambition that the 1.5 or 2°C goals suggest is necessary.⁵

In this context, litigation has emerged as an increasingly attractive alternative way to provoke national action on climate change mitigation.⁶ Concerned citizens and non-governmental organizations (“NGOs”) have filed multiple cases before national and regional courts. At times, courts have dismissed these cases on preliminary grounds, for instance by concluding that the plaintiff did not have standing or by referring to doctrines relating to the separation of powers.⁷ In other cases, domestic courts have ap-

1. See, e.g., U.N. Framework Convention on Climate Change pmb., May 9, 1992, 1771 U.N.T.S. 107, U.N. Doc. FCCC/INFORMAL/84 [hereinafter UNFCCC]; Paris Agreement pmb., Dec. 12, 2015, 3156 U.N.T.S. 88, U.N. Doc. FCCC/CP/2015/10/Add.1 [hereinafter Paris Agreement]; Decision 1/CP.26, Glasgow Climate Pact, in U.N. Climate Change Conference, Rep. of the Conference of the Parties to the Paris Agreement on Its Third Session, at 2, U.N. Doc. FCCC/CP/2021/12/Add.1 (Mar. 8, 2022) [hereinafter Glasgow Climate Pact]. While the United States has had a complex relation with some climate treaties, it has ratified the U.N. Framework Convention on Climate Change in 1992 and has never withdrawn from it.

2. See, e.g., Decision 1/CP.13, Bali Action Plan pmb., in U.N. Climate Change Conference, Rep. of the Conference of the Parties on Its Thirteenth Session, at 3, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008); Decision 1/CP.21, Adoption of the Paris Agreement pmb., in U.N. Climate Change Conference, Rep. of the Conference of the Parties on Its Twenty-First Session, at 2, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Adoption of the Paris Agreement]; Glasgow Climate Pact, *supra* note 1, pmb.; see also Paris Agreement, *supra* note 1, pmb.

3. Paris Agreement, *supra* note 1, art. 4(1).

4. *Id.* art. 2(1)(a). States did not agree on the technical modalities necessary to determine what precisely these temperature targets entail. See *infra* note 391.

5. See, e.g., Glasgow Climate Pact, *supra* note 1, pmb., ¶ 4; U.N. Climate Change Secretariat, Message to Parties and Observers: Nationally Determined Contribution Synthesis Report (Nov. 4, 2021), <http://perma.cc/L8LL-SDPF>. See generally U.N. ENVIRONMENT PROGRAMME, EMISSIONS GAP REPORT 2021: THE HEAT IS ON – A WORLD OF CLIMATE PROMISES NOT YET DELIVERED 3–12 (2021).

6. See, e.g., Address by Johnson Toribiong, President of Palau, in U.N. GAOR, 66th Sess., 16th plen. mtg. at 26, 27, U.N. Doc. A/66/PV.16 (Sept. 22, 2011).

7. See, e.g., Case C-565/19P, *Carvalho v. Parliament & Council*, ECLI:EU:C:2021:252 (Mar. 25, 2021) (lack of standing); *Juliana v. United States*, 947 F.3d 1159, 1174 (9th Cir. 2020) (separation of powers).

plied tort, constitutional or human rights law to interpret international law as requiring national governments to enhance their climate change mitigation efforts.⁸

Until recently, no country had brought a case before an international court.⁹ Tuvalu once considered claiming compensation against the United States before the International Court of Justice (“ICJ”) for the impacts of climate change, but it has never acted on this idea.¹⁰ The voluntary nature of international adjudication hinders the prospects of such inter-state litigation,¹¹ as most large GHG emitters do not accept the compulsory jurisdiction of the ICJ and show no interest in referring a climate-related case to an international court.¹² Overall, contentious proceedings between two or even several states would not adequately present climate change as a global issue that interests every state. An applicant state would not only have to justify its right to invoke another state’s obligation to mitigate climate change,¹³ but would also need to explain how a court could determine the respondent’s obligation to do its fair share in global efforts to mitigate climate change without at the same time determining the proportions of the obligations of other GHG-emitting states that are not parties to the proceedings.¹⁴

Advisory proceedings would appear to have two conspicuous advantages over contentious ones. First, advisory proceedings could conceivably bypass the opposition of the largest GHG emitters.¹⁵ Second, advisory

8. See, e.g., HR [Supreme Court] 20 december 2019, NJ 2020, 41 m.nt. JS (Staat der Nederlanden/Stichting Urgenda) (Neth.), translated in <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>; Civ. [Tribunal of First Instance] Bruxelles (4th ch.) (Belg.), June 17, 2021, 2015/4585/A, unofficial English translation <http://perma.cc/U3A5-PLTY>; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, Mar. 24, 2021 (Neubauer/Germany) (Ger.), unofficial English translation <http://perma.cc/YUD7-Z37P>.

9. See Lavanya Rajamani, Remarks on Judging the Climate Crisis: The Role of the International Court of Justice in Addressing Environmental Harms (Mar. 24, 2021), in 115 PROCEEDINGS OF THE ASIL ANNUAL MEETING 19, 22–23 (2021) (noting that “there is much that the ICJ could contribute” on climate law).

10. *Tiny Tuvalu Sues United States Over Rising Sea Level*, NEW ZEALAND HERALD (Aug. 29, 2002), <http://www.nzherald.co.nz/world/tiny-tuvalu-sues-united-states-over-rising-sea-level/IG7EKELGPDSUS4ILC54CT3GAM>.

11. See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 3 Bevens 1179 [hereinafter I.C.J. Statute].

12. Only two of the eight largest GHG-emitting states have accepted the compulsory jurisdiction of the ICJ (India and Japan). See *Country Greenhouse Gas Emissions Data*, CLIMATEWATCH, <http://www.wri.org/data/climate-watch-cait-country-greenhouse-gas-emissions-data> (last visited Mar. 9, 2022) [hereinafter CAIT Data]; *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT’L COURT JUSTICE, <http://www.icj-cij.org/en/declarations> (last visited Mar. 9, 2022).

13. *Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain)*, Judgment (Second Phase), 1970 I.C.J. 3, ¶ 33 (Feb. 5).

14. *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.)*, Judgment on Preliminary Question, 1954 I.C.J. 19, at 33 (June 15).

15. See *infra* Part I and Part II.A.

proceedings could better reflect the global nature of climate change.¹⁶ Importantly, advisory proceedings may avoid some of the issues of causation and attribution that would impede a contentious case.¹⁷ And the court could be informed by all interested states:¹⁸ it would not be constrained by the narrow rules on intervention and amicus curiae that apply to contentious proceedings.¹⁹ Further, the fact that advisory opinions have “no binding force” is of limited consequence in a legal system in which enforcement is problematic anyway.²⁰ The lack of legal force of advisory opinions does not necessarily affect their political pull as authoritative judicial pronouncements.²¹ For these reasons, scholars have presented advisory opinions as “particularly suitable to clarify . . . disputed point[s] of law,”²² in particular those, such as climate change, that concern “[t]he international community at large.”²³

16. See David Freestone, Richard Barnes, & Payam Akhavan, *Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)*, 37 INT'L J. MARINE & COASTAL L. 166, 168 (2022); see also Rüdiger Wolfrum, *Advisory Opinions: An Alternative Means to Avoid the Development of Legal Conflicts?*, in INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 99, 106 (Hélène Ruiz Fabri ed., 2019).

17. See Penelope Ridings, *An ICJ Advisory Opinion on Climate Change: Can It Assist in Driving Ambition?*, DR. PENELOPE RIDINGS (Nov. 1, 2021) <http://peneloperidings.com/wp48/index.php/2021/11/01/an-icj-advisory-opinion-on-climate-change-can-it-assist-in-driving-ambition>.

18. See, e.g., I.C.J. Statute, *supra* note 11, art. 66; Int'l Tribunal for the L. of the Sea [ITLOS], *Rules of the Tribunal*, art. 133, U.N. Doc. ITLOS/8 (Oct. 28, 1997, amended Mar. 15 & Sept. 21, 2001, & Mar. 17, 2009) [hereinafter Rules of ITLOS].

19. On intervention, see, for example, I.C.J. Statute, *supra* note 11, arts. 62–63; Statute of the International Tribunal for the Law of the Sea arts. 31–32, in Annex VI of United Nations Convention for the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 561 [hereinafter ITLOS Statute]. On amicus curiae, see, for example, I.C.J. Statute, *supra* note 11, art. 34(2); Rules of ITLOS, *supra* note 18, art. 84. Advisory proceedings could also reduce the power imbalance, reflected in the quality of party submissions, which would likely appear in a contentious case between a small developing island state and a major GHG emitter. See Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 540 (2009).

20. Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, at 71 (Mar. 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 47 (July 9); Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 76.

21. See *infra* notes 307–309.

22. See Rüdiger Wolfrum, *Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?*, in INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS? 35, 39 (Rüdiger Wolfrum & Ina Gätzschmann eds., 2013); see also J. Thomas Buergenthal, President of IACHR, Address to a Special Session of the O.A.S. Permanent Council (Dec. 3, 1986), in ANN. REP. IACHR 103–05 (Aug. 30, 1987).

23. Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Humankind*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 105, 107 (Laurence Boisson de Chazournes, Cesare Romano, & Ruth MacKenzie eds., 2002).

Due to their unique vulnerability to the detrimental impacts of climate change,²⁴ small-island states have been the main proponents of an advisory opinion on climate change. They hope that an advisory opinion will provide an authoritative interpretation of states' rights and obligations which will, they believe, lead states to take more ambitious action on climate change by changing the "conversation from one of vague, voluntary commitments to legally binding obligations and compensation."²⁵ They appear to assume that the advisory opinion would persuade powerful states to change their course of action, if only incrementally.

For these reasons, in 2011, Palau launched a campaign to get the General Assembly to request an advisory opinion from the ICJ.²⁶ Albeit short-lived, this campaign inspired Vanuatu to announce a similar initiative a decade later, in September 2021,²⁷ and to circulate a draft General Assembly resolution in November 2022.²⁸ Like Palau, Vanuatu now faces the daunting task of securing a majority decision at the U.N. General Assembly.

The ICJ is neither the only, nor necessarily the most attractive forum for international advisory proceedings on climate change. Just a month after Vanuatu's announcement, two other small-island states—Antigua and Barbuda (in the West Indies) and Tuvalu (in Polynesia)—adopted a treaty that established the Commission of Small Island States on Climate Change and International Law ("COSIS") and gave it the power to request an advisory opinion of the International Tribunal on the Law of the Sea ("ITLOS").²⁹

24. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 2043–2121 (2022) [hereinafter IPCC 2022].

25. See Payam Akhavan, *Remarks at a Press Conference Organized by Ant. & Barb. and Tuvalu at COP 26* (Nov. 1, 2021), <http://www.youtube.com/watch?v=fRgDjlvOtLw>; see also Margaretha Wewerinke-Singh, *Remarks at the Conference of the British Inst. Int'l & Comp. L.* (Mar. 11, 2021), in *RISING SEA LEVELS: PROMOTING CLIMATE JUSTICE THROUGH INTERNATIONAL LAW* 8, ¶ 12 (Brit. Inst. Int'l & Compar. L. ed., 2021), http://www.biicl.org/documents/10720_rising_sea_levels_episode2_report.pdf [<https://perma.cc/BG8E-SUZM>].

26. Address by Toribiong, *supra* note 6, at 27–28; see also *Palau Seeks U.N. World Court Opinion on Damage Caused by Greenhouse Gases*, U.N. NEWS (Sept. 22, 2011), <http://news.un.org/en/story/2011/09/388202>.

27. See *Vanuatu Leading Global Initiative to bring Climate Change to World Court*, DAILY POST (Sept. 25, 2021), http://www.dailypost.vu/news/vanuatu-leading-global-initiative-to-bring-climate-change-to-world-court/article_0da76b61-fc52-5d12-baec-03d8a67000e7.html; Bernadette Carreon, *Vanuatu to Seek International Court Opinion on Climate Change Rights*, THE GUARDIAN (Sept. 26, 2021), <http://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights>.

28. Draft Resolution, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, in Permanent Mission of the Republic of Vanuatu to the United Nations (@VanuatuUN), TWITTER (Nov. 29, 2022, 7:54 PM), <http://twitter.com/VanuatuUN/status/1597740887764660225> [<http://perma.cc/TM5N-SC9W>].

29. Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Ant. & Barb.-Tuvalu, arts. 1–2, Oct. 31, 2021, 61 I.L.M. 742 [hereinafter COSIS Agreement].

COSIS' power to request an advisory opinion relies on a controversial provision of the Rules of ITLOS that permits an international agreement related to the purpose of the U.N. Convention on the Law of the Sea ("UNCLOS") to authorize "whatever body" to request an opinion of ITLOS on a legal question.³⁰ As discussed below, it is uncertain whether ITLOS can exercise advisory jurisdiction when the request touches chiefly upon the obligations of states that are not party to the agreement authorizing the request.³¹ Nonetheless, COSIS formally requested an advisory opinion of ITLOS in December 2022.³²

A third possible tactic consists of initiating advisory proceedings before a regional human rights court. In particular, the treaties establishing the Inter-American Court of Human Rights ("IACHR") and the African Court of Human and People's Rights ("ACHPR") allow an individual state party to request an advisory opinion.³³ Small-island states do not seem to have explored this option yet, but others have. In January 2023, Chile and Colombia announced that they would jointly request an advisory opinion of the IACHR.³⁴ Such an opinion of the IACHR or the ACHPR would be limited by the subject-matter jurisdiction of these courts. This may not allow them to apply the full gamut of norms relevant to climate change, such as norms arising from climate treaties and customary international law.

Following any of these tactics, an advisory opinion would aim to provide an authoritative judicial interpretation of the international law norms on climate change mitigation and, possibly, on the reparations available for the impacts of climate change. The exercise would not be unlike the attempt of the International Law Association to codify the international law applicable to climate change or the study of the International Law Commission on the

30. Rules of ITLOS, *supra* note 18, art. 138; *see infra* Part II.B.

31. *See infra* Part III.A.1.

32. Letter from COSIS to the Registrar of ITLOS (Dec. 12, 2022), http://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf; *see also* Press Release, ITLOS, The International Tribunal for the Law of the Sea Receives A Request for an Advisory Opinion from COSIS on Climate Change and International Law, ITLOS Press Release ITLOS/Press327 (Dec. 12, 2022), http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_327_EN.pdf (decision approving a recommendation to request an advisory opinion).

33. Organization of American States, American Convention on Human Rights art. 64, Nov. 22, 1969, O.A.S.T.S. No., 36, 1144 U.N.T.S. 123 [hereinafter Pact of San José]; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 4(1), June 19, 1998 [hereinafter ACHPR Protocol].

34. Ministerio de Relaciones Exteriores (Chile), *Chile y Colombia realizan inédita consulta a la Corte Interamericana de Derechos Humanos sobre emergencia climática* (Jan. 9, 2023), <https://www.minrel.gob.cl/noticias-antiores/chile-y-colombia-realizan-inedita-consulta-a-la-corte-interamericana-de> [<https://perma.cc/WG5Y-X9NK>]; Ministerio de Relaciones Exteriores (Colombia), *Chile y Colombia acuerdan consulta ante la Corte IDH sobre impacto de crisis ambiental en los derechos humanos* (Jan. 9, 2023), <https://www.cancilleria.gov.co/newsroom/news/chile-colombia-acuerdan-consulta-corte-idh-impacto-ambial-derechos-humanos> [<https://perma.cc/D2Q7-H342>].

“protection of the atmosphere.”³⁵ It is noteworthy, in this regard, that these expert-driven processes only confirmed the existence of overly broad legal principles (e.g., the obligations of prevention and cooperation), without really shedding light on how the principles are to be interpreted or applied in specific instances.³⁶ Moreover, the work of the International Law Commission has revealed the full-fledged opposition of many industrialized countries to an authoritative codification of the law applicable to climate change, with some voicing concerns that an independent interpretation of climate law would “upset the balance achieved” through climate negotiations.³⁷ These precedents suggest that advisory proceedings may lead to a rephrasing of well-known but overly abstract legal principles rather than offering any useful guidance to international negotiations on climate change.

By and large, scholars and advocates have painted a rosy picture of international advisory proceedings on climate change. As part of “an epic battle to save planet Earth,”³⁸ they imagine that an advisory opinion would necessarily be “a useful tool [to] clarify legal obligations of States,”³⁹ presume that international judges “would likely yield ‘pro-climate’ decisions,”⁴⁰ and assert that such an opinion would “create political and grassroots pressures to mitigate GHG emissions.”⁴¹ But is it realistic to expect that, first, a state makes a valid request for an advisory opinion containing useful questions; second, the court accepts the request; third, the court issues a meaningful response; fourth, this response is “pro-climate;” and, fifth, it is implemented, or influences state conduct at all?

This article aspires to provide a reality check through a comprehensive assessment of the feasibility and desirability of international advisory proceedings on climate change. It analyzes the law and practice related to advi-

35. See generally International Law Association [ILA], Rep. of the 76th Conference, Washington D.C., United States, 2014, *Resolution 2/2014: Declaration of Legal Principles Relating to Climate Change 2* (2014) [hereinafter ILA Resolution]; Protection of the Atmosphere, in Int’l Law Comm’n, Rep. on the Work of its Seventy-Second Session, at 9, U.N. Doc. A/76/10 (2021).

36. ILA Resolution, *supra* note 35, arts. 7A, 8; see also Protection of the Atmosphere, *supra* note 35, at 26–28 (Guideline 3).

37. U.N. GAOR, 69th Sess., 6th Comm., 21st mtg. at 22, ¶ 135, U.N. Doc. A/C.6/69/SR.21 (Nov. 18, 2014). See generally Benoit Mayer, *A Review of the International Law Commission’s Guidelines on the Protection of the Atmosphere*, 20 MELB. J. INT’L L. 453, 453–63 (2019).

38. U.N. Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change (Feb. 3, 2012), http://www.un.org/press/en/2012/120203_ICJ.doc.htm.

39. Anxhela Mile, *Emerging Legal Doctrines in Climate Change Law – Seeking an Advisory Opinion from the International Court of Justice*, 56 TEX. INT’L L.J. 59, 94 (2021).

40. Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689, 694 (2017) [hereinafter *Role of ICJ*].

41. Jesse Cameron Glickenhau, *Potential ICJ Advisory Opinion Duties to Prevent Transboundary GHG Emissions*, 22 N.Y.U. ENV’T L.J. 117, 154 (2015).

sory proceedings before the ICJ, ITLOS, and regional human rights courts. It also maps out the main substantive issues that an advisory opinion would touch upon, thus revealing the challenges of addressing them through advisory proceedings. Lastly, it presents a broader reflection on the political context in which advisory proceedings would take place, with the view of determining the prospects of compliance.

Overall, the article provides a skeptical perspective on the prospects for a successful advisory opinion. In particular, the article reveals the difficulty of achieving a best-case scenario, whereby an advisory opinion would help clarify the relevant law and prompt more effective climate action. States have seldom complied with advisory opinions that went against their vested interests.⁴² They are even less likely to comply with an advisory opinion that is requested and given despite widespread protest or based on questionable procedural grounds, especially when the stakes are particularly high.⁴³

A court seeking to interpret states' general obligations on climate change mitigation would almost inevitably fall into one of two opposing pitfalls. First, the court may content itself with reaffirming the existence of norms that states have expressly agreed upon—for instance, the principles that each state's action must represent its "highest possible ambition" and reflect its "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."⁴⁴ As the existence of these norms is undisputed, such an advisory opinion would serve no useful purpose. Second, the court may try to interpret and apply these treaty provisions—for instance, by seeking to determine the requisite level of mitigation action applicable to an individual state. Yet, as soon as it steps beyond carefully worded treaty provisions, the court would tread into a political minefield, leaving its conclusion highly controversial and almost certainly ignored by the states that disagree with its findings.

While advisory proceedings are unlikely to yield significant benefits for climate action, they might come at a great cost to international institutions. Practically any treatment a court may give to a request for an advisory opinion would erode both its authority and the credibility of international law. If the court finds that it cannot answer the questions, even if for good reason, some observers will view it as a denial of justice and as evidence of the lack of independence of the court from powerful GHG emitters. On the other hand, if the court does answer the questions, its response will either be obvious (*i.e.*, merely restating well-known but exceedingly general principles) or dubious (*i.e.*, inventing rules on which states have never agreed). To the extent that the court's conclusions are anything other than platitudes, and assuming that they point to the need for enhanced action on climate change

42. See Karin Oellers-Frahm, *Discussion, in* INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS?, *supra* note 22, at 116–17.

43. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1825, 1833 (2002).

44. Paris Agreement, *supra* note 1, art. 4(3).

mitigation, it will rapidly become evident to all that large GHG-emitting states are ignoring them entirely, further calling into question the relevance of international law in addressing major global issues. This, in turn, will undermine cooperation on climate change mitigation, which relies on international law to tackle climate change as a global collective action problem.

The article is organized as follows. Part I identifies the various themes that a request for an advisory opinion could touch upon, the norms that it could ask the court to interpret, and the types of outcomes it could seek. Part II explores the three most likely ways states may request an advisory opinion on climate change from the ICJ, ITLOS, and regional human rights courts, respectively. Part III considers objections that could lead a court to turn down a request for an advisory opinion. It argues that a court cannot exercise advisory jurisdiction without either the ad hoc consent or the prior authorization of the states directly concerned—a condition that would constitute a fatal flaw to the COSIS initiative. Part IV turns to methodological issues that a court would face when seeking to answer the questions asked in the request for an advisory opinion, particularly in relation to the fundamental indeterminacy of the relevant norms. Part V envisages the effects that an advisory opinion may have on climate law, climate action, and international institutions. Part VI concludes.

I. THE QUESTIONS

The following sections identify the themes that would be explored in advisory opinions requested by small-island states, the norms to which these themes would relate, and the outcomes that the states may seek.

A. *Thematic Focus*

A request for an advisory opinion could conceivably bear on four themes: (1) climate science, (2) the obligations of states regarding climate change mitigation, (3) the responsibilities of states regarding the impacts of climate change, and (4) the implications of these obligations and responsibilities on other aspects of international law. The few indications that small-island states have given so far suggest that their focus would be on the second and third themes.

First, a request for an advisory opinion could seek an assessment of scientific findings on the reality and severity of anthropogenic interference with the climate system. Although advisory opinions must answer legal questions,⁴⁵ courts may engage in the scientific literature as part of their assessment of the relevant facts; they could be called upon to confirm, for instance, the human causes of climate change. Philippe Sands suggested that “the single most important thing” that an international court could do to combat climate change “is to settle the scientific dispute,” asserting that an

45. See *infra* Part III.B.1.

international court's factual conclusions "would be significant and authoritative."⁴⁶ However, one may question the existence of genuine disagreement among states on any key aspect of the relevant science, including the existence of climate change, its anthropogenic origins, and its widespread consequences.⁴⁷ In any case, an international court is not the best authority to assess scientific findings. In all likelihood, a court's assessment of scientific evidence would only preach to the converted.⁴⁸ Additionally, their assessment may not be persuasive because the court is not, itself, a scientific authority. When scientific interpretation is needed as part of a process of applying the law to the facts, international courts should take note of the best science, particularly as reflected in the latest assessment reports of the Intergovernmental Panel on Climate Change.⁴⁹ They should not, however, act as scientific authorities.

Second, advisory proceedings could seek clarification of the legal norms that require states to limit or reduce GHG emissions or to enhance sinks and reservoirs of GHGs with the view of mitigating climate change. This theme often appears as the main focus of the proponents of advisory proceedings.⁵⁰ Thus, a 2013 study prepared under the supervision of Palau's ambassador Stuart Beck assumed that the ICJ would be asked to identify "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."⁵¹ Similarly, the first question proposed in the draft General Assembly resolution circulated by Vanuatu in November 2022 would relate to the identification of "the obligations of States ... to ensure the protection of the climate system and other parts of the environment for present and future generations."⁵² And COSIS' request of an advisory opinion of ITLOS focuses on the interpretation of the general obligations on environmental protection in Part XII of UNCLOS, on the protection and preservation of the marine environment.⁵³ A key issue, in this regard, would concern the standard to which a state may be held or, more specifically, the level of mitigation action that the state would be required to implement. An advisory opinion would thus touch upon the way that states should share the global efforts necessary to

46. Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENV'T L. 19, 29 (2016).

47. See generally IPCC, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 4–22 (2021) [hereinafter IPCC 2021]; IPCC 2022, *supra* note 24, at 9–11. See also references *supra* notes 1–2.

48. See *Role of ICJ*, *supra* note 40, at 709.

49. See generally IPCC 2021, *supra* note 47; IPCC 2022, *supra* note 24.

50. See, e.g., Address by Toribiong, *supra* note 6.

51. DOUGLAS A. KYSAR, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE 8 (2013).

52. Draft Resolution of Vanuatu, *supra* note 28, ¶ 1.

53. Letter from COSIS, *supra* note 32, at 2.

mitigate climate change. Yet, as states have never agreed on a burden-sharing formula and in the absence of any morally obvious solution,⁵⁴ a court would find it challenging to reach any meaningful conclusion. Alternative approaches to mitigation obligations could focus on the specific steps that states must take, such as the adoption of clear and specific medium-term and long-term objectives and the implementation of consistent measures.

Third, advisory proceedings could consider the legal norms that apply to the impacts of climate change.⁵⁵ While climate treaties require every state to promote adaptation to climate change within its own jurisdiction,⁵⁶ island states would instead focus requests for advisory opinions on the remedial obligations of large GHG emitters for the impact of their actions on the most vulnerable countries. In particular, island states could seek an advisory opinion that would identify, interpret, and apply an obligation of large GHG emitters to make reparations for the impacts of climate change.⁵⁷ Thus, Antigua and Barbuda presented international responses to “loss and damage” as the main focus of COSIS,⁵⁸ echoing the demand of small-island states for a recognition of “the legal responsibility of states for carbon emissions . . . and rising sea levels.”⁵⁹ As any mention of climate reparations remains politically divisive,⁶⁰ this theme is less likely to be included in a request adopted by a majority of the U.N. General Assembly than in one submitted

54. See Thomas Leclerc, *The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable But Failed Effort to Enhance Equity in Climate Law*, in DEBATING CLIMATE LAW 76, 76–77 (Benoit Mayer & Alexander Zahar eds., 2021); STEPHEN M. GARDINER, A PERFECT MORAL STORM: THE ETHICAL TRAGEDY OF CLIMATE CHANGE 213 (2011) (noting “moral and political theories face fundamental and often severe difficulties addressing” the issues raised by climate change, in particular in relation to burden-sharing).

55. See, e.g., Wewerinke-Singh, *supra* note 25, ¶ 13; Gaston Browne, Chair of the Alliance of Small Island States, Statement on Behalf of AOSIS at the COP26 World Leaders’ Summit (Nov. 1, 2021), <http://www.aosis.org/aosis-statement-at-cop26-world-leaders-summit> (alluding to a plan “to seek justice in the appropriate international bodies” on compensation).

56. UNFCCC, *supra* note 1, art. 4(1)(b); Paris Agreement, *supra* note 1, art. 7(9).

57. See generally Burkett, *supra* note 19, at 536–41; Benoit Mayer, *Climate Change Reparations and the Law and Practice of State Responsibility*, 7 ASIAN J. INT’L L. 185, 188–91 (2017); Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT’L L. 1, 18–20 (2008).

58. Browne, *supra* note 55. See generally COSIS, 2022 Annual Report 13 (Oct. 2022), (on file with author) (mentioning that the Commission had conveyed “discussion on loss and damage under international law”).

59. Kausea Natano, Prime Minister of Tuvalu, High-Level Statement at COP26 4–5 (Nov. 2, 2021), http://unfccc.int/sites/default/files/resource/TUVALU_cop26cmp16cma3_HLS_EN.pdf; see also Address by Toribiong, *supra* note 6 (“innocent victims of transboundary harm”); Margaretha Wewerinke-Singh & Diana Hinge Salili, *Between Negotiations and Litigation: Vanuatu’s Perspective on Loss and Damage from Climate Change*, 20 CLIMATE POL’Y 681, 686–87 (2019).

60. See Karen E. McNamara & Guy Jackson, *Loss and Damage: A Review of the Literature and Directions for Future Research*, 10 WIRES CLIMATE CHANGE e564, at 2 (2019).

by a small organization of like-minded states (such as COSIS) or an individual state before ITLOS or a regional human rights court.⁶¹ Nonetheless, the draft resolution proposed by Vanuatu in November 2022 includes a second question focusing on “the legal consequences ... for States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment.”⁶² The request proposed by Vanuatu would consider such consequences for “[s]mall island developing States and other States” that “are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change” as well as for “[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change.”⁶³ COSIS’ request does not involve questions of responsibility, but it includes a question on the obligations of states “to protect and preserve the marine environment in relation to climate change impacts.”⁶⁴

Fourth, advisory proceedings could touch upon the implications of climate change for other aspects of international law. For instance, they could assess the obligations of third-party states to assist those affected by climate impacts, as in the context of climate-related disasters and international migration.⁶⁵ A court could also determine how states’ territory and maritime areas are affected by sea-level rise,⁶⁶ or it could explore whether and how small-island states lying close to sea level could maintain their existence when their territory becomes uninhabitable.⁶⁷ Additionally, a court could assess how norms relating to the management of shared resources apply when they are affected by climate impacts, such as the impact of drought and flooding on transboundary watercourses and aquifers, or the impact of ocean warming and acidification on straddling and highly migratory fish stocks.⁶⁸ These more technical questions are less controversial, yet they are

61. See U.N. Press Conference, *supra* note 38 (noting that Grenada’s intention was not “to focus blame on major emitters”).

62. Draft Resolution of Vanuatu, *supra* note 28, ¶ 2.

63. *Id.*

64. Letter from COSIS, *supra* note 32, at 2.

65. See generally Benoit Mayer, *Climate Change, Migration, and the Law of State Responsibility*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 238, 253–55 (Benoit Mayer & François Crépeau eds., 2017).

66. See José Luís Jesus, President of ITLOS, Statement to the Sixth Committee of the General Assembly 4 (Nov. 4, 2009), http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/sixth_committee_041109_eng.pdf; Malgorzata Materna, *Introductory Note to the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*, 61 I.L.M. 739, 740 (2022).

67. See Stefica Nicol Bikes, *Tuvalu Looking at Legal Ways to Be a State If It Is Submerged*, REUTERS (Nov. 9, 2021, 5:25 AM), <http://www.reuters.com/business/cop/tuvalu-looking-legal-ways-be-state-if-it-is-submerged-2021-11-09>. See generally Ori Sharon, *State Extinction Through Climate Change*, in DEBATING CLIMATE LAW, *supra* note 54, at 349, 356–60.

68. See generally IPCC 2022, *supra* note 24, at 476–480, 593.

of great importance to many states that are disproportionately affected by climate change. Perhaps regrettably, these questions have generally not been the focus of discussions on potential requests for an advisory opinion, and they feature neither in Vanuatu's draft resolution, nor in COSIS' request.

B. Normative Focus

Advisory proceedings on climate change mitigation or climate reparations could involve the interpretation of various sources of international law. Climate treaties would be an obvious starting point. Advisory proceedings could seek to clarify, for instance, the legal force of NDCs or the legal significance of the "expectation" that each party's new NDC "reflect its highest possible ambition" and "represent a progression" beyond its previous NDC.⁶⁹ Advisory proceedings could also assess the legal force of the mitigation objectives formulated by the Paris Agreement or the implications of the principle of "common but differentiated responsibilities."⁷⁰ Thus, Lavanya Rajamani suggested that an advisory opinion could "concretize ... open-textured" obligations.⁷¹ However, courts would face considerable methodological challenges when seeking to make sense of treaty provisions like the principle of common but differentiated responsibilities which, truth be told, reflect little more than states' agreement to disagree.⁷²

To bypass the gridlock of international climate negotiations, advisory proceedings could focus on another source of international law: customary law.⁷³ A court would thus call into question the widespread assumption, among climate law specialists, that climate treaties displace the application of other norms of international law.⁷⁴ As no climate treaty expressly or im-

69. See generally Benoit Mayer, *International Law Obligations Arising in Relation to Nationally Determined Contributions*, 7 *TRANSNAT'L ENV'T L.* 251, 252 (2018) (legal force); Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28 *J. ENV'T L.* 337, 343 (2016) (legal significance of the expectation); Paris Agreement, *supra* note 1, art. 4(3) (standards of "highest possible ambition" and "progression").

70. See *supra* notes 3–4; Leclerc, *supra* note 54, at 76.

71. Center for International Sustainable Development, *Experts Panel: Advancing Climate Justice through the World's Highest Court*, YOUTUBE (Nov. 7, 2021), <http://youtu.be/JUJ-0pEly3M>.

72. See Susan Biniaz, *Comma But Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime*, 6 *MICH. J. ENV'T & ADMIN. L.* 37, 40 (2016).

73. See, e.g., Draft Resolution of Vanuatu, *supra* note 28, pmbl. (referring broadly to "rules of general international law, including the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment, and the duty to protect and preserve the marine environment").

74. See *Role of ICJ*, *supra* note 40, at 698; see also Alexander Zahar, *The Contested Core of Climate Law*, 8 *CLIMATE L.* 244, 255–56 (2018); Alan Boyle & Navraj Singh Ghaleigh, *Climate Change and International Law Beyond the UNFCCC*, in *THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW* 26, 52 (Kevin R. Gray, Richard Tarasofsky, & Cinnamon P. Carlame eds., 2016).

PLICITLY excludes the application of other relevant norms, these norms should—under the principle of harmonization identified by the International Law Commission—“be interpreted so as to give rise to a single set of compatible obligations.”⁷⁵ Several small-island states have formally declared their understanding that climate treaties “in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change” and cannot “be interpreted as derogating from principles of general international law.”⁷⁶

With regard to climate change mitigation, President Johnson Toribiong of Palau highlighted in 2011 that the ICJ had identified the principle that states must “ensure that activities within their jurisdiction or under their control respect the environment of other states.”⁷⁷ Likewise, Daniel Bodansky voiced hope that an international court may elaborate “more specific criteria of due diligence” in order to determine what precisely each state must do.⁷⁸ Yet this obligation of due diligence has only been applied in simple cases in which an activity within a state’s jurisdiction directly harmed another state’s territory,⁷⁹ shared resources,⁸⁰ or areas beyond national jurisdiction,⁸¹ rather than cases in which such activities contributed incrementally to a globally cumulative issue such as climate change. While the obligation of due diligence is certainly relevant to climate change,⁸² a court would find no concrete benchmark to determine what, precisely, it means in terms of global emission reduction pathways and the process of sharing the necessary efforts between states.⁸³ In the rare cases in which na-

75. Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, *in* Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, at 177, ¶ 251(a)(4), U.N. Doc. A/61/10.

76. See, e.g., UNFCCC, *supra* note 1, Declarations of Kiribati, Nauru, Papua N.G., and Tuvalu; Paris Agreement, *supra* note 1, Declarations of the Cook Islands, the Marsh. Is., Nauru, Niue, Solom. Is., Tuvalu, and Vanuatu.

77. Address by Toribiong, *supra* note 6, at 4.

78. *Role of ICJ*, *supra* note 40, at 709; see also Richard Barnes, *An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?*, 53 OCEAN DEVELOPMENT & INT’L L. 180, 211 (2022).

79. See *United States v. Canada (Trail Smelter)*, 3 R.I.A.A. 1938, 1965 (1941); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) & Construction of a Road in Costa Rica Along the San Juan River (Nicar. V. Costa Rica)*, Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16).

80. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶¶ 101, 103 (Apr. 20).

81. See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011 ITLOS Rep. 10, ¶¶ 107–16 (Seabed Disputes Chamber).

82. See, e.g., Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 AM. J. INT’L L. 409, 445 (2021).

83. See discussion *infra* Part IV.A.1.

tional courts have sought to determine a state's requisite level of mitigation action, their decisions have been ill-motivated and unconvincing.⁸⁴

Customary law would also be central to proceedings bearing on reparation.⁸⁵ Despite small-island states' repeated claims for compensation in international climate negotiations,⁸⁶ other states have only agreed to provide limited assistance to helping developing countries adapt.⁸⁷ The Paris Agreement recognizes the importance of "addressing loss and damage associated with the adverse effects of climate change,"⁸⁸ but with the caveat, in the accompanying decision of the Conference of the Parties, that this would "not involve or provide a basis for any liability or compensation."⁸⁹ This neutrality of climate treaties on the question of reparations does not preclude the application of customary law to the responsibility of states for internationally wrongful acts.⁹⁰

Like primary rules on climate change mitigation, however, the secondary rules of customary law on state responsibility are difficult to apply to climate change. This is because a state's wrongful GHG emissions do not *directly* cause any injury to another state. Mitigation obligations can perhaps be understood as obligations owed to the international community as a whole (*erga omnes*).⁹¹ In such cases, the International Law Commission has suggested that reparations might be made, without identifying an injured state, "in the interest...of the beneficiaries of the obligation breached."⁹² As such, Vanuatu proposed that the ICJ be asked to determine legal consequences of potential breaches of international law obligations with respect to "[p]eoples and individuals of the present and future generations affected

84. See Benoit Mayer, *Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review*, 28 REV. EUR. COMPAR. & INT'L ENV'T L. 107 (2019).

85. Draft Resolution of Vanuatu, *supra* note 28, ¶ 2.

86. See, e.g., Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Proposal by Vanuatu for a Draft Annex Related to Article 23, U.N. Doc. A/AC.237/WG.II/CRP.8 (Dec. 17, 1991). See generally Wewerinke-Singh & Salili, *supra* note 59.

87. See UNFCCC, *supra* note 1, art. 4(4).

88. Paris Agreement, *supra* note 1, art. 8(1).

89. Adoption of the Paris Agreement, *supra* note 2, ¶ 51.

90. See Florentina Simlinger & Benoit Mayer, *Legal Responses to Climate Change Induced Loss and Damage*, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS 179, 196 (Reinhard Mechler, Laurens M. Bowers, Thomas Schinko, Swenja Surminski, & JoAnne Linnerooth-Bayer eds., 2019).

91. See Maiko Meguro, *Litigating Climate Change Through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. INT'L L. 933, 936–38 (2020); Mayer, *A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere*, *supra* note 37, at 490–92.

92. Draft Articles on the Responsibility of States for Internationally Wrongful Acts art. 48(2)(b), in Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, at 26–31, U.N. Doc. A/61/10 (2006); see also Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011 ITLOS Rep. 10, ¶ 180 (Seabed Disputes Chamber).

by the adverse effects of climate change.”⁹³ However, a court would have to break new ground to determine the nature, amount, or modalities of such reparations to the beneficiaries of an *erga omnes* obligation.

Aside from climate treaties and customary international law, advisory opinions could focus on treaties that are incidentally relevant to climate change. For instance, in light of the considerable impacts of climate change on the marine environment,⁹⁴ a court could construe provisions of UNCLOS on the protection of the marine environment as requiring states to mitigate climate change.⁹⁵ Similarly, states have treaty obligations to protect human rights, which a court could interpret as requiring climate action, on the grounds that the climate change has an adverse impact on the enjoyment of human rights.⁹⁶ Thus, the advisory opinion that Chile and Colombia intend to request from the IACHR would focus on the need for climate action “for a human rights perspective”.⁹⁷ Identifying incidental obligations would be instrumental to justifying the advisory jurisdiction of specialized courts like regional human rights courts and (in some interpretations of its jurisdiction) ITLOS.⁹⁸ Thus, it is unsurprising that COSIS’ request focuses on the obligations of Parties to UNCLOS, in particular under Part XII, on environmental protection.⁹⁹ In further analysis, however, action on climate change mitigation appears to be an inefficient way to protect the marine environment or, *a fortiori*, the human rights of individuals within the territorial scope of a human rights treaty. In comparison to incidental obligations, customary law allows for a more powerful argument,¹⁰⁰ justifying climate change not only to protect both the marine environment *and* the human rights of individuals

93. Draft Resolution of Vanuatu, *supra* note 28, ¶ 2.

94. See, e.g., IPCC 2022, *supra* note 24, at 9.

95. See, e.g., Address by Toribiong, *supra* note 6, at 28; Sandrine W. de Herdt & Tafsir Malick Ndiaye, *The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment: Taking Stock and Prospects*, 57 CAN. Y.B. INT’L L. 353, 370 (2019); Rozemarijn J. Roland Holst, *Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change*, REV. EUR. COMPAR. & INT’L ENV’T L. (forthcoming).

96. See Solomon Yeo, Remarks on Judging the Climate Crisis: The Role of the International Court of Justice in Addressing Environmental Harms (Mar. 24, 2021), in PROCEEDINGS OF ASIL, *supra* note 9, at 20, 21; see, e.g., MARGARETHA WEWERINKE-SINGH, STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW 5 (2019); John Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT’L L. 163, 196–212 (2010).

97. Ministerio de Relaciones Exteriores (Colombia), *supra* note 34.

98. See *infra* text at note 199. By contrast, there is no obvious reason for the request of an advisory opinion of the ICJ to invoke UNCLOS or human rights treaties. *But see* Draft Resolution of Vanuatu, *supra* note 28, pmbl.

99. Letter from COSIS, *supra* note 32, at 2.

100. See Christina Voigt, Remarks on Judging the Climate Crisis: The Role of the International Court of Justice in Addressing Environmental Harms (Mar. 24, 2021), in PROCEEDINGS OF ASIL, *supra* note 9, at 23, 23.

within and beyond a state's territory,¹⁰¹ but also as a way to secure a range of other sovereign rights such as survival,¹⁰² territorial integrity,¹⁰³ and permanent sovereignty over natural resources.¹⁰⁴

C. Intended Outcome

Courts have offered advisory opinions responding to general and abstract questions,¹⁰⁵ as well as those responding to questions that relate more directly to the situations of specific states.¹⁰⁶ Thus, the body that is requesting an advisory opinion on climate change could seek different outcomes. For the purpose of exposition and without claiming that a clear line always exists, this article distinguishes between three types of potential outcomes that can be situated on a spectrum. At one end of the spectrum, an *identificatory* opinion would consist of an inventory of the relevant norms. At the other end of the spectrum, an *applicatory* opinion would determine what these norms concretely mean for one, several, or all states. Between these two extremes, an *interpretative* opinion would seek to determine, in abstract terms, what the relevant norms imply—that is, how they are relevant to climate change.

An identificatory opinion could confirm the existence of customary norms on climate change mitigation and reparations. This, however, would only point out the obvious: that in a legal system under which states are equal sovereigns, their sovereign rights (*e.g.*, to territorial integrity) imply the existence of a corollary duty (*i.e.*, at least, an obligation of due dili-

101. See, *e.g.*, Detlef Czybulka, *Part XII: Protection and Preservation of the Marine Environment*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1277, 1284–86 (Alexander Proelss ed., 2017) (describing the customary nature of article 192 of UNCLOS in relation to the protection of the marine environment); see *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); Draft Articles on Diplomatic Protection art. 2, in *Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session*, at 16, U.N. Doc. A/61/10 (2006).

102. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 96 (July 8).

103. See U.N. Charter art. 2(4); *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, at 35 (Apr. 9); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 80 (July 22).

104. See International Covenant on Economic, Social and Cultural Rights art. 1(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights art. 1(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 2, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992). *But see* *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 244 (Dec. 19).

105. See, *e.g.*, *Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights*, No. 001/2018, Advisory Opinion, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 5 (Dec. 4, 2020).

106. See, *e.g.*, *id.*; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25).

gence);¹⁰⁷ and that the breach of this obligation entails some legal consequences.¹⁰⁸ At most, an identificatory opinion would influence the dominant political discourse by making it more difficult for developed states to approach these questions from a purely self-serving perspective.¹⁰⁹ Yet, this opinion would disappoint many proponents of advisory proceedings on climate change, who would expect the court to help states make sense of these ill-defined norms rather than simply identifying them since they have already been identified and are already understood to be ill-defined.

At the other extreme, an applicatory opinion would seek to determine precisely what individual states must do or not do to comply with their obligations. Regarding climate change mitigation, a court could seek to determine what a state must do to remain in line with its general obligations, for instance under customary law. In particular, the court could seek to determine the stringency of the state's contribution to global efforts on climate change mitigation based on the court's interpretation of global mitigation objectives and burden-sharing criteria. The court could also prescribe a set of rules (*e.g.*, the requirement for a state to implement its NDC) or even provide a list of quantified emission limitation and reduction targets applicable to individual states (similar to Annex B of the Kyoto Protocol).¹¹⁰ Alternatively, the court could merely determine whether specific states are in compliance with their general mitigation obligations, without articulating a specific standard.¹¹¹ Regarding climate reparations, the court could define a formula to determine the amount of compensation that states responsible for the largest share of GHG emissions owe to those most vulnerable to the impacts of climate change.

In either case, the outcome would be unconvincing, for reasons discussed at greater length later in this article.¹¹² For one, given the complexity of the questions that would be asked, a court could not realistically weigh all the important factors, such as all the costs and benefits of mitigation action, or all the national circumstances that are relevant to determining states' fair shares in global efforts. Overall, a few international judges selected based on their legal expertise would lack legitimacy to make such critical, complex, value-loaded decisions on such a technical issue. An applicatory opin-

107. Jutta Brunnée, *Sic utere tuo ut alienum non laedas*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum, eds., 2010), <http://www.opil.oupilaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1607>.

108. See JAMES CRAWFORD, *Part III: Breach*, in STATE RESPONSIBILITY: THE GENERAL PART 215, 229–30 (2013).

109. See Akhavan, *supra* note 25 (expressing the will to shift the conversation around climate change mitigation obligations from one of vague voluntary commitments to one of legally binding obligations and compensation).

110. Kyoto Protocol to the United Nations Framework Convention on Climate Change, annex B, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

111. See, *e.g.*, Civ. [Tribunal of First Instance] Bruxelles (4th ch.) (Belg.), June 17, 2021, 2015/4585/A, unofficial English translation <http://perma.cc/U3A5-PLTY>.

112. See discussion *infra* Part V.

ion would be a caricature of the genre, as the court would, in effect, step in as a substitute for national negotiators, consequently functioning as a global legislator. This could considerably erode a court's reputation and credibility without even swaying the conduct of states.

Halfway between these two extremes, sponsoring states would likely opt to seek an interpretative opinion. Yet, it is unclear what question they could ask of a court whose response would neither be obvious (as in an identificatory outcome) nor exceed the ability of a court to interpret elusive norms (as in an applicatory outcome). On the one hand, a court could note, as has been done in previous judicial pronouncements, that a due diligence obligation implies not only the undertaking of "negotiations in good faith for the equitable solution,"¹¹³ but also the adoption of "appropriate measures" and the exercise of "vigilance in their enforcement."¹¹⁴ However, this would do little to clarify the relevant norms, as it would not go far enough to be of assistance to states. On the other hand, the act of assessing the precise criteria relevant to the principle of "common but differentiated responsibilities" and the relative weight of those criteria would involve political decisions that are not within the ambit of judicial functions. In other words, it would go too far to be acceptable to states.

What remains are peripheral questions of legal interpretation on which judicial debates could shed new light. Some questions could concern treaty provisions that are only mildly ambivalent, such as the obligation of parties to the Paris Agreement to "pursue domestic mitigation measures, with the aim of achieving the objectives of" their NDCs.¹¹⁵ A court could answer these questions in a relatively predictable manner by applying legal rules and principles on the interpretation of treaties.¹¹⁶ Other questions could regard specific aspects of states' general obligations on climate change mitigation. For instance, a court could make a pronouncement on the legal force of emerging standards on the phasing out of fossil fuel subsidies,¹¹⁷ the phasing down of unabated coal power,¹¹⁸ or the conduct of environmental impact assessments as a tool for climate change mitigation.¹¹⁹ None of these questions would seek to change the world by a single strike of a gavel, but they could have some incremental influence on national processes. Howev-

113. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, ¶ 79(3) (July 25).

114. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 197 (Apr. 20).

115. Paris Agreement, *supra* note 1, art. 4(2).

116. See Mayer, *International Law Obligations Arising in Relation to Nationally Determined Contributions*, *supra* note 69, at 257–61.

117. Glasgow Climate Pact, *supra* note 1, ¶ 20; Kyoto Protocol, *supra* note 110, art. 2(1)(a)(v); G20, *G20 Leaders' Declaration: The Rome Summit*, ¶ 27 (Oct. 30–31, 2021), http://www.gpfi.org/sites/gpfi/files/7_G20%20Rome%20Leaders%27%20Declaration.pdf.

118. Glasgow Climate Pact, *supra* note 1, ¶ 20.

119. Benoit Mayer, *Climate Assessment as an Emerging Obligation Under Customary International Law*, 68 INT'L & COMP. L.Q. 271, 273 (2019).

er, such lower profile cases do not seem to be the focus of proponents of advisory opinions on climate change.¹²⁰

II. THE REQUESTS

This section assesses how small-island states could request an advisory opinion from an international court. The most likely way for small-island states to request an advisory opinion of the ICJ is to achieve a majority decision at the U.N. General Assembly. However, it is uncertain that this condition can be fulfilled. By contrast, these states and their allies may find it easier to request an advisory opinion from ITLOS or regional human rights courts. However, with this approach, small-island states would have to be aware that specialized courts would approach the advisory proceedings narrowly, given their limited subject-matter and territorial jurisdiction.

A. Requests to the ICJ

The ICJ and its predecessor, the Permanent Court of International Justice (“PCIJ”), have issued dozens of advisory opinions on various aspects of international law. As “the principal judicial organ of the United Nations,”¹²¹ the ICJ may appear as a natural choice to the proponents of an advisory opinion on climate change. In addition to being the longest-existing international court and arguably the most authoritative, it is also “[t]he only international judicial body with general jurisdiction regarding inter-State disputes on a world-wide scale.”¹²²

However, only a few institutions can request an advisory opinion from the ICJ. The U.N. Charter grants only the General Assembly and Security Council the power to request advisory opinions from the ICJ “on any legal question.”¹²³ In addition, the General Assembly can authorize other U.N. organs and specialized agencies to request advisory opinions “on legal questions arising within the scope of their activities.”¹²⁴ The General Assembly has granted competence to several organs, including the U.N. Economic and Social Council¹²⁵ (but not to the U.N. Secretary-General),¹²⁶ and to specialized agencies.¹²⁷

120. See, e.g., Wewerinke-Singh, *supra* note 25, ¶ 12.

121. U.N. Charter art. 92; see also I.C.J. Statute, *supra* note 11, art. 37.

122. Christian Tomuschat, *International Courts and Tribunals* ¶ 11, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum, eds., 2019), <http://www.opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e35>; see also *Role of ICJ*, *supra* note 40, at 701.

123. U.N. Charter art. 96(1).

124. *Id.* art. 96(2).

125. G.A. Res. 89 (I) (Dec. 11, 1946).

126. See generally Stephen M. Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78 AM. J.

The General Assembly has made more requests for advisory opinions than all the other institutions combined and is the institution most likely to request an advisory opinion on climate change.¹²⁸ Such a request would be made by a majority vote of members present and voting, which would be challenging to acquire.¹²⁹ In the past, this condition did not prevent the General Assembly from requesting advisory opinions on controversial questions such as the legality of the use of nuclear weapons and the consequences of the construction of a wall in occupied Palestinian territory.¹³⁰ Although perhaps no topic has been as complex and sensitive as climate change mitigation and climate reparations, a majority of the 193 U.N. member states could conceivably be carved out, in particular, of the 134 developing states participating in the Group of 77,¹³¹ including thirty-eight small-island states and fifty-five members of the Climate Vulnerable Forum,¹³² many of which would likely see an advisory opinion as aligned with their national interests.

Other institutions authorized to request an advisory opinion are less likely to do so on climate change. A request from the Security Council would require an affirmative vote by nine of the Council's fifteen members, without any opposition from its five permanent members.¹³³ The prospects of fulfilling this condition are remote, especially considering that the five permanent members contribute about half of global GHG emissions and in-

INT'L L. 869, 876–78 (1984); ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 1049–50 (Alan Perry trans., 2013).

127. See, e.g., Agreement between the United Nations and the United Nations Educational, Scientific and Cultural Organization art. XI (2), Feb. 3, 1947, 1 U.N.T.S. 238; Agreement between the United Nations and the World Health Organization art. X(2), July 10, 1948, 19 U.N.T.S. 193.

128. See *Organs and Agencies Authorized to Request Advisory Opinions*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/en/organs-agencies-authorized> (last visited Mar. 6, 2022).

129. U.N. Charter art. 18. See generally Anthony Aust, *Advisory Opinions*, 1 J. INT'L DISP. SETTLEMENT 123, 149 (2010); KENNETH JAMES KEITH, *THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* 45–46 (1971).

130. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

131. *The Member States of the Group of 77*, G77, <http://www.g77.org/doc/members.html> (last visited Mar. 6, 2022). For an early statement of the G77 approaching climate change as essentially the responsibility of developed states, see Group of 77, *Caracas Declaration*, ¶ 34, U.N. Doc. A/44/361, annex (June 30, 1989). However, many developing states have revised their positions in the last thirty years, in particular as their own emissions were increasing. See, e.g., Kathryn Hochstetler & Manjana Milkoreit, *Responsibilities in Transition: Emerging Powers in the Climate Change Negotiations*, 21 GLOB. GOVERNANCE 205, 217–18 (2015).

132. *List of SIDS*, U.N. OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES, <http://www.un.org/ohrls/content/list-sids> (last visited Mar. 6, 2022); *About*, CLIMATE VULNERABLE F., <http://thecvf.org/about> (last visited Mar. 6, 2022).

133. U.N. Charter art. 27(3).

clude the world's two largest GHG emitters (China and the United States).¹³⁴ The permanent members have generally opposed any attempt at codifying the international law on climate change, whether this be focused on the courts or non-judicial bodies of experts.¹³⁵

Other U.N. organs and specialized agencies are also unlikely to offer an avenue towards an ICJ advisory opinion on climate change. Bodansky suggested that the World Meteorological Organization is preferable to the General Assembly because it “is a more technical, less politicized forum, in which it might be easier to resist efforts to encumber the request with unhelpful baggage.”¹³⁶ However, a request by the World Meteorological Organization would have to be made or authorized by a two-thirds majority of its Congress,¹³⁷ a condition that would be more difficult to fulfill than the simple majority required at the General Assembly (the membership of the two organizations being comparable). In addition, institutions other than the General Assembly and the Security Council can only be authorized to request advisory opinions on questions that are “within the scope of their activities.”¹³⁸ In a 1996 pronouncement, the ICJ found this condition to preclude compliance with a World Health Organization request for an advisory opinion on the legality of the use of nuclear weapons in armed conflict, finding that the link between the request and the activities of the organization was too tenuous.¹³⁹ Neither the U.N. Climate Secretariat nor the U.N. Environment Programme are among the organs authorized to request an advisory opinion, and other organs or specialized agencies do not appear to exercise any functions to which an advisory opinion would be directly relevant.

Consistently, small-island states have focused their efforts on gathering support at the General Assembly. In September 2011, President Toribiong announced that he would “call on the Assembly to seek, on an urgent basis . . . an advisory opinion from the International Court of Justice on the responsibilities of States under international law to ensure that activities emit-

134. Calculations based on CAIT Data, *supra* note 12.

135. See, e.g., Stuart Beck & Elizabeth Burleson, *Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations*, 3 *TRANSNAT'L ENV'T L.* 17, 26 (2014) (courts); Michael B. Gerrard, *Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*, *CLIMATE L. BLOG* (Sept. 29, 2021), <http://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues> (courts); see U.N. Press Conference, *supra* note 38 (non-judicial bodies).

136. *Role of ICJ*, *supra* note 40, at 712.

137. See Agreement Between the United Nations and the World Meteorological Organization art. VII, Dec. 20, 1951, 123 *U.N.T.S.* 245; Convention of the World Meteorological Organization art. 11, *opened for signature* Oct. 11, 1947, *reprinted in* *WORLD METEOR. ORG., BASIC DOCUMENTS NO. 1*, at 12 (2019).

138. U.N. Charter art. 96(2).

139. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 *I.C.J.* 66, ¶¶ 31–32 (July 8).

ting greenhouse gases that are carried under their jurisdiction or control do not damage other States.”¹⁴⁰ The announcement captured media attention and contributed to a political debate about Western countries’ climate responsibilities.¹⁴¹ It was later reported that Palau built a coalition of “more than” thirty states that included Bangladesh and small-island states such as Grenada and the Marshall Islands.¹⁴² However, this remains far short of a majority of the General Assembly. They did not present a draft resolution to the General Assembly, and at the next session, just a year after the coalition’s formation, Palau made no mention of a request for an advisory opinion.¹⁴³

It has been reported that the abrupt end of Palau’s campaign may have been influenced by diplomatic pressure from the United States.¹⁴⁴ Since its independence from the United States in 1994, Palau continues to receive significant aid and, in turn, influence, from the United States.¹⁴⁵ It is worth noting that this situation of aid-dependency is not unique to Palau; many small-island developing states are heavily dependent on international aid and, as such, are vulnerable to external diplomatic pressure from donor countries.¹⁴⁶

Long after Palau’s campaign faltered at the General Assembly, the idea of requesting an advisory opinion continued to receive support from civil-society organizations like the International Union for the Conservation of

140. Address by Toribiong, *supra* note 6, at 27–28.

141. See, e.g., Lawrence Hurley, *Island Nation Girds for Legal Battle Against Industrial Emissions*, N.Y. TIMES (Sept. 28, 2011), <http://archive.nytimes.com/www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html?pagewanted=print>; Chris Huhne, *It Won’t Be Long Before the Victims of Climate Change Make the West Pay*, THE GUARDIAN (Dec. 29, 2013), <http://www.theguardian.com/commentisfree/2013/dec/29/poorer-countries-climate-change-case>.

142. Margaretha Wewerinke-Singh, Julian Aguon, & Julie Hunter, *Binging Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 393, 406 (Ivano Alogna, Christine Bakker, & Jean-Pierre Gauci eds., 2021); see also Address by Toribiong, *supra* note 6, at 27–28; U.N. Press Conference, *supra* note 38.

143. See U.N. GAOR, 67th Sess., 21st plen. Mtg. at 4–7, U.N. Doc. A/67/PV.21 (Oct. 1, 2012).

144. *Can a Pacific Island Nation Use Old Industrial Law to Stop Climate Change?*, THE ATLANTIC (Aug. 23, 2012), <http://www.theatlantic.com/technology/archive/2012/08/can-a-pacific-island-nation-use-old-industrial-law-to-stop-climate-change/261455>; Beck & Burleson, *supra* note 135, at 26.

145. Compact of Free Association, Palau-U.S., tit. 2, art. I, Jan. 10, 1986, 100 Stat. 3672.

146. For instance, Tuvalu received official development flows representing \$27,000,000 U.S. dollars in 2020, representing 55% of its G.D.P. For Vanuatu, this rate is 8% of its G.D.P. See *Total Official Development Flows by Country and Region (ODF)*, OECD.STAT, <http://stats.oecd.org> (last visited Mar. 9, 2022); *GDP*, WORLD BANK DATA, <http://data.worldbank.org> (last visited Mar. 9, 2022); see also Adam Grydehøj & Ilan Kelman, *Reflections on Conspicuous Sustainability: Creating Small Island Dependent States (SIDS) Through Ostentatious Development Assistance (ODA)?*, 116 GEOFORUM 90 (2020).

Nature.¹⁴⁷ In 2019, a Communiqué of the Pacific Islands Forum “noted”—without endorsing—“the proposal for a U.N. General Assembly Resolution seeking an advisory opinion from the [ICJ] on the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change.”¹⁴⁸ Local media reported that some of the eighteen members of the Pacific Islands Forum (which include Australia and New Zealand) did not support the initiative in light of “their own direct coal and fossil fuel related responsibility for the climate emergency.”¹⁴⁹

In September 2021, the Government of Vanuatu announced its project to campaign for the General Assembly to request an advisory opinion from the ICJ.¹⁵⁰ Vanuatu has since assembled a task force of experts and practitioners and initiated a public campaign,¹⁵¹ which has received support from several NGOs.¹⁵² In March 2022, the fifteen members of the Conference of Heads of Government of the Caribbean Community (“CARICOM”) adopted

147. IUCN World Conservation Congress, *Request for an Advisory Opinion of the International Court of Justice on the Principle of Sustainable Development in View of the Needs of Future Generations*, ¶ 1, WCC Doc. WCC/2016/Res/079/EN (Sept. 1–10, 2016), http://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_079_EN.pdf; see also Wewerinke-Singh, Aguon, & Hunter, *supra* note 142, at 406.

148. Fiftieth Pacific Islands Forum, *2019 Forum Communiqué*, in PACIFIC ISLANDS FORUM SECRETARIAT, ANNUAL REPORT 50, ¶ 16 (2021).

149. *Civil Society Is Fighting for Pacific Leaders to Seek Advice from International Court of Justice on Climate Emergency*, DAILY POST (Aug. 10, 2019), http://www.daily.post.vu/news/civil-society-is-fighting-for-pacific-leaders-to-seek-advice-from-international-court-of-justice/article_617932dc-950a-5cb7-b111-f945d09bae34.html.

150. See *Vanuatu to Push International Court for Climate Change Opinion*, REUTERS (Sept. 25, 2021), <http://www.reuters.com/world/asia-pacific/vanuatu-push-international-court-climate-change-opinion-2021-09-25>; Kizzy Kalsakau & Anita Roberts, *Vanuatu Leading Pacific on Climate Justice*, DAILY POST (Jul. 23, 2021), http://www.dailypost.vu/news/vanuatu-leading-pacific-on-climate-justice/article_fd607b5e-eb30-11eb-a737-3be3e41d5f4e.html.

151. Julian Aguon & Margarethe Wewerinke-Singh, *Pacific Firm to Lead Global Legal Team Supporting Vanuatu’s Pursuit of Advisory Opinion on Climate Change from International Court of Justice*, BLUE OCEAN L. (Oct. 23, 2021), <http://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice>; see Bob Loughman Weibur, Prime Minister of Vanuatu, *Addressing Climate Change Is Safeguarding Human Rights*, NEWSWEEK (June 13, 2022), <http://www.newsweek.com/addressing-climate-change-safeguarding-human-rights-opinion-1714773>; Kate Lyons, *From Vanuatu Law School to the Hague: The Fight to Recognise Climate Harm in International Law*, THE GUARDIAN (June 19, 2022), <http://www.theguardian.com/world/2022/jun/20/from-vanuatu-law-school-to-the-hague-the-fight-to-recognise-climate-harm-in-international-law>.

152. Lagipoiva Chelle Jackson, *Vanuatu’s Push for Legal Protection from Climate Change Wins Crucial Support*, THE GUARDIAN (May 10, 2022), <http://www.theguardian.com/world/2022/may/11/vanuatus-push-for-legal-protection-from-climate-change-wins-crucial-support> [<http://perma.cc/3PKZ-PKLX>]; *Pacific Elders’ Voice statement in Support of Vanuatu-Led Initiative Seeking ICJ Advisory Opinion on Climate Change*, ISLAND TIMES (Aug. 5, 2022), <http://islandtimes.org/pacific-elders-voice-statement-in-support-of-vanuatu-led-initiative-seeking-icj-advisory-opinion-on-climate-change> [<https://perma.cc/N95A-FRFZ>].

a communiqué indicating “their support for Vanuatu in its pursuit of an Advisory Opinion from the [ICJ] on the rights of present and future generations to be protected from Climate Change.”¹⁵³ Similar support was also affirmed by the Pacific Islands Forum in July 2022.¹⁵⁴ On October 27, 2022, a group of fourteen states announced their intention to present a draft resolution to the General Assembly “on climate change.”¹⁵⁵ Further, on November 29, 2022, Vanuatu circulated a draft resolution and announced that it would “begin” consultations of member states.¹⁵⁶ At the time of completing this article, however, it remains to be seen whether Vanuatu will succeed—where Palau did not—in gathering sufficient political support for the adoption of a General Assembly resolution. While states may understand the urgency of responses to climate change better than they did a decade ago, there remains limited support from states—even, seemingly, from some of those most affected by climate change.¹⁵⁷ Even if sufficient political support could be garnered, such support would likely only come in response to questions representing the lowest common denominator.¹⁵⁸ The most politically sensitive questions, in particular those relating to reparations, would be the least likely find support in a sufficiently broad political coalition.

B. Requests to ITLOS

As an alternative to the ICJ, small-island states are seeking an advisory opinion from ITLOS, a judicial body established in 1996 by Annex VI of UNCLOS (the Statute of the Tribunal).¹⁵⁹ UNCLOS (including Annex VI) does not expressly grant advisory jurisdiction to ITLOS as a full tribunal. It

153. Caribbean Community, Communiqué on the Thirty-Third Inter-Sessional Meeting of CARICOM Heads of Government (Mar. 3, 2022), <http://caricom.org/communique-thirty-third-inter-sessional-meeting-of-caricom-heads-of-government>.

154. Pacific Islands Forum, Communiqué of the Fifty-First Leaders Meeting, ¶ 46 (July 14, 2022), <http://www.forumsec.org/2022/07/17/report-communique-of-the-51st-pacific-islands-forum-leaders-meeting> [<http://perma.cc/D4J9-PPGL>].

155. Permanent Mission of the Republic of Vanuatu to the United Nations (@VanuatuUN), TWITTER (Oct. 27, 2022, 12:12 PM), <http://twitter.com/VanuatuUN/status/1585665699086843905>; Press Release, General Assembly Adopts Text Authorizing \$3.52 Billion to Ease Global Food Insecurity, Considers Annual International Court of Justice Report, U.N. Press Release GA/12461 (Oct. 27, 2022), <http://press.un.org/en/2022/ga12461.doc.htm>; see also Valerie Volcovici, *From Pacific to Red Sea: Climate Court Action Gathers Wave of Support*, REUTERS (Nov. 19, 2022), <http://www.reuters.com/business/cop/pacific-red-sea-climate-court-action-gathers-wave-support-2022-11-18> (suggesting that “[i]n total 86 countries . . . gave their support to a resolution to ask the International Court of Justice to clarify what obligations governments have to protect their own populations and others,” without indicating the source of this claim and how this “support” was expressed).

156. Draft Resolution of Vanuatu, *supra* note 28.

157. See, e.g., *id.* (suggesting that no endorsement has been secured from organizations like the Climate Vulnerable Forums or AOSIS).

158. See Freestone, Barnes, & Akhavan, *supra* note 16, at 172.

159. ITLOS Statute, *supra* note 19.

only grants advisory jurisdiction to the Seabed Disputes Chamber of ITLOS and only on matters related to “the Area” (*i.e.*, the seabed and its subsoil beyond the limits of national jurisdiction).¹⁶⁰ This jurisdictional basis is probably “too limited to engage wider questions of liability for climate change.”¹⁶¹ COSIS does not invoke any treaty provisions. Instead, it relies on the Tribunal’s far-fetched interpretation of the Statute to provide ITLOS with advisory jurisdiction as a full tribunal.¹⁶²

Article 21 allows ITLOS to exercise jurisdiction on “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”¹⁶³ ITLOS has interpreted “all matters” to include not only contentious cases, but also advisory ones.¹⁶⁴ Accordingly, Article 138 of the Rules of the Tribunal provides that the full tribunal may give an advisory opinion “on a legal question if an international agreement related to the purpose of [UNCLOS] specifically provides for the submission to the Tribunal of a request for such an opinion.”¹⁶⁵ The Tribunal issued its first, and so far only, full-tribunal advisory opinion in 2015 following a request from the Sub-Regional Fisheries Commission (“SRFC”). The SRFC is an organization of seven West-African states and the advisory opinion concerned questions relating to illegal, unreported, and unregulated fishing activities in the exclusive economic zones (“EEZ”) of these states.¹⁶⁶ The request for the advisory opinion was made by the Conference of Ministers of the SRFC, authorized under a provision of the Convention on the Minimal Conditions for Access to Marine Resources (“MCA Convention”), a treaty adopted and ratified by the SRFC’s seven member states.¹⁶⁷

160. United Nations Convention on the Law of the Sea arts. 187, 191, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; ITLOS Statute, *supra* note 19, art. 40(2).

161. Freestone, Barnes, & Akhavan, *supra* note 16, at 169.

162. Letter from COSIS, *supra* note 32, at 1.

163. ITLOS Statute, *supra* note 19, art. 21.

164. See Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶¶ 53–59; Rüdiger Wolfrum, President of ITLOS, Statement to the General Assembly, ¶ 16 (Nov. 28, 2005), http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ga_281105_eng.pdf; Doo-young Kim, *Advisory Proceedings Before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea*, 7 ISSUES LEGAL SCHOLARSHIP 3–5 (2010); Budislav Vukas, *The International Tribunal for the Law of the Sea: Some Features of the New International Judicial Institution*, 37 INDIAN J. INT’L L. 372, 381 (1997); José Luis Jesus, *Section H: Advisory Opinions*, in THE RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: A COMMENTARY 373, 393–94 (P. Chandrasekhara Rao & Phillipe Gautier eds., 2006).

165. Rules of ITLOS, *supra* note 18, art. 138(1).

166. Sub-Regional Fisheries Commission, 2015 ITLOS Rep. 4, ¶ 85.

167. Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission art. 33, June 8, 2012, <http://perma.cc/H95P-RFMH> [hereinafter MCA Convention].

Scholars and judges have denounced ITLOS's interpretation of Article 21 as being "convoluted" and resulting in a "creeping" exercise of jurisdiction.¹⁶⁸ Observers have pointed out that the text of Article 21 is, at best, ambivalent and that the context does not easily lend support to ITLOS's interpretation.¹⁶⁹ Rather, if states had really wanted to grant advisory jurisdiction to ITLOS, they would "have done so in express terms and by carefully delimitating" it.¹⁷⁰ Members of the tribunal defended their interpretation of Article 21 in *SRFC* by noting that states had not protested the adoption of the Rules of the Tribunal several years earlier,¹⁷¹ but the absence of protest to an internal act of a tribunal does not demonstrate agreement.¹⁷² In any case, any suggestion of a "consensus of the parties concerned"¹⁷³ became untenable when the *SRFC* request triggered "[a] considerable number of states [to] effectively challenge . . . the advisory competence of the Tribunal head-on" during the advisory proceedings.¹⁷⁴ ITLOS's interpretation of its Statute is also at odds with the preparatory works of UNCLOS, during which "an advisory function for the Tribunal was not even proposed."¹⁷⁵

168. Sub-Regional Fisheries Commission, Declaration of Judge Cot, 2015 ITLOS Rep. 73, ¶ 2 ("convoluted"); Tom Ruys & Anemoon Soete, "Creeping" Advisory Jurisdiction of International Courts and Tribunals? *The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155, 173 (2016) ("creeping").

169. See Massimo Lando, *The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, 29 LEIDEN J. INT'L L. 441, 452 (2016); Alexander Proelss, *Advisory Opinion: International Tribunal for the Law of the Sea (ITLOS)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2019), <http://opil.ouplaw.com/display/10.1093/law-mpeipro/e3689.013.3689/law-mpeipro-e3689>.

170. Proelss, *supra* note 169.

171. Sub-Regional Fisheries Commission, Declaration of Judge Cot, 2015 ITLOS Rep. 73, ¶ 4; Sub-Regional Fisheries Commission, Separate Opinion of Judge Lucky, 2015 ITLOS Rep. 88, ¶ 21.

172. See Vienna Convention on the Law of Treaties art. 31(3)(a)–(b), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter VCLT]; Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, in Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, at 13, 15, U.N. Doc. A/73/10 (2019) (explaining that while "silence . . . may constitute acceptance of subsequent practice when the circumstances call for some reaction," this relates only to state practice, and the conduct of a tribunal does not constitute state practice).

173. Wolfrum, *Advisory Opinions: Are They a Suitable*, *supra* note 22, at 54.

174. Ruys & Soete, *supra* note 168, at 159. Protests were also voiced at the Meeting of the Parties to UNCLOS. See Rep. of the Twenty-Third Meeting of States Parties to UNCLOS, ¶ 21, U.N. Doc. SPLOS/263 (July 8, 2013); Rep. of the Twenty-Fourth Meeting of States Parties to UNCLOS, ¶ 37, U.N. Doc. SPLOS/277 (July 14, 2014); Rep. of the Twenty-Fifth Meeting of States Parties to UNCLOS, ¶ 23, U.N. Doc. SPLOS/287 (July 13, 2015); Rep. of the Twenty-Sixth Meeting of States Parties to UNCLOS, ¶ 25, U.N. Doc. SPLOS/303 (Aug. 2, 2016).

175. Sotirios-Ioannis Lekkas & Christopher Staker, *Article 21*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, *supra* note 101, at 2374, 2379; see also MIGUEL GARCIA GARCIA-REVILLO, THE CONTENTIOUS AND ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 311 (2015).

Contrary to an alternative justification of ITLOS's advisory jurisdiction suggested by Judge Jean-Pierre Cot,¹⁷⁶ the mere absence of a provision prohibiting ITLOS from exercising advisory jurisdiction does not empower it to do so.¹⁷⁷ To the contrary, the *Lotus* principle provides that “[r]estrictions upon the independence of States cannot . . . be presumed.”¹⁷⁸

There is no sign that ITLOS would fundamentally reverse its finding from *SRFC* that it can exercise advisory jurisdiction under Article 21 of its Statute. Yet the criticisms that have been made in relation to *SRFC* suggest that, without directly reversing its precedent, the Tribunal could apply it in a narrow and cautious manner.¹⁷⁹ Without a more nuanced approach, the basis for the Tribunal to exercise advisory jurisdiction in the first place will remain highly questionable and undermine the authority of any advisory opinion on climate change that the Tribunal may adopt.

Article 138 of the Rules of ITLOS, through which the Tribunal interprets and applies Article 21 of its Statute, imposes few conditions for the exercise of advisory jurisdiction. It permits “whatever body” to request an advisory opinion on a legal question, provided that this body is authorized to do so in accordance with an “international agreement related to the purposes of [UNCLOS].”¹⁸⁰ This suggests that two or several states could request an advisory opinion of ITLOS without securing the broad political coalition necessary to request an advisory opinion of the ICJ, possibly bringing “class actions” or *erga omnes* advisory proceedings” before ITLOS.¹⁸¹ Because of this, ITLOS President José Luis Jesus highlighted that advisory proceedings could “be a useful tool” when states are facing

176. Sub-Regional Fisheries Commission, Declaration of Judge Cot, 2015 ITLOS Rep. 73, ¶ 4; Thomas A. Mensah, *The Jurisdiction of the International Tribunal for the Law of the Sea*, 63 RABEL J. COMP. & INT'L PRIVATE L. 330, 340 (1999); Vukas, *supra* note 164, at 381.

177. *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment on Preliminary Objections, 1925 P.C.I.J. (ser. A) No. 6, at 21 (Aug. 25); Interpretation of the Greco-Bulgarian Agreement of December 9th, 1927, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 45, at 87 (Mar. 8); Application of the Principle of Regional Rotation in the Election of the Bureau of the PAP, Advisory Opinion No. 1/2021, African Commission on Human and People's Rights, ¶ 50 (July 16, 2021), <http://www.african-court.org/cpmt/storage/app/uploads/public/60f/6d3/a4b/60f6d3a4bde5862648244.pdf> (explaining that the commission won't arrogate itself power it was not granted); *see also* Proelss, *supra* note 169, ¶ 20; Luis Jesus, *supra* note 164, at 393.

178. *S.S. Lotus* (Fr./Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). While the *Lotus* principle may be unhelpful to determine states' reciprocal rights and obligations, it is fully applicable when assessing the relation between a state and a non-sovereign institution, such as a court.

179. *See supra* notes 168–177.

180. Rules of ITLOS, *supra* note 18, art. 138(2); *see* Wolfrum, Statement to the General Assembly, *supra* note 164, ¶ 15.

181. Shabtai Rosenne, *International Tribunal for the Law of the Sea: 1996–97 Survey*, 13 INT'L J. MARINE & COASTAL L. 487, 507 (1998).

“new challenges in ocean activities, such as piracy and armed robberies.”¹⁸² Accordingly, judges and scholars have pointed out that a request for an advisory opinion of ITLOS on climate change is possible.¹⁸³ In particular, Sandrine De Herdt and Judge Tafsir Malick Ndiaye suggested that the Tribunal’s advisory jurisdiction could be used “to clarify, for instance, the legal environmental obligations of states under Part XII of UNCLOS in the context of climate change, and the legal consequences of sea-level rise for baselines, the outer limits of maritime zones, and coastal states’ entitlements to maritime areas.”¹⁸⁴

Small-island states are now putting this theory to test. On October 31, 2021, Antigua and Barbuda along with Tuvalu adopted a treaty establishing COSIS.¹⁸⁵ The treaty permits accession by any of the other thirty-eight members of the Alliance of Small Island States and it is reported that Palau acceded to the treaty in November 2021,¹⁸⁶ followed by Niue in September 2022,¹⁸⁷ and by Vanuatu and Saint Lucia later that year.¹⁸⁸ The mandate of COSIS is “to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change,” in particular “the obligations of States relating to the protection and preservation of the marine environment.”¹⁸⁹ COSIS may also seek to clarify the “responsibility [of states] for injuries arising from internationally wrongful acts in respect of the breach of such obligations.”¹⁹⁰ The Commission is expressly authorized “to request advisory opinions from [ITLOS] on any legal question within the scope of [UNCLOS].”¹⁹¹ COSIS

182. José Luis Jesus, President of ITLOS, Statement to the General Assembly ¶ 9 (Dec. 5, 2008), http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/general_assembly_051208_eng.pdf.

183. See Luis Jesus, Statement to the 6th Committee of the General Assembly, *supra* note 66, at 4; Seokwoo Lee & Lowell Bautista, *Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues Oceans and Climate Change Governance*, 45 *ECOLOGY L.Q.* 129, 152 (2018); Sands, *supra* note 46, at 28; Roda Verheyen & Cathrin Zengerling, *International Dispute Settlement*, in *THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW* 417, 431–32 (Cinnamon P. Carlarne, Kevin R. Gray, & Richard G. Tarasofsky eds., 2016); Daniel Bodansky, *Adjudication vs. Negotiation in Protecting Environmental Commons*, 41 *U. HAW. L. REV.* 260, 269–70 (2018); BENOIT MAYER, *THE INTERNATIONAL LAW ON CLIMATE CHANGE* 242–43 (2018).

184. de Herdt & Ndiaye, *supra* note 95, at 370.

185. COSIS Agreement, *supra* note 29, at 2.

186. *Id.* art. 4(4) (as to the members of the Alliance of Small Island States); see Free-stone, Barnes, & Akhavan, *supra* note 16, at 167 (as to Palau); see also *About Us*, ALLIANCE OF SMALL ISLAND STATES, <http://www.aosis.org/about/member-states> (last visited Mar. 6, 2022).

187. COSIS 2022 Annual Report, *supra* note 58, at 4.

188. Letter from COSIS, *supra* note 32, at 1.

189. COSIS Agreement, *supra* note 29, art. 1(3).

190. *Id.*

191. *Id.* art. 2(2).

approved a draft request on August 26, 2022,¹⁹² and the request was communicated to the Registrar of UNCLOS on December 12, 2022.¹⁹³

The request communicated by COSIS includes two questions, both focusing on the identification of “specific obligations” of the Parties to UNCLOS, “including” under Part XII of UNCLOS.¹⁹⁴ The first question concerns the obligations of these states on climate change mitigation—or, as COSIS put it, the obligations

to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere.¹⁹⁵

By contrast, the second question is interested in the obligations “to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.”¹⁹⁶

The first question paraphrases article 194 of UNCLOS, on “measures to prevent, reduce and control pollution of the marine environment.”¹⁹⁷ By contrast, the second question builds on the text of Article 192. Article 192 defines the “general obligation” on the protection and preservation of the marine environment, which other provisions of Part XII—including article 194—aim to specify.¹⁹⁸ As such, the relation between the two questions is rather opaque. It could be that the second question aims to consider the obligations on climate change adaptation, by contrast to the mitigation focus of the first question. Yet, the second question could be interpreted as inviting consideration for the obligations of states on climate change mitigation. Either way, the two questions presented are broad and could be addressed from different angles.

A request for an advisory opinion of ITLOS, such as the COSIS request, raises two fundamental issues about the scope and nature of ITLOS’s advisory jurisdiction. First, whether the questions asked to the court would need to touch upon the interpretation of the law of the sea or whether they could focus on other legal issues. Scholars have generally approached ITLOS as a specialized court with a subject-matter jurisdiction limited to

192. Press Release, ITLOS, *supra* note 32, at 1.

193. Letter from COSIS, *supra* note 32, at 1.

194. Letter from COSIS, *supra* note 32, at 2.

195. *Id.*

196. *Id.*

197. UNCLOS, *supra* note 160, art. 194 (title); *see also id.*, Part XII, § 5 (title), in particular art. 212 (on the obligation to take such measures in relation to “[p]ollution from or through the atmosphere”).

198. *See* Czybulka, *supra* note 101, at 1284.

the law of the sea,¹⁹⁹ but there is no express basis for such a limitation under Article 138 of the Rules of the Tribunal. The body requesting the advisory opinion must be so authorized by an international agreement “related to the purposes of” UNCLOS,²⁰⁰ but the condition of a relation with the purposes of UNCLOS does not apply to the request itself or to the questions that the request contains.²⁰¹ As such, it is unclear whether an advisory opinion could be offered by the tribunal on a question unrelated to UNCLOS when the request is made by a body so authorized by a treaty related to the purposes of UNCLOS.²⁰² ITLOS did not need to consider this issue in the SRFC request because the questions therein (regarding illegal, unreported, and unregulated fishing activities) were closely related to provisions of UNCLOS.²⁰³ By contrast, the issue could arise with regard to a request for an advisory opinion on climate change if this bore not only on the protection of the marine environment, but also on broader environmental concerns.²⁰⁴ The COSIS request tries to avoid this issue by emphatically focusing on the interpretation of Part XII of UNCLOS,²⁰⁵ but answering the questions would require the Tribunal to engage thoroughly with other sources of international law.

The second, and possibly more critical issue, is whether ITLOS can comply with a request for an advisory opinion from a body so authorized under an international agreement when the request aims to determine the obligations of states that are not parties to the agreement. In the *SRFC* opinion, ITLOS emphasized that it was only interpreting the law relevant to the functions of the requesting body: namely, the regulation of fishing activities within the EEZ of the SRFC member states.²⁰⁶ The Tribunal suggested that “[t]he object of the request by the SRFC is to seek guidance in respect of its own actions.”²⁰⁷ It highlighted that its opinion did not “relate to the obliga-

199. See, e.g., De Herdt & Ndiaye, *supra* note 95, at 359; *Role of ICJ, supra* note 40, at 701; Tafsir Malick Ndiaye, *The Advisory Function of the International Tribunal for the Law of the Sea*, 9 CHINESE J. INT’L L. 565, 585–86 (2010); Anna Petrig & Marta Bo, *The International Tribunal for the Law of the Sea and Human Rights*, in HUMAN RIGHTS NORMS IN “OTHER” INTERNATIONAL COURTS 353, at 355–56 (Martin Scheinin ed., 2019).

200. Rules of ITLOS, *supra* note 18, art. 138.

201. GARCIA-REVILLO, *supra* note 175, at 313.

202. Proelss, *supra* note 169, ¶ 23.

203. UNCLOS, *supra* note 160, arts. 56, 58, 61–62, 73, 192–93.

204. This issue of the subject-matter jurisdiction is distinct from that of identifying the law applicable once ITLOS has decided to give an advisory opinion. See generally Peter Tzeng, *Jurisdiction and Applicable Law Under UNCLOS*, 126 YALE L.J. 242 (2016). On the applicable law, see Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 84, finding that the tribunal can apply UNCLOS, the Convention authorizing the request for an advisory opinion, and “other relevant rules of international law not incompatible with” UNCLOS.

205. Letter from COSIS, *supra* note 32, at 1.

206. Sub-Regional Fisheries Commission, 2015 ITLOS Rep. 4, ¶¶ 87, 200, 214, 219(1).

207. *Id.* ¶ 76.

tions of flag States in cases of illegal, unreported, and unregulated fishing in other maritime areas, including the high seas.”²⁰⁸

It is difficult not to be under the impression that the SRFC request was aimed primarily at putting pressure on third-party states to regulate their fishing fleet in the EEZ of SRFC member states. Yet, the fact that the SRFC was competent to act upon the conclusions of the advisory opinion may have been critical to ITLOS’s decision to accept the request. By contrast, ITLOS might have declined to exercise jurisdiction if the request was made by an association of landlocked countries (assuming these countries do not have fishing fleets and, hence, no competence to act upon the advisory opinion). COSIS, like this association of landlocked countries, is requesting an advisory opinion with the conspicuous aim of identifying the obligations of states that are not parties to the COSIS Agreement—that is, states that have not consented to give the competence to COSIS to request an advisory opinion of ITLOS. As suggested below, this lack of consent could well be a fatal flaw in the COSIS strategy.²⁰⁹

C. Requests to Regional Human Rights Courts

As alternatives to the ICJ and ITLOS, regional human rights courts could receive requests for advisory proceedings on climate change. The IACHR and the ACHPR both offer favorable conditions of standing, but they are undoubtedly specialized courts, meaning that their advisory jurisdiction is limited to the interpretation of human rights treaties. As such, these courts would only be able to give an advisory opinion on climate change mitigation to the extent that they characterize climate change mitigation as an effective measure by which states can promote the enjoyment of human rights within their territory or jurisdiction.

The main advantage that the IACHR and the ACHPR offer, when compared with the ICJ or ITLOS, is their favorable conditions for standing in advisory proceedings. The IACHR accepts requests from the organs listed in the Charter of the Organization of American States, including some organs that are a step removed from states’ influence, such as the General Secretariat of the Organization of American States and the Inter-American Commission on Human Rights.²¹⁰ It also allows such requests from any member states of the Organization of American States, notwithstanding whether these states are party to the Pact of San José.²¹¹ In January 2023, Chile and Colombia announced their intention to request an advisory opin-

208. *Id.* ¶ 89.

209. *See infra* Part III.A.

210. Pact of San José, *supra* note 33, art. 64(1); Charter of the Organization of American States art. 53, Apr. 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394; *see also* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 42 (2012).

211. Pact of San José, *supra* note 33, art. 64(1); *see also* PASQUALUCCI, *supra* note 210, at 41.

ion of the IACHR on the obligations of states to protect human rights in the context of a “climate emergency”.²¹² The draft request was not immediately published, but Alvaro Leyva Duran, the Minister of Foreign Affairs of Colombia, reported that it raised “a series of questions about how the climate emergency affects fundamental rights”, in particular those of “the most vulnerable people”.²¹³

The ACHPR has an even broader approach to standing. It allows requests from any organ of the African Union (including the main organs established by the Constitutive Act of the African Union and other organs established later), any member state of the African Union, and “any African organization recognized by” the African Union.²¹⁴ The ACHPR has interpreted the reference to “any African organization” to include not only international organizations, but also NGOs. It has also held that the latter organizations are “recognized” by the African Union when they are granted observer status by, or are under a Memorandum of Understanding with, the African Union.²¹⁵ While these provisions offer multiple ways for small-island states and their allies to request an advisory opinion of either the IACHR or the ACHPR, the most straightforward avenue may be for the request to be filed by a small-island state that is a member of either the Organization of American States (*e.g.*, Antigua and Barbuda) or the African Union (*e.g.*, the Seychelles).

By contrast, the European Court of Human Rights (ECHR) has a narrow advisory jurisdiction. The European Convention on Human Rights and its Protocols allow for two types of requests.²¹⁶ The first includes requests under the Convention made by a majority vote of the Committee of Minis-

212. See Ministerio de Relaciones Exteriores (Chile), *supra* note 34; Ministerio de Relaciones Exteriores (Colombia), *supra* note 34.

213. Álvaro Leyva Durán, Representante gubernamental de Colombia (@AlvaroLeyva), TWITTER (Jan. 9, 2023, 5:39 PM), <https://twitter.com/AlvaroLeyva/status/1612564757621493785> [<https://perma.cc/PZ6C-6FFS>] (my translation).

214. ACHPR Protocol, *supra* note 33, art. 4(1); *see also* Constitutive Act of the African Union art. 9(1)(d), Nov. 7, 2000, 2158 U.N.T.S. 3 (authorizing the Assembly to establish “any organ of the Union”); Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples’ Rights, No. 2/2013, Advisory Opinion, Afr. Ct. H.P.R., ¶¶ 50–57 (Dec. 5, 2014), <http://www.african-court.org/cpmt/storage/app/uploads/public/5fd/224/240/5fd224240198d507498993.pdf> (finding that the Committee had standing to request an advisory opinion).

215. Socio-Economic Rights and Accountability Project (SERAP), No. 1/2013, Advisory Opinion, Afr. Ct. H.P.R., ¶ 64 (May 26, 2017), <http://www.african-court.org/cpmt/storage/app/uploads/public/5fd/1ed/159/5fd1ed1596472204848898.pdf>; *see also* Frans Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples’ Rights*, 67 INT’L & COMP. L.Q. 63, 90 (2018).

216. In addition, the Court has accepted a request based on another human rights treaty adopted by the Council of Europe. *See* Decision on the Competence of the Court to Give an Advisory Opinion under Article 29 of the Oviedo Convention, Request No. A47-2021-001 (Sept. 15, 2021) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-7117959-9642022>.

ters, an intergovernmental organ of the Council of Europe.²¹⁷ It seems extremely unlikely that the Committee of Ministers would decide to request an advisory opinion of the ECHR on climate change given that the Council of Europe is composed mainly of developed states, which are less prone than developing states to support such an opinion. The second type includes requests for advisory opinions from any of the “highest courts and tribunals of a High Contracting Party” on questions related to “a case pending before it” under Protocol 16 to the Convention (which entered into force in 2018).²¹⁸ For the ten Council of Europe member states that have ratified the Protocol to date,²¹⁹ this could represent a realistic way to bring climate change before the ECHR,²²⁰ although only in the context of a specific case against an individual member state. In each of the three opinions that the ECHR has adopted under the Protocol so far, the Court has clearly stated that it cannot answer questions that would be of an “abstract and general nature.”²²¹

Admissible advisory proceedings before regional human rights courts would inevitably be confined to the interpretation and application of human rights law. The ECHR’s advisory jurisdiction focuses on the European Convention, its Protocols, and other human rights treaties adopted by the Council of Europe.²²² The IACHR’s advisory opinions interpret and apply both

217. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 47, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

218. The Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 16, art. 1, Oct. 2, 2013, C.E.T.S. No. 214 [hereinafter Protocol 16]. *See generally* Thomas Voland & Britta Schiebel, *Advisory Opinions of the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?*, 17 HUM. RTS. L. REV. 73 (2017).

219. *See Chart of Signatures and Ratifications of Treaty 214*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214> (last visited Mar. 6, 2022).

220. *See* Katharina Franziska Braig & Stoyan Panov, *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?*, 35 J. ENV’T L. & LITIG. 261, 297 (2020); *see also* HR [Supreme Court] 20 december 2019, NJ 2020, 41 m.nt. JS ¶ 5.6.4 (Staat der Nederlanden/Stichting Urgenda) (Neth.), translated in <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>.

221. *See* Use of the “Blanket Reference” or “Legislation by Reference” Technique, Advisory Opinion, Request No. P16-2019-001, ¶ 55 (May 29, 2020) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-6708535-9909864>; Request for an Advisory Opinion under Protocol No. 16 Concerning the Interpretation of Articles 2, 3, & 6 of the Convention, Decision, Request No. P16-2020-001, ¶ 18 (Dec. 14, 2020) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-6951456-9350980>; *see also* Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Through a Gestational Surrogacy Arrangement Abroad, Advisory Opinion, Request No. P16-2018-001, ¶ 26 (Apr. 10, 2019) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-6380464-8364383>.

222. European Convention on Human Rights, *supra* note 217, art. 47(1); Protocol 16, *supra* note 218, art. 1(1); Decision on the Competence of the Court to Give an Advisory Opin-

the Pact of San José and “other treaties concerning the protection of human rights in American states.”²²³ The Court found that this could include not only specialized human rights treaties adopted by the Organization of American States, but also non-regional human rights treaties ratified by American states, provided that the latter are of general interest to American states.²²⁴ Similarly, the ACHPR’s advisory opinions interpret the African Charter on Human and Peoples’ Rights or “any other relevant human rights instruments.”²²⁵

As such, questions relating to climate change do not easily fall within the scope of the advisory jurisdiction of regional human rights courts. Some scholars have presented the Paris Agreement as a human rights treaty.²²⁶ If this characterization is accurate, then requests for advisory opinions of the IACHR or ACHPR could concern the interpretation of the Paris Agreement. However, the Paris Agreement does not reference individual rights. The Agreement’s only reference to human rights comes in its Preamble and is merely a safeguard provision confirming that states must comply with “their respective obligations” when implementing action on climate change.²²⁷ Admittedly, the implementation of climate treaties pursues the public interest and thereby incidentally benefits the enjoyment of human rights. Still, the same could be said of many other treaties, such as those aimed at fighting crime, promoting international trade, and establishing military alliances. One way or another, most treaties are presented as furthering the public interest and hence indirectly promoting the enjoyment of individual rights. It is unclear whether regional courts can give advisory opinions on the interpretation or application of treaties that only have a tenuous relationship to the protection of human rights.²²⁸ In fact, the ACHPR has already

ion under Article 29 of the Oviedo Convention, Request No. A47-2021-001 (Sept. 15, 2021) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-7117959-9642022>.

223. Pact of San José, *supra* note 33, art. 64(1).

224. “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 52 (Sept. 24, 1928); The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 141(8) (Oct. 1, 1999). *See generally* PASQUALUCCI, *supra* note 210, at 54–57.

225. ACHPR Protocol, *supra* note 33, art. 4(1); *see also* Compatibility of Vagrancy Laws with the African Charter on Human and Peoples’ Rights, No. 001/2018, Advisory Opinion, Afr. Ct. H.P.R., ¶¶ 27–28 (Dec. 4, 2020); Lilian Chenwi, *The Advisory Proceedings of the African Court on Human and Peoples’ Rights*, 38 NORDIC J. HUM. RTS. 61, 64 (2020).

226. John H. Knox, *The Paris Agreement as a Human Rights Treaty*, in HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT 323 (Dapo Akande, Jaakko Kuosmanen, Helen McDermott, & Dominic Roser eds., 2020).

227. Paris Agreement, *supra* note 1, pmb., ¶ 12; *see discussion in* Benoit Mayer, *Human Rights in the Paris Agreement*, 6 CLIMATE L. 109 (2016).

228. *See* Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, Advisory Opinion, 1956 I.C.J. 77, 89 (Oct. 23) (noting the need for “a substantial and not merely an artificial connection” between the facts and the provision giving

refused to approach the Rome Statute of the International Criminal Court as a treaty relating to the protection of human rights and has refused to issue an advisory opinion focusing on its interpretation.²²⁹ Likewise, a regional human rights court would reject a request for an advisory opinion focusing on climate treaties or, *a fortiori*, on the customary law applicable to climate change.

While a regional human rights court would not give an advisory opinion on climate treaties or customary law, it could be invited to base an opinion on the interpretation and application of human rights treaties. In particular, these courts could discuss the provisions of human rights treaties that define states' positive obligations to take "appropriate" measures to protect human rights.²³⁰ Since climate change has an adverse impact on the enjoyment of these rights—the argument would go—compliance with this positive obligation requires states to address climate change.²³¹ This argument offers a compelling justification for measures that would promote adaptation to climate change, such as measures that a state would take in order to reduce the vulnerability of its population to the impacts of climate change.²³² This is in line with a long-standing interpretation of human rights law that requires states to take measures to protect persons within their territory in the event of a disaster.²³³ In this sense, states have the same obligation to protect regardless of whether the event threatening the enjoyment of human rights is related to climate change (*e.g.*, a drought or a typhoon).²³⁴

By contrast, states' positive human rights obligations are a less likely source of an obligation to mitigate climate change because there is only a tenuous link between a state's action on climate change mitigation and the

jurisdiction to the court). See generally Callista Harris, *Incidental Determinations in Proceedings under Compromissory Clauses*, 70 INT'L & COMP. L.Q. 417 (2021).

229. Coalition for the International Criminal Court, No. 1/2015, Advisory Opinion, Afr. Ct. H.P.R., ¶ 18 (Nov. 29, 2015), <http://www.african-court.org/cpmt/storage/app/uploads/public/5fd21f378/5fd21f37880b1058244884.pdf>. This decision was criticized, though perhaps more for its lack of motivation than for any substantive flaw. See, *e.g.*, *id.*, Dissenting Opinion of Judge Ouguergouz, ¶ 21; Chenwi, *supra* note 225, at 67–68.

230. See, *e.g.*, Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

231. See Human Rights Council, Resolution 47/24 on Human Rights and Climate Change, ¶ 2, U.N. Doc. A/HRC/RES/47/24 (July 26, 2021) [hereinafter Resolution 47/24]; Human Rights Council, Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, ¶ 77, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).

232. See *Leghari v. Pakistan*, WP No 25501/2015 (Lahore High Court), (Sept. 4, 2015), http://elaw.org/pk_Leghari (Pak.); Resolution 47/24, *supra* note 231, ¶ 6.

233. See Draft Articles on the Protection of Persons in the Even of Disasters art. 5, *in* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, at 12, U.N. Doc. A/71/10 (2016).

234. Benoit Mayer, *Climate Change Adaptation and the Law*, 39 VA. ENV'T L.J. 141, 166 (2021).

protection of the rights of individuals within its territory. Even a state's best efforts would only incrementally reduce emissions within its territory, and these are only a fraction of global emissions. While individual state actions may achieve some diffuse global benefits in the long-term, many of these benefits do not fall within the chiefly territorial scope of a state's obligation to protect the enjoyment of human rights.²³⁵ Put differently, the measures that a state takes to reduce emissions within its territory may hurt individuals within its jurisdiction more than it benefits them. For example, it may divert scarce public resources away from other priorities.²³⁶ Thus, while some national courts in continental Europe have interpreted human rights law to require action on climate change mitigation,²³⁷ it is unclear whether regional human rights courts would follow suit. The IACHR, for one, has insisted that "the purpose of its advisory jurisdiction cannot be diverted to aims other than the protection of the rights and freedoms guaranteed by the Convention."²³⁸

A regional human rights court is even less likely to give an advisory opinion on climate reparations. For one, while human rights treaties define a right to an effective remedy, such remedy does not necessarily have to take the form of backward-looking reparations—especially not in relation to structural harms such as climate change.²³⁹ Overall, identifying an individual's right to climate reparations would raise intractable problems of causation and attribution. While individuals may suffer as a remote consequence of the failure of a state to take appropriate measures to reduce GHG emissions, they may also benefit as a remote consequence of this wrongful act.²⁴⁰ In fact, individuals might even share some of the blame. Thus, cli-

235. See Mayer, *Climate Change Mitigation*, *supra* note 82, at 426–28 (2021); Eric A. Posner, *Climate Change and International Human Rights Litigation*, 155 UNIV. PA. L. REV. 1925, 1926–27 (2007).

236. See Mayer, *Climate Change Mitigation*, *supra* note 82, at 416–19.

237. HR [Supreme Court] 20 december 2019, NJ 2020, 41 m.nt. JS ¶ 5.1 (Staat der Nederlanden/Stichting Urgenda) (Neth.), translated in http://uitspraken.rechtspraak.nl/inzien_document?id=ECLI:NL:HR:2019:2007. *But see* [Supreme Court of Norway] Dec. 22, 2020, HR-2020-2472-P, Case No. 20-051052SIV-HRET, at 166–68 (Natur og Ungdom/Norway). See also Benoit Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)*, 8 TRANSNAT'L ENV'T L. 167 (2019).

238. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights, Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 21 (Dec. 9, 1994).

239. See G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ¶¶ 15–23 (Dec. 16, 2005). See generally Luke Moffett, *Transitional Justice and Reparations: Remediating the Past?*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 377 (Cheryl Lawther & Luke Moffett eds., 2019).

240. For instance, a coal miner or a shareholder of an oil-and-gas corporation may benefit directly from the failure of a state to take appropriate measures to reduce GHG emissions. Many more individuals benefit indirectly from the failure of a state to take measures that

mate reparations are not easily envisaged in the vertical relationship between an individual and a state. Rather, they are a matter to be dealt with in the horizontal relationship between states, as an obligation of the largest GHG-emitting states to make reparations for the structural harm suffered by the states most vulnerable to climate change.²⁴¹

III. CONDITIONS OF JURISDICTION AND PROPRIETY

Once a court receives a request for an advisory opinion, its first task is to decide whether to comply with that request. A request for an advisory opinion on climate change could face serious objections relating to the political sensitivity of the questions asked, ongoing political processes, the relative indeterminacy of relevant legal principles, and the lack of consent among the states concerned. A court would have to decide these objections in its application of legal norms that define the conditions for the exercise of its advisory jurisdiction and the admissibility of requests for advisory opinions. A court could accept or reject the request in its entirety, but it could also decide to answer only certain questions,²⁴² possibly after reframing them.²⁴³

A court's advisory jurisdiction is often based on a treaty provision that uses the word "may." This term seems to permit a court to comply with requests for advisory opinions but does not require it to do so.²⁴⁴ When interpreting these provisions, courts have drawn a distinction between an assessment of the conditions of jurisdiction and the exercise of judicial discretion. On the one hand, they have invoked conditions of jurisdiction in order to refuse to give an opinion when the requesting body lacked standing (either generally or in relation to the questions contained in the request),²⁴⁵ when the questions were not within the scope of the court's subject matter

would increase the cost of a vast range of goods and services, for instance by requiring the producers to pay a carbon tax or to comply with traditional command-and-control regulation.

241. See Benoit Mayer, *Whose "Loss and Damage"?: Promoting the Agency of Beneficiary States*, 4 CLIMATE L. 267, 283–87 (2014); see also references *supra* note 57.

242. Wolfrum, *Advisory Opinions: Are They a Suitable*, *supra* note 22, at 46.

243. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 38 (July 9).

244. I.C.J. Statute, *supra* note 11, art. 65(1); Rules of ITLOS, *supra* note 18, art. 138(1)–(2); European Convention on Human Rights, *supra* note 217, art. 47(2); Pact of San José, *supra* note 33, art. 64(2); ACHPR Protocol, *supra* note 33, art. 4(1). *But see* Protocol 16, *supra* note 218, art. 2(1).

245. Request for Advisory Opinion by Association Africaine de Défense des Droits de l'Homme, No. 2/2016, Advisory Opinion, Afr. Ct. H.P.R., ¶ 35 (Sept. 28, 2017), <http://www.african-court.org/cpmt/storage/app/uploads/public/5fd/0d1/db8/5fd0d1db85648367083702.pdf> (generally); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 31 (July 8) (question specific); Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27–28 (July 23).

jurisdiction,²⁴⁶ and when procedural conditions had not been met.²⁴⁷ On the other hand, courts have frequently claimed a “discretionary power to decline to give an advisory opinion.”²⁴⁸ Courts, however, have also admitted that they would only exercise this power for “compelling reasons.”²⁴⁹ In fact, it is noteworthy that no international court has relied on this would-be discretionary power to decline to give an advisory opinion.²⁵⁰ After finding out that conditions of jurisdiction had been met, few dissenting judges have ever suggested that courts should decline to offer an opinion based on this judicial power.²⁵¹ Thus, the theory of a discretionary power seems rather ineffective.

The concept of a discretionary power in the application of the law is a source of considerable confusion.²⁵² This confusion is unnecessary when analyzing the circumstances in which a court could decline to give an advisory opinion. If a court needs to have “compelling reasons” to decline a request, then presumably it has no genuine “discretion.” As Robert Kolb noted, the identification of these compelling reasons cannot be based on “simple opportunity or political reasons,” since weighing such considerations would “plunge [a court] into a political function that is incompatible with its judicial function.”²⁵³ The political opportunity of an advisory opin-

246. *E.g.*, Decision on the Competence of the Court to Give an Advisory Opinion, Request No. A47-2004-001, ¶ 35 (June 2, 2004), <http://hudoc.echr.coe.int/eng?i=003-1339293-1397515>; Coalition for the International Criminal Court, No. 1/2015, Advisory Opinion, Afr. Ct. H.P.R., ¶ 18 (Nov. 29, 2015), <http://www.african-court.org/cpmt/storage/app/uploads/public/5fd21f378/5fd21f37880b1058244884.pdf>.

247. Socio-Economic Rights & Accountability Project (SERAP), No. 1/2012, Advisory Opinion, Afr. Ct. H.P.R., ¶ 7, (Mar. 15, 2013), <http://www.african-court.org/cpmt/storage/app/uploads/public/60a/e4d/4f9/60ae4d4f9788b547338397.pdf>.

248. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 63 (Feb. 25); *see also* Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 71; Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, ¶ 12 (Aug. 10, 1990).

249. Separation of the Chagos, 2019 I.C.J. 95, ¶65; *see also* Sub-Regional Fisheries Commission, 2015 ITLOS Rep. 4, ¶ 71; “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 30 (Sept. 24, 1928).

250. *See* 2 MALCOLM N. SHAW, ROSENNE’S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2015, ¶ 246 (Brill Nijhoff 5th ed. 2016); ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 273 (2016).

251. *But see* Legality of the Use by a State of Nuclear Weapons, Dissenting Opinion of Judge Oda, 1996 I.C.J. 330, ¶¶ 47–52; Tullio Treves, *Discussion*, in INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS?, *supra* note 22, at 109, 110.

252. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 48–57 (Bloomsbury Academic 2013) (1977).

253. KOLB, *supra* note 250, at 274. *See generally* KOLB, *supra* note 126, at 1083–94.

ion is appraised by the political body requesting it. A court's judicial functions do not include a power to "overrule [this] political judgment."²⁵⁴

Rather than political opportunity, the "compelling reasons" that a court could identify to decline a request for an advisory opinion must be based on considerations of judicial propriety.²⁵⁵ Courts have envisaged that such "compelling reasons" could include the close relationship of the request with a dispute between states,²⁵⁶ the risk of interference with political processes,²⁵⁷ or the overly abstract nature of the question.²⁵⁸ While a court's decision may involve some appreciation, it must be guided by legal principles about what constitutes the proper exercise of judicial functions, rather than any genuine "power of free decision-making."²⁵⁹ As such, there is no difference in nature and no clear line between the court's decision on its jurisdiction and its decision on the propriety of complying with the request.²⁶⁰

Different conditions of jurisdiction and propriety may apply before the ICJ, ITLOS, and regional human rights courts. Admittedly, the ICJ's case-law has had some influence on ITLOS's *SRFC* advisory opinion and even on regional human rights courts.²⁶¹ However, the ICJ has highlighted its status as the UN's principal judicial organ and the expectation that it cooperate with other organs of the organization in order to justify that "[a] reply to a request for an Opinion, in principle, should not be refused."²⁶² ITLOS does not have the same duty to cooperate with U.N. organs, let alone with "what-

254. Sir Franklin Berman, *The Uses and Abuses of Advisory Opinions*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 809 (Nisuke Ando, Edward McWhinney, Rüdiger Wolfrum, & Betsy Baker Röben eds., 2002).

255. Georges Abi-Saab, *On Discretion: Reflections on the nature of the consultative function of the International Court of Justice*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 36, 42–45 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

256. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶¶ 83–90 (Feb. 25).

257. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 51–54 (July 9).

258. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 15 (July 8); Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 72. See generally KOLB, *supra* note 250, at 266–72. As such, courts' appreciation in the exercise of advisory jurisdiction is not a discretionary power. *But see* Barnes, *supra* note 78, at 197 n.112.

259. *Discretion*, BLACK'S LAW DICTIONARY (9th ed. 2009).

260. See SHAW, *supra* note 250, at 985 (suggesting that "the difference . . . is largely one of formulation and of judicial technique rather than one of substance").

261. See references *supra* note 246; see also Wolfrum, *Advisory Opinions: Are They a Suitable*, *supra* note 22, at 56.

262. Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, at 71 (Mar. 30); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 65 (Feb. 25); SHAW, *supra* note 250, at 1000–02; see KOLB, *supra* note 250, at 273; U.N. Charter art. 92 (status as principal judicial organ).

ever body” authorized by two or more states to request an advisory opinion from it.²⁶³ Likewise, the states or institutions competent to request an advisory opinion of regional human rights courts may not have the same legitimacy as U.N. organs in determining the opportunity or propriety of clarifying a legal question of global concern. As such, questions of propriety should be more carefully considered before ITLOS and regional human rights courts than is necessary before the ICJ.

The following sections focus on the objections most likely to arise in the face of a request for an advisory opinion on climate change. The first section explores an objection on the lack of consent or prior authorization by the states concerned. The second section turns to objections regarding the nature of the questions within the request for an advisory opinion.

A. *The Consent of the States Concerned*

This section identifies the principle according to which a court must decline a request for an advisory opinion that is aimed at interpreting the rights or obligations of states when that request is submitted without either the states’ ad hoc consent (i.e. in relation to a particular request) or their prior authorization (i.e. granting jurisdiction to the court in relation to subsequent requests). This principle would not be a problem in advisory proceedings before the ICJ, as U.N. members have already authorized U.N. organs and agencies to request advisory opinions from the ICJ under the U.N. Charter. However, this principle points to a structural flaw in COSIS’ strategy for receiving an advisory opinion of ITLOS and presents a serious obstacle to advisory proceedings on climate change before regional human rights courts.

1. The Requirement of State Consent

The contemporary international legal order is based on the principle that states are sovereign, equal, and independent.²⁶⁴ When a dispute arises between states, they have an obligation to seek peaceful settlement,²⁶⁵ yet they are free to choose a dispute settlement mechanism. Such dispute settlement mechanisms include negotiation, enquiry, mediation, conciliation, and adjudication.²⁶⁶ Even in the absence of a dispute, states have a general obligation to cooperate in solving international problems.²⁶⁷ However, the modality of cooperation is to be negotiated by, not imposed upon, them. Accordingly, no state or group of states can seek to determine the rights and

263. Rules of ITLOS, *supra* note 18, art. 138.

264. U.N. Charter art. 2(1).

265. *Id.* art 2(3).

266. *Id.* art. 33(1); *see also* Fisheries Jurisdiction (Spain v. Can), Judgment, 1998 I.C.J. 432, ¶ 56 (Dec. 4).

267. U.N. Charter art. 56.

obligations of another state or a group of other states, whether they do this by themselves (*e.g.*, by adopting a treaty creating rights or obligations for third states) or using an institution of their choosing as an intermediary.²⁶⁸ In particular, a group of states cannot request that a court determine the obligations of other states without the consent of those states.

The PCIJ confirmed and applied this principle in its 1923 advisory opinion in *Eastern Carelia*.²⁶⁹ The case concerned a region that Finland had retroceded to Russia in 1920. When Finland claimed that Russia had assumed an obligation to maintain the autonomous status of this region and Russia refused to do so, a dispute arose between the two states. Finland submitted the dispute to the League of Nations, of which Russia was not a member. In turn, the Council of the League of Nations requested a PCIJ advisory opinion clarifying Russia's obligations relating to Eastern Carelia.²⁷⁰

The PCIJ found it "impossible" to comply with the request on the grounds that Russia had not authorized the League of Nations to settle the dispute and had not consented to the Council's request for an advisory opinion from the PCIJ.²⁷¹ The Court invoked the "principle of the independence of States" according to which "no State can, without its consent, be compelled to submit its disputes with other States ... to any ... kind of pacific settlement."²⁷² Thus, *Eastern Carelia* confirmed that the consent of a state is necessary for an institution to request an advisory opinion from an international court that is aimed at determining the rights or obligations of that state.²⁷³

In principle, a state's consent can take one of two forms. First, the state can consent to the specific request for an advisory opinion on an *ad hoc* basis. In *Eastern Carelia*, Russia withheld its consent.²⁷⁴ Second, a state can consent to giving an institution the authority to request advisory opinions generally. Thus, by ratifying the Covenant of the League of Nations, Fin-

268. See VCLT, *supra* note 172, art. 34.

269. See Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23).

270. *Id.* at 7.

271. *Id.* at 28.

272. *Id.* at 27.

273. See, *e.g.*, Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 28 (Oct. 16); U.N. Sec. Council Request for an Advisory Op. on Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Sec. Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 31 (June 21); Kenneth Keith, *The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections*, 17 AUST. Y.B. INT'L L. 39, 47 (1996); Rosalyn Higgins, *A Comment on the Current Health of Advisory Opinions*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 567, 571 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

274. See Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5, at 27–28. See generally League of Nations Covenant art 17 (on the procedure through which a state not member of the League can be invited to accept the competence of the League to settle a dispute).

land had authorized the Council of the League of Nations to request advisory opinions of the PCIJ.²⁷⁵ Russia, however, had not. *Ad hoc* consent is practically unheard of, likely because two states that agree to bring a question to a court presumably prefer to bring it as a contentious case, allowing them more control over the procedure.²⁷⁶ Advisory opinions, in contrast, touch upon the rights or obligation of states and rely on the prior authorization of the states concerned, often via the court's constitutive treaty, meaning the court must consider more than the particular concerns of the two parties before it in contentious proceedings.

2. Applications to Advisory Opinions on Climate Change

As far as the ICJ is concerned, the condition of state consent is not a serious obstacle to the exercise of advisory jurisdiction. Almost every state is a U.N. member and has empowered U.N. organs and agencies to request advisory ICJ opinions under the conditions defined by the U.N. Charter.²⁷⁷ Thus, even though the ICJ reaffirmed that a request for an advisory opinion must not “have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent,”²⁷⁸ it has never had to reject a request for an advisory opinion on the basis of the lack of state consent. Some states have strongly opposed certain requests for advisory opinions, such as Israel in relation to the construction of a border wall in occupied Palestinian territories,²⁷⁹ but even these states did not relinquish their U.N. membership and their consent to the competence of the General Assembly.²⁸⁰

Nonetheless, some states might question whether the competence that U.N. members have conferred to the General Assembly extends to the re-

275. League of Nations Covenant art. 14.

276. By contrast, third states would be allowed to present their views if the matter was brought to the court in advisory proceedings. *Compare* I.C.J. Statute, *supra* note 11, art. 66 (explaining the automatic nature of the comment-seeking procedure in advisory proceedings) *and* Rules of ITLOS, *supra* note 18, art. 133 (doing the same), *with* I.C.J. Statute, *supra* note 11, arts. 62–63 (establishing the procedure for intervention in contentious proceedings, which is far less automatic) *and* Rules of ITLOS, *supra* note 18, art. 133(5) (doing the same).

277. U.N. Charter art. 96; *see also id.* arts. 4(1), 10.

278. *Western Sahara*, 1975 I.C.J. 12, ¶ 33; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶ 85 (Feb. 25); *see also* *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65, at 72 (Mar. 30).

279. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 46 (July 9).

280. It is unclear whether a state can relinquish their U.N. membership. *See* Jochen A. Frowein, *United Nations* ¶ 40, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2013). At any rate, withdrawal would have no retroactive effect on the jurisdiction of a court to give an advisory opinion on a request for an advisory opinion that has already been made.

quest for an advisory opinion on climate change.²⁸¹ Since 1995, climate negotiations have mainly taken place under the aegis of the Conference of the Parties to the U.N. Framework Convention on Climate Change.²⁸² However, the U.N. Charter confers broad functions to the General Assembly,²⁸³ and the “[p]rotection of global climate for present and future generations of humankind” is a recurring item on the agenda of the Assembly.²⁸⁴ If the request was introduced by a specialized agency, more difficult questions would arise: according to the ICJ’s precedent in *Nuclear Weapons in Armed Conflict*, requests for advisory opinions should have a “sufficient connection” with the functions of the agency.²⁸⁵

The requirement of state consent remains a major obstacle to advisory proceedings before courts other than the ICJ. For one thing, states that are not parties to regional human rights treaties have not authorized any institution to request an advisory opinion under those treaties. As such, a request for an advisory opinion of a regional human rights court cannot relate to the rights and obligations of non-regional states without their improbable *ad hoc* consent.

Regional human rights courts have had few opportunities to confirm this principle because the hypothesis of a request directed at an extra-regional situation has never materialized. Like the ICJ in *Construction of a Wall*, the IACHR in *Promulgation of Laws* discarded ill-founded objections to the request for an advisory opinion raised from a state that had previously consented to the competence of the requesting body.²⁸⁶ On the other hand, regional human rights courts may be called upon to interpret treaties that also apply to non-parties and, consequently, could affect the interests of extra-regional countries. The IACHR noted that, when it comes to interpreting human rights treaties not exclusively applicable to American states, it could only interpret questions “directly related to the protection of human rights in

281. Cf. *Construction of a Wall*, 2004 I.C.J. 136, ¶ 28 (envisaging the possibility that a request from the General Assembly could be declined when acting *ultra vires*).

282. See Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT’L L. 1, 4 (2002); UNFCCC, *supra* note 1, art. 7.

283. U.N. Charter art. 10.

284. E.g., Agenda of the Seventy-Sixth Session of the G.A., ¶ 20(d), U.N. Doc. A/76/251 (Sept. 17, 2021). By analogy, the ICJ has consistently rejected objections to the competence of the General Assembly to request advisory opinions on a vast array of topics. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 16 (July 8); *Construction of a Wall*, 2004 I.C.J. 136, ¶ 62; *Legal Consequences of Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶ 78 (Feb. 25).

285. *Legality of Use by State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, at 77 (July 8); see also U.N. Charter art. 96(2).

286. *International Responsibility for Promulgation and Enforcement of Laws in Violation of American Convention on Human Rights*, Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 25 (Dec. 9, 1994); see also *Pact of San José*, *supra* note 33, art. 64.

a Member State of the inter-American system.”²⁸⁷ In line with the requirement of state consent, the Court emphasized that it would decline to exercise advisory jurisdiction if “the issues raised deal mainly with international obligations assumed by a non-American State.”²⁸⁸

Thus, the requirement of state consent could be a serious obstacle to a request for an advisory opinion on climate change from a regional human rights court. For a court to determine whether it can comply with the request, it would need to assess whether it has jurisdiction over a critical mass of the states concerned—a condition more likely met before IACHR than before ACHPR.²⁸⁹ Absent this critical mass, the Court could find that complying with the request “would distort [its] advisory jurisdiction.”²⁹⁰ In this regard, Chile and Colombia have indicated that the advisory opinion they intend to request would focus on the rights and obligations of American states.²⁹¹ Yet, it remains unclear whether the IACHR would agree that the issue of climate change can be addressed in this regional framework. This may depend in part on the nature of the questions raised and on the intended outcome. It would be more problematic for the IACHR to adopt an applicatory opinion (*e.g.*, determining the fair share of American states in global efforts without the consent of non-American states), but an identificatory or possibly an interpretative opinion could be less problematic.

The condition of consent could also raise some difficulties before ITLOS.²⁹² Like the ICJ, ITLOS is an international court with a broad membership. Yet, ITLOS cannot merely assume that states have consented to its advisory jurisdiction in the same way as the ICJ would with regard to U.N. members. This is because UNCLOS does not directly allow any institution to request an advisory opinion from the full tribunal. At most, according to ITLOS’s interpretation, UNCLOS merely allows *other* agreements to allow bodies of their choosing to request an advisory opinion from ITLOS.²⁹³ In *SRFC*, ITLOS pointed out that, while Article 138 of its Rules “furnishes the prerequisites” for the exercise of advisory jurisdiction,²⁹⁴ it is the MCA Convention (*i.e.*, the agreement that allows the Conference of Ministers of

287. “Other Treaties” Subject to Consultative Jurisdiction of Ct., Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 21 (Sept. 24, 1928).

288. *Id.* ¶ 52.

289. The ten largest GHG emitters include three members of the Organization of American States (the United States, Brazil, and Canada) but no members of the African Union. See CAIT Data, *supra* note 12.

290. “Other Treaties,” Advisory Opinion OC-1/82, ¶ 25.

291. Ministerio de Relaciones Exteriores (Chile), *supra* note 34; Ministerio de Relaciones Exteriores (Colombia), *supra* note 34.

292. See Yoshifumi Tanaka, *The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility*, REV. EUR. COMP. & INT’L ENV’T L. (forthcoming) manuscript at 9 (first view).

293. ITLOS Statute, *supra* note 19, art. 21; see Rules of ITLOS, *supra* note 18, art. 138.

294. Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 59.

the SRFC to request the advisory opinion)²⁹⁵ that “confers such jurisdiction on the Tribunal.”²⁹⁶ The agreement conferring jurisdiction could be a broadly ratified multilateral treaty, but it could also be a bilateral or a regional one, like the MCA Convention,²⁹⁷ or one limited to a few like-minded states, like the COSIS Agreement.²⁹⁸ The requirement of state consent would preclude ITLOS from fulfilling a request for an advisory opinion on the rights and obligations of states that are not parties to the agreement authorizing the request.

The request by the SRFC was potentially problematic, in this regard, as it related in part to the obligations of flag states not parties to the MCA Convention.²⁹⁹ To assuage these concerns, ITLOS sought to focus its opinion on interpreting the rights and obligations of the SRFC member states within their EEZ.³⁰⁰ Nonetheless, some of the opinion did concern flag states, especially by affirming their obligation to “take the necessary measures . . . to ensure compliance by vessels flying [their] flag with the laws and regulations enacted by the SRFC Member States.”³⁰¹ However, ITLOS emphasized that even this aspect of the opinion would “assist the SRFC in the performance of its activities and contribute to the implementation of the Convention.”³⁰² The Tribunal thus appeared to believe that the obligations of third states were purely incidental to the proceedings. This stands in contrast with *Eastern Carelia*, in which the determination of Russia’s obligations was the sole purpose of the request.

The requirement of state consent is a critical obstacle to a request for an advisory opinion from ITLOS that is brought under an agreement ratified only by a few like-minded states, such as the COSIS Agreement. Unlike the advisory opinion requested by the SRFC, one requested by COSIS would not assist the organization or its member states in exercising their functions in any meaningful ways. Rather, it would be an overt attempt at determining the obligations of third states without their consent. Thus, ITLOS may not be able to comply with this request.

3. Counterarguments

Three counterarguments could be made against the idea that the requirement of state consent could constitute an obstacle to advisory proceedings before regional human rights courts and ITLOS. These counterargu-

295. MCA Convention, *supra* note 167, art. 33.

296. Sub-Regional Fisheries Commission, 2015 ITLOS Rep. 4, ¶ 58.

297. Proelss, *supra* note 169, ¶ 19.

298. *See, e.g.*, COSIS Agreement, *supra* note 29, art. 4 (limiting participation to the Members of the Alliance of Small Island States).

299. Sub-Regional Fisheries Commission, 2015 ITLOS Rep. 4, ¶¶ 88–89.

300. *Id.* ¶¶ 69, 200, 214, 219(1). *See generally* Ruys & Soete, *supra* note 168, at 172.

301. Sub-Regional Fisheries Commission, 2015 ITLOS Rep. 4, ¶ 219(3).

302. *Id.* ¶ 77.

ments relate to: (1) the applicability of the requirement of state consent in the absence of a dispute, (2) the relevance of the non-binding nature of advisory opinions, and (3) the inevitability of normative externality in judicial pronouncements.

The first potential counterargument is that the requirement of state consent identified in *Eastern Carelia* only applies when the request is made in relation to a dispute. One could argue that climate change does not constitute a dispute. Both terms of this counterargument are unconvincing. First, the existence of a dispute is not material to the requirement of state consent.³⁰³ Respect for the principle of equal sovereignty precludes the determination of the rights and obligations of a state without its consent, whether or not the formal requirement of a dispute is met.³⁰⁴ Second, there appears to be a dispute, or a “conflict of legal views or of interests,”³⁰⁵ concerning many of the issues that could be raised by a request for an advisory opinion. These issues could concern states’ obligations to mitigate climate change or to pay reparations. Although it may be difficult, in contentious proceedings, to frame this multilateral dispute in bilateral terms by proving that the views of an individual state are “positively opposed” by another individual state,³⁰⁶ the “bilateralization” of the dispute does not appear essential to justifying the application of the principle of state consent.

The second potential counterargument is that state consent to a request for an advisory opinion is unnecessary since, unlike a judgment, an advisory opinion is not legally binding. Both ITLOS and, at times, the ICJ have suggested as much.³⁰⁷ Yet, this excessively formal reasoning overstates the relevance of the binding effect of international law, which is traditionally a legal system largely devoid of enforcement mechanisms. Although they have no binding force, advisory opinions are an exercise of judicial authority that have the potential to influence the prevailing understanding of the rights and

303. Therefore, my argument in Part III.A is not contingent to the existence of a dispute in relation to climate change. *But see* Barnes, *supra* note 78, at 199. My argument does not “preclude any opinion on a question of international law where a state not party to the advisory proceedings holds a different view on the matter,” provided that this other state has consented to the advisory jurisdiction of the court. In the case of the ICJ, any U.N. Member State has consented to the advisory jurisdiction of the court.

304. VCLT, *supra* note 172, art. 34.

305. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

306. *See* *Obligations Concerning Negotiations Relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India)*, Judgment, 2016 I.C.J. 255, ¶ 38 (Oct. 5); *see also* Vincent-Joel Proulx, *The World Court’s Jurisdictional Formalism and Its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30 LEIDEN J. INT’L L. 925, 943 (2017).

307. *Sub-Regional Fisheries Commission*, 2015 ITLOS Rep. 4, ¶ 76; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65, at 71 (Mar. 30).

obligations of a state.³⁰⁸ Courts recognize both advisory opinions and judgments as “judicial decisions” constituting a “subsidiary means for the determination of rules of law.”³⁰⁹ An advisory opinion in international law may thus influence subsequent judicial decisions by other courts, including domestic ones.³¹⁰ But even if advisory opinions had no effect on states whatsoever, it would still be improper for courts to play a part in a political campaign waged by some states with the aim of imposing on others a certain way of determining their rights and obligations, whether it is to constrain the fishing fleets of flag states as in *SRFC*, or to interpret the obligations of large GHG emitters.

The third potential counterargument is that it is practically inevitable for a judicial pronouncement—whether contentious or advisory—to have some diffuse normative effect on states that have not consented to the jurisdiction of a court. Just like judgments, advisory opinions contribute to the development of international law, thus indirectly affecting the rights and obligations of every state, notwithstanding their consent.³¹¹

Yet, such normative externality can only be tolerated when it is genuinely incidental to the determination of the rights and obligations of the states that have consented to the request for an advisory opinion. States would be committing an abuse of rights, by exercising a right “for an end different from that for which the right was created,”³¹² if they conferred jurisdiction to a court with the main or sole intention of determining the rights and obligations of third-party states without their consent.³¹³ An international court should not exercise jurisdiction under such circumstances.

One way for an international court to flag situations that may involve an abuse of rights is to ascertain whether either the requesting body or the

308. See *infra* text accompanying note 350.

309. I.C.J. Statute, *supra* note 11, art. 38(1)(d). On the inclusion of advisory opinions, see Alain Pellet & Daniel Müller, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 819, ¶ 309 (Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, & Christian Tomuschat eds., 3rd ed. 2019).

310. See, e.g., Sub-Regional Fisheries Commission, Declaration of Judge Cot, 2015 ITLOS Rep. 73, ¶ 11; Ruys & Soete, *supra* note 168, at 169; see also GEORGES ABI-SAAB, *LES EXCEPTIONS PRÉLIMINAIRES DANS LA PROCEDURE DE LA COURT INTERNATIONALE* 75–83 (1967); KOLB, *supra* note 250, at 277; HUGH THIRLWAY, *THE INTERNATIONAL COURT OF JUSTICE* 199 (2016).

311. See Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-24/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 283(14) (Aug. 19, 2014).

312. See Alexandre Kiss, *Abuse of Rights* ¶ 1, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE* (2006). See generally Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Judgment on Preliminary Objections, 2018 I.C.J. 292, ¶ 150 (June 6); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 I.C.J. 240, ¶ 38 (June 26); Certain Iranian Assets (Iran v. U.S.), Judgment on Preliminary Objections, 2019 I.C.J. 7, ¶ 113 (Feb. 13).

313. See Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTRAL. Y.B. INT'L. L. 191, 204 (1999).

states giving competence to the requesting body have a particular interest in the court's response. The ICJ has held that it would not give an advisory opinion that would be "devoid of object or purpose"³¹⁴ and that the purpose of an advisory opinion ought to be the "enlightenment" of the requesting body "as to the course of action it should take."³¹⁵ Regional human rights courts allow requests from bodies that can act on this basis only by making recommendations to states.³¹⁶ ITLOS's opinion in *SRFC* emphasized that the organization was "seek[ing] guidance in respect of its own actions,"³¹⁷ rather than seeking an authoritative judicial pronouncement to pressure flag states into compliance with their obligations.

Admittedly, SRFC member states likely had other motives for requesting an advisory opinion. Tom Ruys and Anemoon Soete have suggested that their request was "related primarily to the international obligations of non-SRFC members, rather than to assisting the SRFC to carry out its functions."³¹⁸ Some ITLOS members were well aware that the opinion "might well be of value" to other states.³¹⁹ At the very least, however, SRFC member states had managed to maintain the plausible deniability of their intention to obtain a judicial pronouncement against non-consenting states. Even so, Judge Cot expressed concern that states following the Tribunal's approach "could, through bilateral or multilateral agreement, seek to gain an advantage over third States and thereby place the Tribunal in an awkward position."³²⁰

These considerations do not relate to an exercise of judicial "discretion" particular to the context of advisory proceedings. In fact, similar considera-

314. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 73 (Oct. 16).

315. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, at 71 (Mar. 30); Western Sahara, 1975 I.C.J. 12, ¶ 31; Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 47 (July 9). This includes informing a subsidiary organ. *See* Application for Review of Judgment No. 158 of the U.N. Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, ¶ 22 (July 12).

316. *See* International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights, Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 23–25 (Dec. 9, 1994); "Other Treaties" Subject to Consultative Jurisdiction of Ct., Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 25 (Sept. 24, 1928); *see also* Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 20 (Nov. 15, 2017) (noting that the advisory procedure should not be used "for abstract speculations with no foreseeable application to specific situations"); Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 16 (Oct. 6, 1987).

317. Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 76.

318. Ruys & Soete, *supra* note 168, at 171.

319. Rep. of the Twenty-Sixth Meeting of States Parties to UNCLOS, ¶ 18, U.N. Doc. SPLOS/303 (Aug. 2, 2016) (Vladimir Golitsyn, President of ITLOS).

320. Sub-Regional Fisheries Commission, Declaration of Judge Cot, 2015 ITLOS Rep. 73, ¶ 9.

tions could apply in contentious cases. Consider a hypothetical suggested by Bodansky, whereby “two similarly-inclined states” (e.g., two island states) would agree to bring a “‘contentious’ case between themselves” to the ICJ on a question relating to the obligations or responsibilities of GHG emitters.³²¹ While one of the two states would present itself as the respondent, it would only offer a token defense of the claims of the applicant. In effect, both states would seek to manipulate the court into identifying and interpreting norms applicable to large GHG emitters.

An international court would likely not accept a request to decide on Bodansky’s hypothetical. The most obvious ground for dismissing the case would be the absence of a genuine dispute between the two states.³²² The ICJ suggested that it could not adjudicate on the merits of a dispute when none of the parties are “in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court’s judgment or a defiance thereof.”³²³ As this condition relates to the jurisdiction in the objective sense, a court would be able to raise it *proprio motu*.³²⁴

Yet the two states could avoid this objection through a carefully planned performance in which they would publicly oppose one another’s view. For instance, they could disagree on the legality of a minor source of GHG emissions that are under the control of the would-be respondent. Even then, as Kolb noted, an international court should not be “helpless in [the] face of a manifestly abusive attitude against which it feels the need to react, both to safeguard its own prestige, and in the interests of the due administration of justice.”³²⁵ More fundamentally than the absence or mootness of the dispute, this hypothetical case would be dismissed on the same basis as a request for an advisory opinion submitted by COSIS—namely, that it would constitute an abuse of rights.

B. *A Question That the Court Can Answer*

Whether a court decides to comply with a request for an advisory opinion depends also on the questions contained in the request. The following section looks first at objections that the question is not purely legal and then at objections that it is too general and abstract.

321. *Role of ICJ*, *supra* note 40, at 712.

322. *See* Obligations Concerning Negotiations Relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 255, ¶ 56(1) (Oct. 5).

323. *The Northern Cameroons* (Cameroon v. U.K.), Judgment, 1963 I.C.J. 15, at 37–38 (Dec. 2).

324. SHAW, *supra* note 250, ¶ 233.

325. KOLB, *supra* note 126, at 795.

1. A Legal Question

It is largely accepted that an international court can exercise advisory jurisdiction only in relation to questions of a “legal” nature.³²⁶ In *Certain Expenses*, the ICJ noted that, “[i]f the question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested.”³²⁷ In *Western Sahara*, the Court suggested that the questions must “have been framed in terms of law and raise problems of international law” and thus “by their very nature [be] susceptible of a reply based on law.”³²⁸ Likewise, ITLOS was satisfied that the SRFC had asked questions “framed in terms of law,” which the Tribunal could answer by interpreting relevant treaty provisions and by identifying “other relevant rules of international law.”³²⁹ The Council of Europe explained this requirement as ruling out “on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other hand, questions whose solution would in any way involve matters of policy.”³³⁰

At first sight, this requirement does not seem to be a problem for current initiatives related to climate change. The request for advisory opinions under consideration would raise distinctively legal questions relating to the obligations that states have with respect to the mitigation of climate change and making reparations.³³¹ Nevertheless, the requests may invite legal findings on questions that are not *purely* legal. First, answering a legal question may presuppose the assessment of complex factual evidence. Second, legal questions may have far-reaching political implications.

326. See, e.g., U.N. Charter art. 96; I.C.J. Statute, *supra* note 11, art. 65; Rules of ITLOS, *supra* note 18, art. 138(1); European Convention on Human Rights, *supra* note 217, art. 47; ACHPR Protocol, *supra* note 33, art. 4(1).

327. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, at 155 (July 20).

328. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 15 (Oct. 16); see also *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 37 (July 9); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 25 (July 22); *Legal Consequences of Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶ 135 (Feb. 25).

329. *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion of Apr. 2, 2015 ITLOS Rep. 4, ¶ 65.

330. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Explanatory Report to Protocol No. 2, at 2, May 6, 1963, E.T.S. No. 44; see also *Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights*, Request No. A47-2008-001, ¶ 36 (Feb. 2, 2008) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-2268009-2419060>; *Decision on the Competence of the Court to Give an Advisory Opinion under Article 29 of the Oviedo Convention*, Request No. A47-2021-001, ¶ 48 (Sept. 15, 2021) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-7117959-9642022>.

331. See *supra* Part I.A.

The first problem is that such a question, albeit legal, may invite the assessment of factual evidence. This would most clearly arise in the case of questions seeking an applicatory outcome.³³² For instance, the court could be asked to determine a state's fair share in global mitigation action considering its current and past levels of emissions, taking national circumstances into account. It may alternatively be asked to assess the amount of reparations due for the impacts of climate change.

The role of international courts in assessing factual evidence is more problematic in advisory proceedings than in contentious ones. In contentious proceedings, a court can rely on a system of presumption and on rules that help to determine the burden of proof. Because the plaintiff must prove her case,³³³ the absence of factual evidence benefits the respondent. Since there is no plaintiff in advisory proceedings, however, "the ordinary rules concerning the burden of proof can hardly be applied."³³⁴ Moreover, while the court generally benefits from a dossier prepared by the organization that requests the advisory opinion,³³⁵ as well as from voluntary submissions by states or international organizations,³³⁶ these documents may not represent all relevant views or provide all pertinent information. States and organizations that have a right to present their views in advisory proceedings are not obligated to do so.

International courts have not reached consensus about the best way to address this issue. The PCIJ excluded the existence of "an absolute rule that the request for an advisory opinion may not involve some enquiry as to the facts," while also acknowledging that it would be "expedient" for the court if "the facts upon which [its] opinion . . . is desired should not be in controversy."³³⁷ The ICJ accepted that it may have to decline to provide an opinion in the absence of "sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed question of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character."³³⁸ The proponents of a request for an advisory opinion have often sought to provide as much information as pos-

332. See *supra* Part I.C.

333. See, e.g., *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 162 (Apr. 20) (*onus probandi incumbit actori*).

334. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 44 (Oct. 16).

335. See I.C.J. Statute, *supra* note 11, art. 65(2); Rules of ITLOS, *supra* note 18, art. 131.

336. See references *supra* note 18.

337. *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 28 (July 23).

338. *Western Sahara*, 1975 I.C.J. 12, ¶ 46; see also *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, Advisory Opinion, 1950 I.C.J. 65, at 72 (Mar. 30); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 56 (July 9); *id.*, Declaration of Judge Buergenthal, at 240, ¶ 1; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶ 71 (Feb. 25).

sible to the court, but this has not necessarily helped courts to reach definitive conclusions on contentious facts. Thus, one could view the Court's inability to draw "definitive conclusions" on the legality of nuclear weapons³³⁹ as being "dictated by the absence of factual evidence as to the foreseeable impact of the limited use of tactical nuclear weapons,"³⁴⁰ even though the Court had received a great deal of documentation.³⁴¹

In advisory proceedings on climate change, a court would find extensive information reflected in party submissions and in the dossier. Such information may come from scientific sources such as the reports of the Intergovernmental Panel on Climate Change. Rather than a lack of information, courts might become overwhelmed by the sheer volume and complexity of the information submitted to them.³⁴² The requesting body could seek to avoid this issue by confining its request to more abstract questions, but this may eventually impact the relevance of the opinion by limiting it to an identificatory rather than interpretative outcome.³⁴³

Another problem may arise in relation to the requirement that the request ask legal questions. This second problem is that, in advisory proceedings about climate change, the questions would almost inevitably have a strong political dimension. In particular, any question regarding the obligations of states on climate change mitigation would almost inevitably overlap with ongoing international negotiations under climate treaties.

In principle, international courts attach no importance to the political dimension of questions raised in requests for advisory opinions, provided that the questions are susceptible to a legal treatment.³⁴⁴ The ICJ has given opinions on highly politicized issues such as the Israeli-Palestinian conflict, the legality of nuclear weapons, and the recognition of Kosovo's declaration of independence. In doing so, it has emphasized that the political aspect of a request for an advisory opinion "does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute."³⁴⁵ As Kolb pointed out, "authorized organs

339. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 97 (July 8).

340. Hugh Thirlway, *Advisory Opinions* ¶ 25, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2006).

341. Including a 576-page dossier compiled by the U.N. Secretariat and thirty-one written statements by states and international organizations.

342. See generally Mayer, *Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review*, *supra* note 84.

343. See *supra* Part I.C.

344. See, e.g., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 32 (Aug. 28, 2002).

345. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 13 (July 8) (citations omitted); see also Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

will seek the Court's opinion only for politically sensitive and controversial questions," as they could otherwise rely on their own legal services.³⁴⁶ The Court has denied suggestions that it may be unable to offer an advisory opinion due to excessive "political pressure."³⁴⁷ Climate change may well be *more* controversial than most issues on which a court has pronounced, but that would not be a valid justification for a court to decline the request.

A different question, however, is whether a court *should* consider the predictable political consequences of granting an advisory opinion. For instance, Anthony Aust suggested that the ICJ's Opinion in the *Wall* case "is seen by a large number of Palestinians as confirming their right to use force to make settlers in the occupied territories . . . leave or even to kill them."³⁴⁸ Thus, on several occasions, states have objected to the issuance of an advisory opinion which, they argued, would interfere with ongoing political negotiations.³⁴⁹ However, the ICJ discarded such arguments on two complementary grounds. First, it noted that it "cannot substitute its own assessment for that of the requesting organ . . . as to whether an opinion would be likely to have an adverse effect."³⁵⁰ This ground, albeit compelling before the ICJ, would not easily apply before other courts when the request originates from less representative bodies, such as COSIS.³⁵¹ Second, the ICJ noted the difficulty of predicting the consequences of giving an opinion.³⁵² By enhancing the political cost of disregarding international law for Israel, for instance, the *Wall* opinion might just as well have reduced the use of political violence in Palestine and elsewhere.

Thus, while some scholars believe that consequentialist objections could theoretically succeed,³⁵³ it may be difficult to persuade international judges that the adoption of an advisory opinion on climate change would cause more harm than good. Judges are, after all, typically selected from amongst the firmest believers in the strength of international legal institu-

346. KOLB, *supra* note 250, at 267.

347. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 28–29 (June 21).

348. Aust, *supra* note 129, at 150.

349. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 17 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 51–55 (July 9, 2004); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 35 (July 22).

350. Kosovo, 2010 I.C.J. 403, ¶ 35.

351. See text after note 263 (on the limited legitimacy of many of the "bodies" that are authorized to request an advisory opinion of ITLOS).

352. Construction of a Wall, 2004 I.C.J. 136, ¶ 53.

353. See, e.g., Thirlway, *supra* note 340, ¶ 17.

tions.³⁵⁴ In addition, the consequentialist objection itself is rather uncertain. Some scholars hope that an advisory opinion would help “to identify the legal principles which can or could ground . . . agreed policy positions . . . and thus promote the common interest of human kind,”³⁵⁵ whereas others speculate that an advisory opinion could hinder negotiations by fueling expectations for some states that other states are unwilling to fulfill.³⁵⁶ And while the adoption of an advisory opinion may have a detrimental effect on international institutions, the same could be said of a decision not to give an advisory opinion. Arguably the political consequence of granting an advisory opinion is not a question that the ICJ—or, indeed, any other international court—is well-equipped to consider.³⁵⁷

2. The Degree of Generality and Abstraction

Another potential obstacle to an advisory opinion on climate change relates to the degree of generality and abstraction of the questions. Small-island states may be tempted to ask not just a question on the obligation of a particular state at a particular time, but also more general questions aimed at determining the obligations of all states in relation to climate change mitigation and possibly also reparations. Thus, the draft General Assembly resolution proposed by Vanuatu in November 2022 would request the ICJ to identify the obligations of states “to ensure the protection of the climate system and other parts of the environment” as well as the legal consequences arising when states cause “significant harm to the climate system and other parts of the environment.”³⁵⁸ Doing so in a comprehensive manner would require the Court to develop a comprehensive treatise in international climate and environmental law. Advisory proceedings before ITLOS or a human rights court would be more focused only on what concerns the legal basis for jurisdiction; indirectly, judges would be called upon to interpret the same norms of international climate and environmental law. Thus, under the pretense of identifying the “specific obligations of State Parties” to UNCLOS, the COSIS request really invites ITLOS to delve into the general international law obligation (*e.g.*, of due diligence) that UNCLOS codifies.³⁵⁹

Such overly broad questions can be challenging for a court to answer within a reasonable timeframe. The authority attached to judicial pronouncements stems largely from the slow, tedious process of deliberation

354. See generally Leigh Swigart & Daniel Terris, *Who Are International Judges?*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 619 (Cesare P.R. Romano, Karen J. Alter, & Yuval Shany eds., 2013).

355. Boisson de Chazournes, *supra* note 23, at 107.

356. See, by analogy, references at *supra* note 37.

357. See KYSAR, *supra* note 51, at 14.

358. Draft Resolution of Vanuatu, *supra* note 28, ¶¶ 1–2.

359. Czybulka, *supra* note 101, at 1284.

which is designed to address narrowly defined questions in relation to which states—whether they are parties to a dispute or presenting their views in advisory proceedings—can be “divided in legal terms into a *pro* and a *contra* camp.”³⁶⁰ Sir Franklin Berman points out that when states “maintain a varied spectrum of views,” absent “any compulsion on States to appear and argue their legal viewpoints,” courts “cannot be confident that all of the necessary legal elements would be fully, effectively and equally argued before it.”³⁶¹ Among the subsidiary means for the determination of rules of law, a comprehensive analysis of broad questions—in *extremis*, the analysis of an entire legal field—would be better served by legal scholarship, or perhaps by the work of the International Law Commission, than by judicial proceedings.

Nonetheless, international courts have generally complied with requests for advisory opinions not only on concrete questions relating to actual or potential disputes, but also on more abstract ones.³⁶² Both the ICJ and ITLOS have expressly held that they can “give an advisory opinion on any legal question, abstract or otherwise.”³⁶³ And if the ECHR refused to answer a question that was “abstract and general in nature” when exercising advisory jurisdiction under Protocol No. 16,³⁶⁴ this was solely because this Protocol required the question asked by a national court to relate to “a case pending before it.”³⁶⁵

At times, however, judges have partly echoed Berman’s critique by voicing concerns about excessively general and abstract questions. For instance, Judge Shigeru Oda dissented to an advisory opinion in *Nuclear Weapons*, arguing that the opinion should not be offered on the grounds that the question did not relate to any “issues of a practical nature,”³⁶⁶ such as “a

360. Berman, *supra* note 254, at 819.

361. *Id.*

362. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 17 (July 8); Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011 ITLOS Rep. 10, ¶¶ 107–16 (Seabed Disputes Chamber); Compatibility of Vagrancy Laws with the African Charter on Human and People’s Rights, No. 001/2018, Advisory Opinion, Afr. Ct. H.P.R. (Dec. 4, 2020). *But see* European Convention on Human Rights, *supra* note 217, art. 47(1).

363. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 40 (July 9, 2004); Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 4, ¶ 72; see also KOLB, *supra* note 250, at 268; CHANDRASEKHARA RAO & GAUTIER, *supra* note 164, at 165.

364. Request for an Advisory Opinion under Protocol No. 16 Concerning the Interpretation of Articles 2, 3, & 6 of the Convention, Decision, Request No. P16-2020-001, ¶ 18 (Dec. 14, 2020) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-6951456-9350980>.

365. Protocol 16, *supra* note 218, art. 1(2).

366. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting Opinion of Judge Oda, 1996 I.C.J. 330, ¶ 50 (July 8).

concrete dispute or . . . a concrete problem awaiting a practical solution.”³⁶⁷ Answering such general questions, Oda submitted, would betray the court’s judicial function, transforming it into “a consultative or even a legislative organ.”³⁶⁸

By analogy, such concerns for judicial propriety led the ECHR to reject a request for an advisory opinion on the determination of the “protective conditions” which must exist, in application of the European Convention on Human rights and Biomedicine (Oviedo Convention), before a person with mental disorder can be treated without his or her consent.³⁶⁹ The Court found that the drafters of the treaty had made “the deliberate choice . . . to leave it to the Parties to determine” what protective conditions would be appropriate and, therefore, that this treaty provision could not “be further specified by a process of abstract judicial interpretation.”³⁷⁰ In support of its conclusion, the Court highlighted that the Oviedo Convention “is a framework treaty setting out the most important . . . principles . . . to be further elaborated and specified through additional protocols.”³⁷¹ The specification of the open-ended provisions of this treaty, the Court submitted, should be the object of “a legislative exercise, rooted in policymaking at the international level, aiming at the adoption of new international legal standards,”³⁷² a process in which the court refrained from interfering.³⁷³ Four of the seven judges dissented, arguing that the court should not have refrained from giving an opinion “merely because the Court’s answer to the question could be a source of interpretation for a possible future draft protocol to the Oviedo Convention.”³⁷⁴

An advisory opinion on climate change could raise issues like those in the *Oviedo* opinion because of the close relationship between the questions on climate change mitigation and ongoing political negotiations. The ECHR’s approach, if it is followed by other courts, would constitute a serious obstacle to advisory opinions aimed at the interpretation of the general mitigation obligations. Like *Oviedo*, such advisory proceedings would likely concern vague treaty provisions on topics that states intended to address

367. *Id.* ¶ 51.

368. *Id.* ¶ 53.

369. Convention for the protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine art. 7, Apr. 4, 1997, E.T.S. No. 164; Decision on the Competence of the Court to Give an Advisory Opinion under Art. 29 of the Oviedo Convention, Request No. A47-2021-001, ¶ 65 (Sept. 15, 2021) (Eur. Ct. H.R.), <http://hudoc.echr.coe.int/eng?i=003-7117959-9642022>.

370. Advisory Opinion under Art. 29 of the Oviedo Convention, Request No. A47-2021-001, ¶ 65.

371. *Id.* ¶ 67.

372. *Id.*

373. *See id.* ¶ 66.

374. *Id.*, Joint Dissenting Opinion of Judges Lemmens, Grozev, Eicke & Schembri Orland, ¶ 8.

through subsequent negotiations.³⁷⁵ Critics could question the judicial propriety of a judicial “interpretation” of indeterminate, open-ended norms of international law, when this would involve long strides in unknown legal territory.

IV. THE ANSWERS

This part discusses how an international court may respond if it decides that it has jurisdiction and that the request is admissible. The aim here is not to provide a comprehensive treatment of the law applicable to climate change, but rather to shed light on the limited ability of a court to interpret ill-defined principles in an authoritative and persuasive way. The first section highlights the challenge involved by the application of ill-defined norms to climate change. The second section shows how a court could evade difficult questions, either by expressly deciding not to answer them, or by providing incomplete or evasive answers.

A. Normative Indeterminacy

A request for an advisory opinion on climate change might call for an interpretation of states’ general obligations on climate change mitigation and, possibly, reparations.³⁷⁶ To give its advisory opinion, a court would thus need to interpret norms whose content is both fundamentally indeterminate and fiercely disputed. A court would have no useful benchmark to determine, in any relatively specific and convincing manner, what a state must do concerning climate change mitigation and, *a fortiori*, climate reparations.

1. Climate Change Mitigation

An advisory opinion on climate change would first need to identify the norms applicable to climate change mitigation—in particular, the general norms applicable beyond the scope of specific treaty provisions. Some states might deny that they have obligations to mitigate climate change beyond what they have specifically committed to do under climate treaties, such as in relation to their NDCs.³⁷⁷ Already, scholars have presented inconsistent views about the significance of the UNFCCC’s open-ended “commitment” for every party to “[f]ormulate [and] implement . . . programmes containing measures to mitigate climate change.”³⁷⁸ Beyond cli-

375. See, e.g., Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 511–23 (1993); Biniatz, *supra* note 72.

376. See discussion *supra* Part I.

377. See Paris Agreement, *supra* note 1, art. 4(2).

378. UNFCCC, *supra* note 1, art. 4. Compare Jutta Brunnée, *Procedure and Substance in International Environmental Law*, 450 COLLECTED COURSES HAGUE ACAD. INT’L L. 87, 190 (2020) (“non-binding”), with DANIEL BODANSKY, JUTTA BRUNNÉE, & LAVANYA

mate treaties, the customary obligation of due diligence will certainly be front and center in arguments made by the most vulnerable states.³⁷⁹ Some may question whether precedents that were adopted in relation to direct transboundary harm apply to the far more complex case of climate change.³⁸⁰ Despite these challenges, however, it is likely that a court will find a legal basis to hold that states have a general obligation to mitigate climate change.³⁸¹

The identification of a general obligation on climate change mitigation would confirm that states “do not have unfettered discretion in addressing climate change.”³⁸² While this may be symbolically relevant,³⁸³ it would largely miss the issue. Most states are already implementing *some* action on climate change mitigation. As such, the crux of the matter is not the existence of an obligation to mitigate climate change, but rather its content, in particular the standard of conduct applicable in relation to this obligation.³⁸⁴ The proponents of a request for an advisory opinion might seek not only an identificatory outcome, but also a judicial definition and application of the methodology that one can use to assess a state’s requisite level of mitigation action.³⁸⁵

Judicial debates, in this regard, would certainly refer extensively to the 2019 decision of the Supreme Court of the Netherlands in *Urgenda v. the Netherlands*. The court held that, to comply with a general mitigation obligation inferred from the ECHR in light of customary international law, the Netherlands had to reduce its GHG emissions by at least twenty-five percent between 1990 and 2020.³⁸⁶ The court identified this target mainly by relying on scientific estimates about the least-cost way of achieving the 2°C tem-

RAJAMANI, INTERNATIONAL CLIMATE CHANGE LAW 131 (2017) (“only a general obligation”), and Benoit Mayer, *Obligations of Conduct in the International Law on Climate Change: A Defence*, 27 REV. EUR. COMPAR. & INT’L ENV’T L. 130, 134 (2018) (“obligations of conduct”).

379. See, e.g., Address by Toribiong, *supra* note 6, at 28.

380. See Alexander Zahar, *Mediated Versus Cumulative Environmental Damage and the International Law Association’s Legal Principles on Climate Change*, 4 CLIMATE L. 217, 224–34 (2014).

381. See, e.g., *Role of ICJ*, *supra* note 40, at 694; *Protection of the Atmosphere*, *supra* note 35, at 26–38 (Guideline 3); ILA Resolution, *supra* note 35; BENOIT MAYER, INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION, at ch. 3 (2022).

382. Wewerinke-Singh, *supra* note 25, ¶ 14.

383. See Akhavan, *supra* note 25.

384. See Christina Voigt, *The Potential Roles of the ICJ in Climate Change-Related Claims*, in ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW 152, 159–61 (Michael Faure ed., 2016).

385. See *supra* Part I.C.

386. HR [Supreme Court] 20 december 2019, NJ 2020, 41 m.nt. JS ¶ 7 (Staat der Nederlanden/Stichting Urgenda) (Neth.), translated in <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>.

perature goal.³⁸⁷ Several subsequent cases have emulated this method of identifying a state's (or corporation's) requisite level of mitigation action by inference from global temperature goals.³⁸⁸ Advocates hope that an advisory opinion will play "a role in raising [national] pledges to truly ambitious targets that would allow us to meet the 1.5°C . . . target."³⁸⁹

However, the *Urgenda* method relies on the questionable assumption that a court can determine with sufficient precision the level of mitigation action that a state would be required to achieve to act consistently with ambivalent and unspecific temperature goals. For example, states have not agreed on which temperature goal should prevail (1.5 or 2°C),³⁹⁰ how global temperatures should be measured,³⁹¹ when these goals must be achieved (e.g., by 2100, during the 21st century, or on a long-term equilibrium), or what level of confidence one should have of achieving these goals (e.g., a 50, 66, or 90% chance).³⁹²

But even if a court could translate the temperature goals into a global emission-reduction pathway, it would still need to determine what this global goal means for individual states. Contrary to the Court's holding in *Urgenda*, there is no "principle" according to which every developed state should reduce its emissions at the same pace.³⁹³ To the contrary, states have agreed that individual mitigation commitments depend on national circumstances considered in light of the principle of common but differentiated responsibilities.³⁹⁴ Even among countries with a similar level of development, different rates of emission reduction are necessary to reflect different capacity to reduce emissions. For instance, reductions are often easier to achieve in countries with high emissions coming mainly from coal power than in countries with low emissions coming mostly from agriculture. Beyond this general idea, though, states have been unable to define a comprehensive burden-sharing formula.

387. *Id.* ¶¶ 7.2.9, 7.4.3

388. *See, e.g.*, Civ. [Tribunal of First Instance] Bruxelles (4th ch.) (Belg.), June 17, 2021, 2015/4585/A, ¶ 2.1 (holding that Belgium's mitigation action is insufficient); Rb. Den Haag 26 mei 2021, JOR 2021, 208 m.nt. S.J.M. van Biesmans, ¶ 4.1.4 (Milieudefensie/Royal Dutch Shell) (Neth.) (holding that Shell must reduce CO2 emissions resulting from its global operations by 45% by 2030 compared with 2019).

389. Wewerinke-Singh, *supra* note 25, ¶ 16.

390. The difference between 1.5 and 2°C is particularly significant when one considers that the global average temperature has already increased by around 1.1°C. *See* IPCC 2021, *supra* note 47, at 5.

391. IPCC, *Framing and Context*, in GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT 49, 56–59 (Valérie Masson-Delmotte et al. eds., 2019).

392. *Cf.* Reto Knutti, Joeri Rogelj, Jan Sedlá ek, & Erich M. Fisher, *A Scientific Critique of the Two-Degree Climate Change Target*, 9 NATURE GEOSCIENCE 13, 15–17 (2016).

393. HR [Supreme Court] 20 december 2019, NJ 2020, 41 m.nt. JS ¶ 7.3.2 (Staat der Nederlanden/Stichting Urgenda)(Neth.), translated in http://uitspraken.rechtspraak.nl/inzien_document?id=ECLI:NL:HR:2019:2007.

394. UNFCCC, *supra* note 1, art. 3(1); Paris Agreement, *supra* note 1, art. 4(1)–(2).

More fundamentally, the *Urgenda* method relies on the premise that states have an obligation to act consistently with these temperature goals.³⁹⁵ In fact, the temperature goals were consistently defined as mere objectives.³⁹⁶ Thus, as the UK Supreme Court noted, the Paris Agreement “did not impose on any state to adopt a binding domestic target to ensure that those objectives were met.”³⁹⁷ One could seek to argue that an obligation of states to act consistently with these objectives has emerged under customary law or through subsequent treaty practice.³⁹⁸ However, this line of argument would face seemingly insuperable evidentiary issues, as it is largely understood that states—both in aggregate³⁹⁹ and, in general, individually⁴⁰⁰—have failed to act consistently with even the most permissive readings of these temperature goals.

Martti Koskenniemi famously showed that arguments about legal interpretation can follow one of two methods: a descending reasoning (mainly deductive) consisting in the application of abstract principles to concrete situations, or an ascending approach (mainly inductive) relying on empirical evidence of prevailing social practice to ascertain prevailing norms.⁴⁰¹ The *Urgenda* method relies unmistakably on a descending approach: it assumes that states must act consistently with the temperature targets of the Paris Agreement, despite evidence that states have not generally acted consistently with these targets.⁴⁰² A problem with this approach is that it may lead to overly abstract conclusions that are disconnected from social realities or even conflict with one another (*e.g.*, if states have agreed upon incompatible

395. See Mayer, *Interpreting States’ General Obligations on Climate Change Mitigation: A Methodological Review*, *supra* note 84, at 114.

396. See Copenhagen Accord, in annex of Decision 2/CP.15, U.N. Climate Change Convention, Rep. of the Conference of the Parties on Its Fifteenth Session, at 5, ¶¶ 1–2, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010); Paris Agreement, *supra* note 1, art. 2(1)(a); Decision 10/CP.21, The 2013–2015 Review, in U.N. Climate Change Conference, Rep. of the Conference of the Parties on Its Twenty-First Session, at 23, ¶ 4, U.N. Doc. FCCC/CP/2015/10/Add.2 (Jan. 29, 2016).

397. *R. v. Heathrow Airport* [2020] UKSC 52, ¶ 71 (U.K.). See generally Benoit Mayer, *Temperature Targets and State Obligations on the Mitigation of Climate Change*, 33 J. ENV’T L. 585 (2021).

398. VCLT, *supra* note 172, art. 31(3)(a)–(b).

399. See sources cited *supra* note 5.

400. See, *e.g.*, *Countries*, CLIMATE ACTION TRACKER, <http://climateactiontracker.org/countries> (last visited Mar. 6, 2022) (suggesting that no country is “1.5°C Paris Agreement Compatible”). These assessments necessarily involve a range of questionable assumptions, for instance on burden-sharing.

401. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 59 (2007).

402. See generally Benoit Mayer, *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: Milieudéfense v. Royal Dutch Shell*, 11 TRANSNAT’L ENV’T LAW 407 (2022); Daniel Bodansky, *Non Liqueur and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 255, at 153, 169–70.

objectives).⁴⁰³ As such, the interpretation of international law tends to rely on ascending reasoning (*e.g.*, from state practice) at least as much, and often more, than on descending reasoning.⁴⁰⁴ Thus, it seems unlikely that an advisory opinion would find that states have an obligation to act consistently with the temperature targets when, in fact, states do not generally do so.

Rather than seeking to assess states' requisite levels of mitigation action, a court could try to identify some of the necessary steps that a state should take to comply with its general mitigation obligations. General mitigation obligations are obligations of due diligence,⁴⁰⁵ that require states to take "appropriate" and "necessary measures."⁴⁰⁶ The court could seek to identify such measures. Thus, instead of *Urgenda*, an advisory opinion could be inspired by *Friends of the Irish Environment v. Ireland*, in which the Irish Supreme Court found that the national government had to adopt a long-term mitigation target that was clear and specific,⁴⁰⁷ or by *Grande-Synthe v. France*, in which the French State Council ordered the state to comply with its own carbon budget.⁴⁰⁸ It could also turn to the dozens of cases in which national courts have held that mandatory requirements on the conduct of environmental impact assessments required an assessment of the impact of the project on GHG emissions.⁴⁰⁹ In line with their own decisions on the management or preservation of shared resources, international courts might recognize environmental assessment and negotiations in good faith as some of the measures that a state would normally implement as part of their due diligence obligation.⁴¹⁰ This outcome, however, would fall short of what the proponents of advisory opinions hope to see.⁴¹¹

403. See Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, 293–294 (1993) (Neth.).

404. See, *e.g.*, Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, at 125–26, U.N. Doc. A/73/10 (2019).

405. Mayer, *Obligations of Conduct in the International Law on Climate Change: A Defence*, *supra* note 378, at 132–34; BODANSKY, BRUNNÉE, & RAJAMANI, *supra* note 378, at 41–42.

406. See Duncan French & Tim Stephens, *Study Group on Due Diligence in International Law: Second Report*, 77 INT'L L. ASS'N REP. CONF. 1062, 1064 (2016).

407. *Friends of the Irish Env't v. Ireland* [2020] IESC 49, [2020] 2 ILRM 233 (Ir.).

408. Conseil d'État [CE][Council of State], Nov. 19, 2020, Rec. Lebon, 427301 (Fr.); Conseil d'État [CE][Council of State], Jul. 1, 2021, Rec. Lebon, 427301 (Fr.).

409. See, *e.g.*, *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003); *Save Lamu v Nat'l Env't Mgmt. Auth.* (2019) 2016 NET No. 196 (National Environmental Tribunal) (Kenya); *Gloucester Resources v. Minister for Planning* [2019] NSWLEC 7 (8 February 2019) ¶¶ 486–87, 513–515 (Austl.). See generally Mayer, *Climate Assessment as an Emerging Obligation Under Customary International Law*, *supra* note 119, at 273, 283–84.

410. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 204 (Apr. 20) (environmental assessment); *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16 2015) (environmental assessment); *Lake Lanoux (Fr. v. Spain)*, Award, 12 R.I.A.A. 281, ¶ 11 (Perm. Ct.

2. Climate Reparations

Aside from general mitigation obligations, a court could be requested to pronounce states' obligations to make reparations for the impacts of climate change. In the absence of special rules under climate treaties,⁴¹² arguments for reparations would rely on the general international law on state responsibility. In *Factory at Chorzów*, the PCIJ identified “[t]he essential principle . . . that reparation must, as far as possible, wipe out all the consequences of the illegal act.”⁴¹³ The International Law Commission codified this principle as requiring a state responsible for an internationally wrongful act “to make full reparation for the injury caused” by this act.⁴¹⁴

The notion of climate reparations is morally attractive considering both the contributions to climate change of developed states and the great impacts of climate change on developing states.⁴¹⁵ Here again, however, judges would encounter serious difficulties when seeking to apply this principle to climate change. For one, a state is only responsible for the consequences of wrongful acts and not all GHG emissions are unlawful. Thus, to determine a state's responsibility, a court would need to rely on patchy data about historical emissions before engaging with thorny historical-doctrinal questions to determine the time at which state obligations emerged and the subsequent evolution of their content.⁴¹⁶ To complicate things further, the standard of conduct applicable under general mitigation obligations may have evolved over time, reflecting progression in general state practice.

Overall, climate reparations would involve intractable issues of causation and attribution. Courts have generally applied a state's obligation to make reparations in situations in which there was a proximate causal link between the state's wrongful act and harm suffered by another state.⁴¹⁷ The

Arb. 1957) (negotiations in good faith); Fisheries Jurisdiction (U.K. v Ice.), Judgment, 1974 I.C.J. 3, ¶ 79(3) (July 25) (negotiations in good faith).

411. See sources cited *supra* notes 39 and 41.

412. See, e.g., Adoption of the Paris Agreement, *supra* note 2, ¶ 51.

413. Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

414. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries art. 31(1), in Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, at 26, U.N. Doc. A/56/10 (2001).

415. See Simon Caney, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 LEIDEN J. INT'L L. 747 (2005).

416. See, e.g., Alexander Zahar, *Historical Responsibility for Climate Change Is Political Propaganda*, in DEBATING CLIMATE LAW, *supra* note 54, at 190, 192 (as to reliance on patchy data); Sarah Mason-Case & Julia Dehm, *Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present*, in DEBATING CLIMATE LAW, *supra* note 54, at 170 (as to the engagement of thorny historical-doctrinal questions).

417. See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2002 I.C.J. 1, ¶ 93 (Feb. 9), <http://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf>; see also Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 414, art. 31(10).

breach of a state obligation to mitigate climate change does not cause similarly direct damage to another state. Rather, this wrongful act contributes incrementally to the increase of GHG concentrations in the atmosphere, which, in the long-term, causes a slight acceleration of slow-onset phenomena like sea-level rise and a slight increase in the risk of adverse sudden events like hurricanes. In such circumstances, it is unclear whether reparations would have to be paid to states or to other entities that represent “the interest of . . . the beneficiaries of the obligation breached.”⁴¹⁸ Due to the difficulty of attributing climate impacts to a state’s wrongful act, it would be particularly challenging for a court to justify the determination of the value of such reparations, even if it was to rely on a lump sum calculation of damages rather than on a more detailed calculation.⁴¹⁹

Another series of questions regards the scope of climate reparations. Climate change causes far-reaching impacts that will unfold over centuries and millennia.⁴²⁰ Even if only a small portion of these damages can be attributed to wrongful acts, and even if a high discount rate is applied to the value of future harms, the amount of climate reparations would be enormous.⁴²¹ Despite the insistence of the International Law Commission on “full” reparations, state practice and judicial decisions reflect that injured states need sometimes to accept less-than-full reparations, for instance in relation to war damages, when doing otherwise would cripple the ability of the responsible state to operate.⁴²² On the other hand, an advisory opinion recognizing an obligation of responsible states to pay less-than-full reparations would beg difficult questions about the way of quantifying such reparations.

B. *Plausible Judicial Treatments*

This section identifies three ways in which a court may address the indeterminacy of the relevant norms. First, the court may make a finding that it cannot answer the question because the law is unclear. Second, members of the court may find themselves unable to reach any agreement on the find-

418. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 414, art. 48(2)(b); *see also* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011 ITLOS Rep. 10, ¶ 180 (Seabed Disputes Chamber).

419. *See, e.g.*, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. 13, ¶ 35 (Feb. 2); Armed Activities on the Territory of the Congo, 2022 I.C.J. 1, ¶ 106.

420. *See* IPCC 2021, *supra* note 47, at 21. On the difficulties facing an economic valuation of climate change, *see* Delavane Diaz & Frances Moore, *Quantifying the Economic Risks of Climate Change*, 7 NATURE CLIMATE CHANGE 774 (2017).

421. *See* William D. Nordhaus, *A Review of the Stern Review on the Economics of Climate Change*, 45 J. ECON. LITERATURE 686 (2007).

422. *See, e.g.*, Eritrea’s Damages Claim, Final Award, 26 R.I.A.A. 505, ¶ 22 (Eri.-Eth. Claims Comm’n 2003); *see* Benoit Mayer, *Less-Than-Full Reparations in International Law*, 56 INDIAN J. INT’L L. 463 (2016).

ing. Third, the court may provide an opinion that is incomplete, narrow, or evasive.

1. Finding That the Court Cannot Answer the Question

An advisory opinion on climate change would put a court in a difficult situation, particularly if the request related not only to the identification of relevant norms, but also to their interpretation and application. International courts generally understand their function as one of interpreting and applying the law rather than writing it.⁴²³ Yet when the content of law is fundamentally indeterminate—and, as the previous section has shown, such is the case with most of the norms that would be invoked in advisory proceedings on climate change—it may appear impossible for a court to merely interpret the law without simultaneously inventing it. As such, advisory proceedings on climate change will reignite the jurisprudential debate on the possibility that a court may decline to make a substantive decision on the grounds that the applicable law is unclear (*non liquet*).

Both Hersch Lauterpacht and Hans Kelsen have argued that, from a theoretical perspective, a legal system is necessarily complete.⁴²⁴ Admittedly, if one accepts the positivist tenet that norms emanate only from states' "free will,"⁴²⁵ then it becomes conceivable that no norm applies specifically to a given question when states have not agreed on a relevant rule. Even then, however, one should be able to rely on general principles passively accepted by states to make up for the absence of applicable rules expressly agreed upon by those states.⁴²⁶ Thus, courts and scholars accept that "a decision must be made" when a court has jurisdiction over an admissible claim.⁴²⁷ No international court has ever made an express finding of *non liquet* in a contentious case.⁴²⁸

In advisory proceedings, however, it may not always be conceivable for a court to explore all remote aspects of a broad question. In such proceedings, Prosper Weil suggested, a court "may . . . choose to limit itself in advisory opinions to stating the law as it is, with the prescriptive, prohibitive, or

423. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 18 (July 8).

424. HERSCH LAUTERPACHT, FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 64 (1933); see HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 305 (1952).

425. S.S. Lotus (Fr./Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

426. See, e.g., Robert Jennings & Arthur Watts, *The Nature of International Law*, in 9 OPPENHEIM'S INTERNATIONAL LAW: PEACE 3, 12–13 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Vaughan Lowe, *The Role of Equity in International Law*, 12 AUSTL. Y.B. INT'L L. 54, 55 (1992).

427. See, e.g., Indus Waters Kishenganga (Pak./India), Partial Award, 31 R.I.A.A. 55, ¶ 437 (Perm. Ct. Arb. 2013).

428. See, e.g., Mariano J. Aznar-Gomez, *The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law*, 48 INT'L & COMP. L.Q. 3, 3 (1999).

permissive rules, but also with its gaps and incompleteness.”⁴²⁹ This was the case in the ICJ’s Advisory Opinion on *Nuclear Weapons*, in which an evenly split bench declared, by the president’s casting vote, that it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.”⁴³⁰ Thus, the court appeared unable to “give a complete answer to the question asked of it.”⁴³¹ This was arguably not due to the incompleteness of the law, but was rather a result of the limited ability of the court to answer a broad and overly abstract question. In particular, the Court found it particularly difficult to arrive at a definitive and categorical answer because of the diversity of nuclear weapons, existing or potential (*e.g.*, low-yield weapons) and the infinite number of scenarios in which states could use or threaten to use them.⁴³²

If a court considers the merits of broad questions about the interpretation or application of general mitigation obligations, then that court may make a finding similar to that in *Nuclear Weapons*: a finding that speaks to its inability to provide a complete answer. Such a finding would not be a formal finding of an ontological *non liquet*, suggesting that the law does not exist. The court would not deny that, if given enough time and opportunity for extensive debates, it could interpret and apply all the relevant norms. Rather, this would be an epistemological *non liquet*: a finding that the question is too broad and complex, involving for instance too many potential scenarios, to allow a comprehensive treatment within an advisory opinion of a reasonable length adopted within an acceptable time frame.⁴³³

2. Inability of the Members of the Court to Agree on a Response

In another scenario, the members of a court are unable to agree on an answer to the question. This is different from a finding of *non liquet*, whether ontological or epistemological, which would involve a positive decision of the court. By contrast, this scenario would involve the members of the court agreeing that the law is clear while disagreeing on its content.

International courts generally adopt their decisions by an absolute majority of the members present (or by the president’s casting vote)⁴³⁴ in a

429. Prosper Weil, *The Court Cannot Conclude Definitively . . . Non Liquet Revisited*, 36 COLUM. J. TRANSNAT’L L. 109, 117 (1998).

430. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 97, 105(2)(E) (July 8).

431. *Id.* ¶ 19. See generally HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 125–30 (2nd ed. 2019).

432. See *supra* note 340.

433. See Bodansky, *Non Liquet and the Incompleteness of International Law*, *supra* note 402, 154–55.

434. See, *e.g.*, I.C.J. Statute, *supra* note 11, art. 55.

process where abstention is precluded.⁴³⁵ Achieving such a majority is simple when there are only two possible solutions. In contentious proceedings, the submissions of the parties define default polar questions on which judges can vote. Judges must eventually decide *either* to uphold *or* to reject each claim and counterclaim, unless an absolute majority of the judges is in favor of a more nuanced decision.⁴³⁶

By contrast, the questions raised by a request for an advisory opinion may not be immediately amenable to a binary vote. Advisory opinions on climate change could involve yes–no questions, such as inquiries into the existence of putative norms, but they could also include open questions on the interpretation and application of such norms.⁴³⁷ When a question admits more than two responses, it is conceivable that no absolute majority may appear among the judges. Successive answers proposed by the court’s president, drafting committee, or individual judges may all fail to attract the approval of an absolute majority. If no judge is willing to make concessions, then the advisory proceedings could hit a dead-end, resulting in an embarrassing situation in which the court would completely fail to fulfill its duty to adopt a formal decision.

The requesting body could seek to avoid this situation by requesting an opinion on polar questions rather than open-ended questions. For instance, instead of asking the court to identify the standard applicable to states’ general mitigation obligations, the requesting body might ask for a determination on whether states have an obligation to act consistently with the 2°C goal. In effect, this strategy would displace the difficulty from the court to the requesting body, which would need to determine the hypothesis to be proposed to the court. States may disagree on which putative theory to propose to the court. For instance, some states may want to ask the court to confirm the legal force of the 2°C goal, while other states may insist that the question should exclusively refer to the 1.5°C goal. Moreover, a request containing closed-ended questions runs the risk of the court releasing a simple, adverse finding that rejects the proposed theory without providing an alternative interpretation of the relevant law.

435. See I.C.J., Resolution Concerning the Internal Judicial Practice of the Court art. 8(v), Apr. 12, 1976, reproduced in 70 AM. J. INT’L L. 905 (1976); SHAW, *supra* note 250, ¶ 369; ITLOS, Resolution of the Internal Judicial Practice of the Tribunal art. 9(1), Oct. 31, 1997, ITLOS Doc. ITLOS/10; Rules of Procedure of the Inter-American Court of Human Rights art. 16(1), Nov. 16, 2009, <http://www.corteidh.or.cr/reglamento.cfm?lang=en>; African Court on Human and Peoples’ Rights, Rules of Court, rule 69(2), Sept. 1, 2020, http://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf.

436. I.C.J., Resolution Concerning the Internal Judicial Practice of the Court, *supra* note 435, art. 8(v); SHAW, *supra* note 250, ¶ 369.

437. See, e.g., Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011 ITLOS Rep. 10, ¶ 1 (Seabed Disputes Chamber); Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 1 (July 9).

3. Evasive Answer

Several advisory opinions on highly politicized issues have fallen short of the expectations of their proponents, with courts offering incomplete, narrow, or evasive opinions. For instance, in *Western Sahara*, the General Assembly invited the ICJ to determine the “legal ties” between Western Sahara, on one side, and Morocco and Mauritania, on the other. This case came during the colonization of Western Sahara by Spain and the question was asked in order to clarify the validity of territorial claims over Western Sahara.⁴³⁸ Some observers were disappointed when the Court provided an evasive response, stating that Western Sahara and these other two countries shared “ties of allegiance,” but no “tie of territorial sovereignty.”⁴³⁹ Likewise, in the subsequent *Kosovo* opinion, the Court focused narrowly on the question that was formally asked—whether the declaration of independence was legal—and, in doing so, carefully avoided the real gist of the inquiry: whether or not Kosovo had, in fact, achieved independence.⁴⁴⁰

Admittedly, if these opinions were unhelpful, it was in large part because the General Assembly had not asked the right questions. As Marc Weller noted, “it is unfair to criticize [a court] for failing to address the very issues the drafters of the question carefully and deliberately did not ask.”⁴⁴¹ One needs, however, to be aware of the political difficulty of requesting an advisory opinion from the ICJ through the General Assembly.⁴⁴² Efforts to gather a majority in the Assembly might result in some twisting of the original questions contained in the request. Because questions are often edited and watered down, even on less politically sensitive occasions, one cannot assume that the General Assembly will necessarily adopt clear and useful questions in a request on climate change. In this regard, advisory opinions of ITLOS or regional human rights courts could be more promising because the request could be made by a smaller organization of like-minded states, or even by an individual state.⁴⁴³

V. EFFECTS

This part considers how an advisory opinion could affect states and international institutions. The proponents of an advisory opinion think of it as

438. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 1 (Oct. 16); see B.O. Okere, *The Western Sahara Case*, 28 INT’L & COMP. L.Q. 296, 304 (1979).

439. *Western Sahara*, 1975 I.C.J. 12, ¶ 162; see, e.g., Okere, *supra* note 438, at 311; Yoram Dinstein, *Discussion*, in INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS?, *supra* note 22, at 110, 112.

440. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 51 (July 22).

441. Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT’L L. 127, 127 (2011).

442. See *supra* Part II.A.

443. See generally *supra* Parts II.B and II.C.

a political campaign tool for enhanced climate action.⁴⁴⁴ However, there are reasons to question lawyers' "unqualified trust in the power of international adjudication," in particular with regard to "complex political problems" such as climate change.⁴⁴⁵ The first two sections cast doubt on their assumptions, first, that an advisory opinion would clarify and develop the law applicable to climate change and, second, that it would thus promote more ambitious climate action. The third section submits that any treatment of a request for an advisory opinion on climate change might tarnish international courts' reputations and undermine the credibility of international institutions. As such, while an advisory opinion on climate change would have few benefits, if any, such an opinion may pose a considerable hardship to the fragile international legal order.

A. *Effects on International Climate Law?*

There exists a widespread assumption that an international court's pronouncement on climate change would provide "an authoritative clarification" of the general obligations on climate change mitigation.⁴⁴⁶ However, proponents of an advisory opinion have yet to identify a concrete, best-case scenario by which a court would be able to reach conclusions that are neither obvious nor dubious and which would effectively clarify international climate law. Margaretha Wewerinke-Singh has suggested that an advisory opinion could make "a valuable contribution" by "[d]emonstrat[ing] that states do not have unfettered discretion in addressing climate change . . . and that they are bound by existing obligations that require certain action."⁴⁴⁷ This, however, would only point out the obvious: that virtually every state has expressly committed to take action on climate change mitigation, in particular by adopting and implementing NDCs that represent "progression" and the state's "highest possible ambition."⁴⁴⁸ The finding that current commitments are insufficient, likewise, would only reaffirm what states have agreed upon emphatically on numerous occasions.⁴⁴⁹

The real legal issue regarding climate change mitigation is not that states ignore the existence of their obligation or that they are unaware of the lack of collective ambition, but rather that they disagree on what, precisely, the obligation implies for each of them. In other words, states are unclear about which of them is to blame for their lack of collective ambition in the

444. See, e.g., Wewerinke-Singh, *supra* note 25, ¶ 15.

445. See Fuad Zarbiyev, *On the Judge Centredness of the International Legal Self*, 32 EUR. J. INT'L L. 1139, 1164 (2021).

446. See Voigt, Remarks on Judging the Climate Crisis, *supra* note 100, at 22.

447. Wewerinke-Singh, *supra* note 25, ¶ 14.

448. Paris Agreement, *supra* note 1, art. 4(3); see also *id.* art 4(2); UNFCCC, *supra* note 1, arts. 4(1)(b), 4(2)(a).

449. See, e.g., Glasgow Climate Pact, *supra* note 1, ¶ 4; G.A. Res. 76/205, ¶ 6 (Dec. 17, 2021).

area.⁴⁵⁰ Requesting a court to address this issue, for instance by determining the “fair share” of states in global efforts on climate change mitigation, would throw the court into inextricable political controversies. Likewise, the historical application of mitigation obligations is highly uncertain, and states could defend various conceptions of whether and how climate reparations should be paid.⁴⁵¹ The intensity of the political controversies and the lack of an unambiguous legal or moral basis to overcome them could preclude a court from answering questions in a convincing way. The content of an advisory opinion on these matters (if its court’s members could even agree on one) would not be obvious, but it would be of dubious quality.⁴⁵² As such, it would fail to preach beyond the converted.

Moreover, while it is largely expected that an advisory opinion on climate change would “yield ‘pro-climate’ decisions,”⁴⁵³ Penelope Ridings points out the risk of “an adverse opinion that settles a legal question contrary to the outcome desired.”⁴⁵⁴ Past opinions show that, as most clearly demonstrated in *Nuclear Weapons*, an international court may fail to confirm the views of a majority of states; in that case, its assessment that the threat or use of nuclear weapons is necessarily unlawful.⁴⁵⁵ Likewise, an advisory opinion on climate change might reject some prevailing, yet doctrinally dubious interpretations of general mitigation obligations, such as the view that states are required to act consistently with the 1.5 or 2°C goals.⁴⁵⁶ Alternatively, a finding that the request does not bear on a “legal question” could undermine other cases on states’ climate obligations, including before national courts.

B. *Effects on Climate Action?*

The non-binding nature of advisory opinions does not necessarily render them entirely inconsequential.⁴⁵⁷ The proponents of advisory opinions on climate change hope that they would galvanize action on the mitigation of climate change and, possibly, reparations for the impacts of climate change.⁴⁵⁸ Thus, campaigns for advisory procedures rely on the tacit assumption that an authoritative judicial pronouncement on the law applicable to climate change would foster climate action.

450. See *supra* text accompanying note 384.

451. See *supra* text accompanying notes 415–416.

452. See *supra* Part IV.B.2.

453. *Role of ICJ*, *supra* note 40, at 694.

454. Ridings, *supra* note 17, at 3.

455. See G.A. Res. 49/75K, at 15 (Dec. 15, 1994) (recalling its declaration that the use of nuclear weapons “would be a violation of the Charter and a crime against humanity,” before asking the Court’s opinion on the same question).

456. See *supra* notes 390–393 and accompanying text.

457. See *supra* note 308 and accompanying text.

458. See, e.g., Yeo, *supra* note 96, at 21.

At first sight, this assumption seems reasonable: a clarification of the law should increase the reputational cost of non-compliance.⁴⁵⁹ Thus, Hugh Thirlway notes that “the advisory procedure may be used to bring pressure to bear on a State that is out of step with the general view of States on a legal question that particularly concerns that State.”⁴⁶⁰ Yet, skeptics point out that states—especially the most powerful ones—do not necessarily comply with the law established by judicial decisions, even when non-compliance is apparent to any reasonable observer.⁴⁶¹ Thus, it is common for states to simply ignore the conclusions of unwanted advisory opinions.⁴⁶² Doing so is easier when advisory opinions are based on questionable jurisdictional bases, as in the case of an advisory opinion of ITLOS.⁴⁶³

Overall, the elephant in the room is the extraordinary scope of an advisory opinion on climate change. Any meaningful conclusions regarding states’ obligations on climate change mitigation would require those states to transform their economic systems, while climate reparations would be orders of magnitude larger than what courts have granted in previous cases.⁴⁶⁴ Reputational costs can persuade states to comply with international law when the stakes are low (that is, when the costs of non-compliance exceed the costs of compliance) but, as Andrew Guzman noted, “it is reasonable to expect that the compliance pull of international law will be the weakest when the stakes at issue are large.”⁴⁶⁵ As such, one can entertain little hope that states will change their conduct in any fundamental way simply to comply with an advisory opinion on climate change.

The proponents of advisory opinions affirm that opinions would facilitate or “complement” international negotiations by “providing guidance.”⁴⁶⁶ Wewerinke-Singh, for instance, has asserted that an advisory opinion “could provide important benchmarks and yardsticks that could inform” the preparation of more ambitious NDCs.⁴⁶⁷ However, it is doubtful that a court could outline such benchmarks in a sufficiently compelling way to convince states to comply, especially when protracted international negotiations failed to reach an agreement on this topic.⁴⁶⁸ The effect would, at best, be

459. See Guzman, *supra* note 43, at 1863.

460. THIRLWAY, *supra* note 310, at 139 (references omitted).

461. See *Role of ICJ*, *supra* note 40, at 705.

462. See, e.g., Dinstein, *supra* note 439, at 112; see also DHARMA PRATAP, ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 249–54 (1972).

463. See generally Ruys & Soete, *supra* note 168, at 174.

464. See generally Nordhaus, *supra* note 421.

465. Guzman, *supra* note 43, at 1883. See generally Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 177 (1993); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401, 413 (2000).

466. See U.N. Press Conference, *supra* note 38, at 2.

467. Wewerinke-Singh, *supra* note 25, ¶ 16.

468. See *supra* text accompanying note 394.

very limited. On the other hand, scholars fear that advisory proceedings “may complicate and stall”⁴⁶⁹ international climate negotiations by “distracting from and even interfering with” political processes.⁴⁷⁰ Bodansky has suggested that an opinion on climate change could “cause parties to re-trench in an effort to limit their legal exposure.”⁴⁷¹ Another risk is that an advisory opinion would only reinforce the preexisting views of the states with which the court agrees without convincing the others, thus only making it more difficult for states to reach an agreement.

Admittedly, the audience of international judicial pronouncements is not limited to national governments.⁴⁷² An advisory opinion could help to shape public opinion and national politics, inform companies and investors about the legal risks associated with emission-intensive activities, and influence the legal analysis of domestic courts.⁴⁷³ On the latter point, André Nollkaemper has pointed out that national courts can sometimes “recognize the interpretation of an international court as an authoritative formation of an international norm.”⁴⁷⁴ The influence of an advisory opinion on climate change, however, could be inhibited by the limited ability of the international court to assess its factual bases.⁴⁷⁵ The Supreme Court of Israel gave “the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ” in the *Wall* opinion, but it held that the ICJ’s findings of factual matters were “not res judicata.”⁴⁷⁶ This approach would limit the influence of an advisory opinion on national courts, in so far as that the opinion is not confined to a restatement of overly abstract principles, but rather seeks to reach concrete, fact-specific conclusions. An advisory opinion will not be able to guide the application of general legal principles to climate change effectively if all relevant facts are again put up for debate in national courts.

469. Ridings, *supra* note 17, at 3.

470. *Role of ICJ*, *supra* note 40, at 692.

471. Bodansky, *Adjudication vs. Negotiation in Protecting Environmental Commons*, *supra* note 183, at 268; *see also* Ridings, *supra* note 17, at 4.

472. *See generally* André Nollkaemper, *The Court and its Multiple Constituencies*, in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 219* (Marko Milanovic & Michael Wood eds., 2015).

473. Ridings, *supra* note 17, at 4; Daniel Bodansky, *An ICJ Advisory Opinion on Climate Change: Ten Questions and Answers 3* (C2ES, Oct. 2022) <http://www.c2es.org/document/an-icj-advisory-opinion-on-climate-change-ten-questions-and-answers> [<https://perma.cc/W3JT-QFM9>].

474. André Nollkaemper, *Conversations Among Courts: Domestic and International Adjudicators*, in *OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 523, 539* (Cesare P.R. Romano, Karen J. Alter, & Yuval Shany eds., 2013).

475. *See supra* notes 335–342 and accompanying text.

476. H CJ 7957/04 Mara’abe v. The Prime Minister of Israel, PD 1, ¶ 74 (2005) (Isr.) (*italics omitted*).

C. Effects on International Institutions?

Advisory proceedings on climate change might erode the court's reputation and, more generally, the authority of international law. In fact, it is difficult to see how a court that receives a request for an advisory opinion could avoid considerable embarrassment.⁴⁷⁷ If the court declines to give an opinion, observers will question its political motivation.⁴⁷⁸ Observers would criticize the court for losing an opportunity to show its relevance and ability to address one of the structural global issues of our time.

On the other hand, a court would not avoid embarrassment by giving an advisory opinion. If the court were able to achieve an absolute majority, the opinion would likely be convoluted, providing only a Delphic treatment of anything the court was asked to clarify. As Judge Oda noted in *Nuclear Weapons*, such an "unimpressive" opinion "may cause some damage to the Court's credibility."⁴⁷⁹ The opinion would certainly be accompanied by multiple strongly worded dissenting opinions that would further discredit it. Overall, an advisory opinion that is overtly ignored by most or all states would affect the court's authority and the credibility of international law in general.⁴⁸⁰ This, in turn, would further limit the capacity of international institutions to foster international cooperation, albeit incrementally, on issues such as climate change.

One can only speculate about how a court would navigate its way through such pitfalls. The ICJ once suggested that "it would be a compelling reason, making it inappropriate for the Court to entertain a request, that its judicial role would be endangered or discredited."⁴⁸¹ Declining a request for an advisory opinion on this ground, however, would expose the court to the criticism that it is putting its own interests above those of humankind. Alternatively, Judge Tullio Treves has suggested that a court should use the doctrine of judicial "discretion" to exercise "judicial restraint" by deciding not to take cases when "it knows that the result can be dangerous or perhaps insignificant."⁴⁸² Still, any reference to the questionable doctrine of judicial discretion would only fuel suspicion that the court's decision not to answer the question is politically motivated.⁴⁸³ Other judges may prefer to reframe the questions in order to answer them formally while confining themselves to evasive conclusions. This might be a reasonable way to minimize the

477. See Bodansky, *An ICJ Advisory Opinion on Climate Change: Ten Questions and Answers*, *supra* note 473, at 4.

478. See generally Oellers-Frahm, *supra* note 42, at 116.

479. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting Opinion by Justice Oda, 1996 I.C.J. 330, ¶ 52 (July 8).

480. See *Role of ICJ*, *supra* note 40, at 708; see also, e.g., KOLB, *supra* note 250, at 277; Dinstein, *supra* note 439, at 112.

481. Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, ¶ 45 (July 20).

482. Treves, *supra* note 251, at 110.

483. On judicial discretion, see *supra* text at accompanying note 248.

harm of the advisory proceedings to international institutions. Ultimately, many judges will agree with Aust's statement that "long-standing problems . . . will not be resolved by any Advisory Opinion . . . but only by lengthy political negotiations."⁴⁸⁴

VI. CONCLUSION

This article has shown that, while small-island states can request an advisory opinion on climate change, a court might refuse to answer the questions or else it will certainly fail to provide a useful response. The article leads to four key findings, as follows.

First, because a request for the ICJ to provide an advisory opinion would require the improbable political support of a majority of U.N. members, small-island states may resolve to request the advisory opinion from a different court. Proceedings before specialized or regional courts, however, will face additional legal hurdles and any opinions given will be less broadly authoritative and more topically specific.

Second, a treaty cannot authorize the request for an advisory opinion that is aimed at determining the rights or obligations of third-party states without their consent or prior authorization. This requirement will hinder or preclude advisory proceedings before ITLOS and regional human rights courts. In particular, COSIS cannot validly request an advisory opinion of ITLOS on the obligations of large GHG-emitting states without their ad hoc consent or prior authorization.

Third, the indeterminacy of the relevant norms will make it difficult, perhaps even impossible, for a court to adopt an insightful advisory opinion. If the members of a court can reach an agreement at all, the opinion will almost inevitably be based on conclusions that are either obvious or dubious. On the one hand, an advisory opinion that merely restates the content of climate treaties or the well-known need for more climate action will not serve any useful purpose. On the other hand, an international judicial pronouncement that seeks to impose norms to which states never agreed will not have any success in compelling state compliance.

Fourth, compliance can certainly not be taken for granted. The odds that an advisory opinion could influence state conduct are lower when the stakes are higher. These odds will be further reduced if the opinion is adopted despite the strong protests of states or without the consent or prior authorization of the largest GHG-emitting states. Without compliance, an advisory opinion will achieve no tangible benefits. In fact, such an opinion might erode the credibility of international institutions, thereby having the opposite of the desired effect.

The foremost issue that this article has revealed is the absence of a realistic, best-case scenario through which an advisory opinion could achieve

484. Aust, *supra* note 129, at 147.

positive change. If international courts are going to act as the field for “an epic battle to save planet Earth,” then advocates need to determine not only how to start the battle, but how to win it—and how to use this victory to win the war.⁴⁸⁵ By engaging in that reflection, proponents of change should be open to the idea that international advisory proceedings might not be the best battle to fight after all.

485. U.N. Press Conference, *supra* note 38, at 3.

