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‘Common but differentiated’ motivations? Requests for advisory opinions concerning climate change and the law of the sea

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Abstract

This research analyses the motivations of three key states (Antigua and Barbuda, Tuvalu, and Vanuatu) in seeking advisory opinions on climate change based on the United Nations Convention on the Law of the Sea (UNCLOS). While Vanuatu spearheaded the request from the International Court of Justice (ICJ), Antigua and Barbuda and Tuvalu led the request from the International Tribunal for the Law of the Sea (ITLOS). The literature has seldom discussed the motivations of states to resort to advisory opinions over contentious cases or diplomatic means. Considering this research gap, this research answers the two questions: (1) why did three states opt for advisory opinions, and (2) why did they choose the ICJ or ITLOS instead of other international courts and tribunals? This research draws upon the literature to build an analytical framework classifying states’ motivations into legal reasons, strategic reasons, communal or social motivations, and domestic circumstances. This research employs a twofold methodology, by first analysing statements from the governments of the three states and then conducting semi-constructed interviews with legal experts involved in the ICJ and ITLOS proceedings. The findings show that both requests were driven by a combination of legal reasons, strategic reasons, communal or social motivations, and domestic circumstances. The most apparent difference between the two requests was communal or social motivations, with the ICJ request initiated by a bottom-up approach. The findings can be expanded to other transboundary environmental issues that could potentially be raised as another advisory opinion.

Keywords International Courts and Tribunals · Law of the Sea · Climate Change · Advisory Opinion · Paris Agreement

Abbreviations

COP	Conference of the Parties
COSIS	Commission of Small Island States on Climate Change and International Law
GHG	Greenhouse Gas
ICJ	International Court of Justice
ICTs	International Courts and Tribunals
ITLOS	International Tribunal for the Law of the Sea
NDCs	Nationally Determined Contributions
SIDS	Small Island Developing States
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly

1 Introduction

In July 2023, UN Secretary-General António Guterres stated that ‘the era of global warming has ended ... the era of global boiling has arrived’ (United Nations News, 2023). Climate change is undoubtedly the most critical challenge facing the world today. Several have been made to respond to the of climate change on a global scale, such as the Paris Agreement in 2015.¹ Recent have included requests for advisory opinions from international courts and tribunals (ICTs) based on the United Nations Convention on the Law of the Sea (UNCLOS).² The role of UNCLOS as a ‘Constitution for the Oceans’ in regulating climate change has received increasing attention. The ocean has absorbed approximately 90 per cent of the total greenhouse gas (GHG) emissions, thus serving as a crucial mitigator of global warming. However, this emission absorption has resulted in multiple adverse on the ocean, including sea-level rise, ocean and coral bleaching (United Nations Climate Action, 2024), with sea-level rise posing a serious threat to small island states.

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) requested the International Tribunal for the Law of the Sea (ITLOS) to give an advisory opinion concerning states’ obligations in relation to climate change under UNCLOS (Commission of Small Island States on Climate Change and International Law, 2022b). Approximately three months later (29 March 2023), the United Nations General Assembly (UNGA) followed suit by adopting a resolution seeking an advisory opinion from the International Court of Justice (ICJ) (United Nations General Assembly, 2023). Both requests involve questions on climate change pertaining to UNCLOS. Key states for the request were Antigua and Barbuda and Tuvalu (Co-chairs of COSIS), whereas Vanuatu took the initiative for the UNGA’s resolution. ITLOS released its advisory opinion on climate change in May 2024,³ whereas an advisory opinion from the ICJ remains pending.

¹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 54113.

² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

³ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS.*

Amid numerous climate litigations and negotiation for addressing climate change, why did states opt for an advisory opinion rather than pursuing a contentious case or negotiations? International legal scholarship on states' requests for advisory opinions related to climate change has mostly discussed the history of advisory opinions by the ICJ and ITLOS (Akande et al., 2023), advisory jurisdiction of the ICJ and ITLOS (Tanaka, 2023), remit of COSIS's mandate on requesting an advisory opinion (Barnes, 2022; Miron, 2023), and possible outcomes of the advisory opinion and its implications (Mayer, 2023; Roland Holst, 2023). Much of this literature emphasises the importance of considering past advisory opinions when framing questions in requests for advisory opinions (Akande et al., 2023; Barnes, 2022). However, previous studies have not explored states' motivations for requesting advisory opinions from ICTs. Moreover, the literature has not discussed what motivates states to take legal action rather than diplomatic means, and request advisory opinions rather than resorting to contentious cases.

Considering this gap in the literature, this research addresses the abovementioned question by analysing the driving forces leading states to seek advisory opinions on climate change issues relating to UNCLOS. Second, a comparative study is conducted to uncover the reasons behind states' decisions on ICTs. Despite all being small island states impacted by the adverse of climate change, Antigua and Barbuda, Tuvalu, and Vanuatu have diverged in their selection of ITLOS and the ICJ. Thus, this research examines the legal, strategic, communal or social, and domestic factors key states' choices. These two requests have scholarly and practical importance because previous attempts to submit climate change issues to ICTs have failed to materialise, as seen in Tuvalu's (2002) and Palau's (2011) (Honniball, 2022; Wewerinke-Singh & Salili, 2019: 6–7).

Based on a literature review, this research potential factors likely to drive states to ICTs and provides an analytical framework in Sect. 2. This analytical framework divides the possible motivations for requesting advisory opinions into legal reasons, strategic reasons, communal or social motivations, and domestic circumstances. Then, Sect. 3 discusses the methodology, in which the analytical framework is built based on the literature, and second, semi-structured interviews are conducted with legal experts involved in the advisory proceedings in the ICJ and ITLOS. Based primarily on the analysis of government statements, Sect. 4 presents the main factors relevant to the key states and uses interviews to the Vanuatu's motivations for the ICJ request are and compared with those of the Co-chairs of COSIS for the ITLOS request. Unless evidence is provided to the contrary, this research groups the Co-chairs' driving factors because they tend to act as a coalition on requests for advisory opinions on climate change issues at the international level. The that a combination of legal reasons, strategic reasons, communal or social motivations, and domestic circumstances drive the choices of these three states. Section 5 provides broader insights into states' strategies for seeking advisory opinions beyond the issue of climate change.

Table 1 Analytical framework

Motivations	Factors
Legal reasons	
	- Linkage to ongoing legal dispute settlements
	- Scope of ICT's jurisdiction
Strategic reasons	- Small states' political leverage in negotiations
	- Public pressure on certain states
Communal or social motivations	- Response to the concerns of the international community
	norms and values related to the issue
Domestic circumstances	- Avoiding audience cost of public opinions
	- Financial need for adaptation to climate change or other related issues

2 Analytical framework

This research constructs an analytical framework based on a literature review to identify the states' motivations for requesting advisory opinions from ICTs. The motivations can largely be divided into three categories (see Figure 1).

2.1 Legal reasons

The most plausible motivation for states to request advisory opinions is legal reasons. States have resorted to an advisory opinion to elucidate applicable laws and their contents, as shown in the Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (ITLOS)⁴ or the Reparation for injuries in the service of the United Nations (ICJ)⁵. Advisory opinions are often expected to contribute to the development of international law more than contentious cases (Bodansky, 2017: 711; British Institute of International and Comparative Law, 2023: 12). While contentious cases are inherently bilateral, advisory proceedings allow the wide participation of states and relevant entities, which suits the nature of multilateral instruments, such as UNCLOS, the United Nations Framework Convention on Climate Change (UNFCCC)⁶, and the Paris Agreement (Wolfrum, 2012: 413).

Meanwhile, states may be driven by the ulterior motive to settle the legal circumstances surrounding ongoing disputes or contentious cases by requesting an advisory opinion, despite insisting they are only seeking legal clarification. This is because an advisory opinion has a similar effect to declaratory judgments (Oellers-Frahm, 2012: 93). In contentious cases, declaratory judgments have a res judicata effect and may resolve legal disputes. Comparatively, although advisory opinions cannot settle disputes, they are

⁴ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.

⁵ Reparations for injuries in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174.

⁶ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

suggested as an indirect means to receive declaratory judgments on legal issues (Oellers-Frahm, 2012: 93; Stoica, 2021: 24). A relevant example of this is the Chagos Advisory Opinion, in which the UNGA asked the ICJ to answer two questions regarding the legal consequences of the separation of the Chagos Archipelagos from Mauritius. Commentators have described this case as inherently involving a sovereignty dispute over the Chagos Archipelagos between Mauritius and the United Kingdom (Allen, 2019: 445). However, the questions of the advisory opinions were framed in the context of de-colonisation rather than as an inter-state sovereignty dispute.⁷ When an advisory opinion is rendered in favour of the principal players in its request, those states may promote their legal argument without explicitly mentioning the relevant parties. Accordingly, legal norms through advisory opinions can work as a supplementary means to settle disputes.

The third legal motivation for resorting to advisory opinions is relevant to the scope of ICTs' jurisdictions. When states choose ICTs, they consider the scope of ICTs' jurisdiction, which determines the matters they can address. The ICJ holds the widest jurisdiction because it can adjudicate on all matters relating to international law. Article 65 of the ICJ Statute states that 'The Court may give an advisory opinion on any legal question'.⁸ With the ICJ being the principal judicial organ for the UN, its advisory opinions

Compared to the ICJ, other specialised courts have a narrower scope of jurisdiction. ITLOS is a specialised court for UNCLOS and an international agreement related to the purposes of UNCLOS.⁹ Therefore, these specialised courts are expected to provide expertise in areas and adjudicate expeditiously (Feria-Tinta, 2023: 5). UNCLOS, which ITLOS can address, is considered a vital instrument for small states as a means of legal statecraft. This is partially because UNCLOS has a high number of parties (170 members) and Part XV of UNCLOS has a compulsory dispute settlement mechanism for contentious cases (Guilfoyle, 2023a: 6). However, owing to a lack of relevant explicit provisions in the Statute of ITLOS, views diverge on the competence of ITLOS as a full bench for advisory proceedings (Tanaka, 2015: 319). Hence, the jurisdictional scope of the ICTs and the underlying constitutive treaties may also be relevant to states' selection of ICTs when requesting advisory opinions.

2.2 Strategic reasons

States may also resort to ICTs for strategic reasons, including motivations to change the political circumstances in international relations. States can use ICTs for political leverage with other states, which would existing or ongoing bilateral or multilateral negotiations. In relying on the authority of ICTs, states may seek to use advisory opinions to turn the negotiations in their favour.

Another strategic motivation can be to publicly pressure certain states through advisory opinion proceedings. In the context of climate change issues, the target states will be major GHG emitters. The states most vulnerable to climate disasters often contribute the least

⁷ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95.

⁸ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355.

⁹ Article 288 of UNCLOS.

to GHG emissions. As such, Article 2(2) of the Paris Agreement stipulates that it ‘will be implemented to equity and the principle of common but responsibilities and respective capabilities, in light of national circumstances’. Despite this provision being central to the Agreement, the lack of ambitious nationally determined contributions (NDCs) states have submitted under the Paris Agreement has led to increasing concern (Bodansky, 2023: 3). Even if all states meet their NDCs by 2030, global warming would still likely surpass the target of a 1.5° C increase, instead rising by 2.1–2.9° C (UNFCCC Secretariat, 2022: para. 17). Thus, active participation and more ambitious NDCs from major GHG emitters are direly needed. Requesting advisory opinions from ICTs may publicly pressure these major GHG emitters to change course, thereby prompting their participation.

2.3 Communal or social motivations

States may request advisory opinions based on communal or social motivations. Communal motivations arise when the legal issues for the request are not restricted to relevant parties but involve the concerns of the international community. Environmental issues are a classic example of this transboundary nature. Global commons, such as biodiversity beyond national jurisdiction, are a growing concern that requires action from the international community. Likewise, climate change is an issue that the entire international community. Thus, two requests for an advisory opinion may be intended to represent the international community’s concerns and values. This action can earn legitimacy for the communal cause and rally support from others (Guilfoyle, 2023a: 4).

Social and communal motivations are distinct, as social motivations may not always involve the concerns of the international community. Driven by social motivations, states may attempt to shape or social norms and values regarding the relevant issue (Bodansky, 2023: 6). Compared to contentious cases, advisory opinions allow various states to participate in the proceedings, thus facilitating global discussion on the issue (Wolfrum, 2012: 413). Advisory opinions also have an authoritative and *erga omnes* character, as the interpretation provided by the Court will how relevant international law is applied (Oellers-Frahm, 2012: 93). The authority of an advisory opinion makes it useful for emphasising the urgency of an issue and the need to address deleterious on the environment. Advisory proceedings can also be an arena for states to frame an issue in a particular way, such as justice and fairness, to highlight the inequality of international politics.

2.4 Domestic circumstances

States may resort to ICTs for domestic circumstances, which can be subdivided into political and reasons. For example, states may push for ICTs when national politicians favour a third-party legal institution rather than bilateral negotiations to resolve international issues. National politicians may prefer resorting to ICTs to avoid dissatisfaction from domestic audiences following unfavourable outcomes from negotiations, known as ‘avoiding the audience cost’ (Kingsbury, 2012: 216). Domestic audiences are more likely to accept outcomes from a dispute settled by a third-party legal institution than the same outcomes reached through political agreements (Simmons, 2002: 834). This phenomenon also applies to states by climate disasters. Small island developing states (SIDS) are particularly vulnerable to climate disasters, with an increased magnitude and frequency of

disasters domestic audiences (International Tribunal for the Law of the Sea, 2023a: 7). Thus, states may request advisory opinions from ICTs to appease domestic audiences.

The other domestic circumstances for requesting advisory opinions relate to reasons. International legal disputes carry costs that states may choose to avoid by resorting to third-party legal institutions. For example, land boundary and territorial disputes between Argentina and Chile led to an average annual trade loss of USD 326 million between 1967 and 1994, ultimately prompting both states to settle the dispute in 1995 (Kingsbury, 2012: 217). Under such circumstances, resorting to a third-party legal institution is an appealing means of resolution. Although SIDS do not face boundary or territorial disputes, they require substantial resources to cope with the loss and damage associated with climate change (e.g. climate disasters) and the possible loss of statehood. Considering these domestic economic needs, SIDS have sought support through multilateral instruments and negotiations, such as UNFCCC and the Paris Agreement. Their culminated in the creation of a loss and damage fund under the UNFCCC regime; however, without the initiation of support (UN Climate Press Release, 2022), the domestic pressure of acquiring resources will persist. Thus, the motivations of

3 Methodology

The motivations of states can be deduced from the government statements made by principal decision-makers of the states (e.g. the heads of state) in forums such as the UNGA or the Conference of the Parties (COP). Thus, this research primarily derives its from legal analyses of governmental statements and secondarily uses the interviews to the The for this approach is twofold. First, public acts and statements of state organs or are attributable to the conduct of states under international law (International Law Commission, 2001). Second, government statements and decision-makers' behaviours can indicate the national interest of states (Krasner, 1978), assuming they are rational actors pursuing their national interests. According to Krasner, decision-makers' actions and preferences can be equated to national interests under two criteria. The criterion is that their actions must represent the general objectives of states rather than the interests of a particular domestic group or class (Krasner, 1978: 35). The three key states satisfy this criterion because the adverse of climate change have every corner of them. The second criterion is that the order of state preferences must be persistent over time (Krasner, 1978: 35). The government statements referred to in this research are from 2021, and the order of each key state's preferences has not changed. They have persistently claimed climate change to be the most important issue facing the international community.

Based on the analytical framework, this research examined governmental and other relevant documents, including verbatim records of advisory proceedings. Analysing primary sources helps to identify states' motivations for resorting to such proceedings. The statements were primarily collected from Vanuatu's ICJ initiative website, the UNGA sessions, the COP of the UNFCCC, and the advisory proceedings of ITLOS. The selection criteria among these statements were those demonstrating the motivation of states. Certain key-

words were used to select the statements relevant to this research, such as ‘climate change’, ‘climate justice’, ‘world court’, ‘advisory opinion’, and ‘loss and damage’.

Furthermore, this research conducted semi-structured interviews with legal experts involved in the advisory opinion processes to gain expert insights and the derived from the text analysis. The interviewees were selected from a list of legal experts involved in the advisory proceedings of the ICJ and ITLOS. Potential interviewees were sent an email asking them to participate, and those who provided a positive response were selected. They were informed of the research’s purpose and that they could withdraw at any time. After agreeing to participate, the researchers sent them the consent form, information sheet on the research, and provisional list of questions. The interview questions were based on the analytical framework discussed above and mostly covered fact-checks, the interviewees’ expertise, and opinions or prospects on the advisory proceedings. Depending on the interviewees’ responses, the researchers asked a few follow-up questions; however, these did not deviate far from the list of questions previously provided to the interviewees. The interviews lasted approximately one hour for each interviewee and were recorded and transcribed with the interviewees’ consent. The interviewees’ names and were anonymised upon their request, and are referred to as they preferred.

4 Findings

4.1 Legal reasons

The and third factors related to legal reasons in Table 1 were observed in both requests for advisory opinions from the ICJ and ITLOS, whereas the second factor was in neither of them.

First, the statements of the three states and the legal experts all note that the primary motivation to seek an advisory opinion is ‘to clarify the rights and obligations of states under international law in relation to the of climate change’ (Browne, 2023; Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu, 2023; Prime Minister of Tuvalu, 2022).¹⁰ Despite the vital link between the ocean and climate change, UNCLOS does not explicitly stipulate climate change or global warming. The treaty negotiations took place in the 1970s, when the negotiators of UNCLOS could not envisage the critical issue climate change would be today. Nevertheless, the argument was made during the advisory proceedings and later by ITLOS that UNCLOS can regulate GHG emissions as pollutants.¹¹ Furthermore, the legal on climate change is expected to -ence ongoing and future domestic litigation. The ICTs’ ruling that legal consequences exist under international obligations could be ‘a game changer for litigation at the domestic level’ because the judges from countries ‘will feel more comfortable’ asking states to adopt more ambitious stances.¹²

¹⁰ This quote is from Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu.

¹¹ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS*, para. 179.

¹² Anonymous (2023) Interview with a Legal Expert Advising a Small Island Nation in the ICJ Advisory Proceedings.

Second, in neither of the requests was it found that the key states were seeking to link the advisory opinions to the ongoing legal dispute settlement. Advisory opinions may theoretically help bring contentious climate change cases to ICTs; however, whether this strategy motivated the key states was unclear. For states to succeed in contentious cases, applicable laws should be unequivocal, particularly regarding what constitutes a breach of international obligations and which states are responsible for that breach. However, the global nature of climate change makes it difficult to pinpoint the liable parties. These difficulties may explain past failures in submitting contentious cases on climate change. For example, Tuvalu attempted to submit a contentious case in 2002 against Australia and the United States for ‘their alleged failure to address global warming’ (Wewerinke-Singh & Salili, 2019: 6). Although Tuvalu tried to mobilise a coalition of SIDS, this coalition failed when the government of the country changed. Considering the legal uncertainties, an advisory opinion can elucidate the relevant international obligations as an ‘unconfrontational route’ (Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu, 2023) and pave the way for future contentious cases. Despite the plausibility that an advisory opinion may help overcome these two main obstacles to contentious cases, whether the three key states have

Finally, states have shown that the scope of jurisdiction is relevant when choosing ICTs. The noticeable distinction that led the three key states to refer to submit to different ICTs (the ICJ and ITLOS, respectively) arose from the different scope of the ICT jurisdictions and, consequently, their distinct functions. Regarding the reasons for choosing the ICJ, Vanuatu emphasised that the ICJ is a ‘World Court’, and requesting advisory opinions from a ‘World Court’ is necessary for the wider social process (Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu, 2023). The primary motivations stem from the ICJ carrying symbolic importance as a principal judicial organ of the UN and having the widest jurisdiction in international law. Vanuatu also carefully assessed the jurisprudence of the ICJ and its decisions, hoping the ICJ would render a landmark opinion that could potentially influence other ICTs and domestic climate litigation, preferably in favour of realising climate justice (Republic of Vanuatu, 2023).¹³

Regarding the reasons for choosing ITLOS, participants suggested the expertise of ITLOS in the law of the sea and lower political bars to request advisory opinions than those for the ICJ. COSIS views ITLOS as ‘the custodian’ (International Tribunal for the Law of the Sea, 2023a: 11) of UNCLOS and believes in the ‘expeditious and efficient manner’ in which ITLOS has dealt with previous cases (Feria-Tinta, 2023: 5). An advisory opinion request from the ICJ is arguably more difficult to achieve, as it requires a majority vote in the UNGA, whereas an ITLOS request can be initiated by an international agreement conferring jurisdiction on ITLOS.¹⁴ Considering that Palau failed to request an advisory opinion from the ICJ through the UNGA in 2011 (Mayer, 2023: 63; Wewerinke-Singh & Salili, 2019: 7), the ITLOS advisory opinion request process is less onerous. Furthermore, the Co-chairs of COSIS do not appear concerned about the possible jurisdictional limitation of ITLOS in rendering advisory opinions as a full bench.

¹³ Anonymous (2023) Interview with a Legal Expert Advising a Small Island Nation in the ICJ Advisory Proceedings.

¹⁴ Statute of the International Tribunal for the Law of the Sea, Annex VI to the UNCLOS (adopted 10 December 1982) 1833 UNTS 561.

4.2 Strategic reasons

All three key states opted for advisory processes at the ICJ and ITLOS, motivated to use them as political leverage in negotiations regarding compensation for loss and damages due to climate change. This decision was made in the context of disappointment in the implementation of the Paris Agreement and particularly unambitious NDCs of other states. While the three key states regard the concept of NDCs under the Paris Agreement to be laudable, they appear to be with too many ‘vague commitments and empty promises’ (Akhavan, 2021) and are concerned about the lack of progress of the COP of the UNFCCC (Browne, 2023; United Nations, 2023). These states hope that an advisory opinion on climate change may not only legally elucidate the content of the vague and voluntary commitments but also provide leverage in loss and damage negotiations. In particular, Vanuatu hopes that the ICJ will determine that ambitious NDC submissions are a matter of ‘diligence’ rather than discretion (Republic of Vanuatu, 2023).

Moreover, although the simultaneous decision to resort to multiple ICTs may lead to fragmentation, Vanuatu and the Co-chairs of COSIS have worked on a complementary basis. Vanuatu spearheads the ICJ advisory opinion and the Co-chairs of COSIS lead the ITLOS case, emphasising that their work is complementary rather than competitive (Commission of Small Island States on Climate Change and International Law, 2022a: 15; United Nations General Assembly, 2022). Vanuatu has joined COSIS, and member states of COSIS have consistently supported Vanuatu’s request for an advisory opinion from the ICJ (Permanent Mission of Tuvalu to the United Nations, 2023; United Nations General Assembly, 2022). However, the coordination between Vanuatu and the Co-chairs of COSIS, appears to lack a regular or systemised structure. No supporting evidence was found that Vanuatu and the Co-chairs of COSIS precoordinated before the advisory opinion request to decide that one would resort to the ICJ and the other to ITLOS.

Regardless of the lack of systemised coordination, Vanuatu and COSIS hope this complementary relationship will be repeated between ITLOS and the ICJ, with the expectation that the ICJ will consider the advisory opinion of ITLOS. As the ITLOS advisory opinion was released earlier, the ICJ is expected to build upon the ITLOS advisory opinion as ‘a stepping-stone or a building block’ (British Institute of International and Comparative Law, 2023: 6). The interviewees also echoed this expectation of the ITLOS advisory opinion to form a favourable circumstance for the ICJ advisory opinion.¹⁵

While the strategic reason was found, the second reason to publicly pressure major GHG emitters was not found in either request. The second question addressed to the ICJ was framed as ‘the legal consequences under these obligations’ rather than legal responsibilities. With a broader meaning, the expression ‘legal consequences’ may have been carefully crafted to avoid directly pinpointing the responsibility of states. COSIS also did not include responsibility-related questions for their requests from ITLOS. Rather than looking to the past and publicly blaming the major GHG emitters, the three key states requesting advisory opinions appeared to have decided to look towards the future.

¹⁵ Anonymous (2023) Interview with a Legal Expert Advising a Small Island Nation in ITLOS Advisory Proceedings; Anonymous (2023) Interview with a Legal Expert Advising a Small Island Nation in the ICJ Advisory Proceedings.

4.3 Communal or social motivations

Both requests exhibited communal motivations to represent the concerns of the international community. Vanuatu in the ICJ process and Antigua and Barbuda in the ITLOS process underlined that their initiatives are not solely for the of SIDS but for the entire international community. Vanuatu has called itself a '[representative] of the international community' (Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu, 2023), urging that its agenda the interests of the international community rather than merely those of SIDS. Antigua-Barbuda also echoes this narrative, emphasising that it stands not only for the survival of SIDS but also 'for the preservation and prosperity of all nations in our shared world' (Browne, 2023).

Regarding social motivations, these key states have attempted to shape the social norms and values, particularly in the context of reframing climate change issues as 'climate (in) justice'. The narrative of climate (in)justice appears in the key state's statements and was in the interviews (Browne, 2023; Pareti, 2021; Republic of Vanuatu; United Nations, 2023). One interviewee stated that the states' main motivation was to receive an advisory opinions recognising climate (in)justice.¹⁶ The climate (in)justice narrative is particularly prevalent in the ICJ process, as the momentum of the advisory opinion request stems from the youth movement. It started at the University of the South in 2019, where a group of law students argued that SIDS could induce change by bringing climate change issues to the 'world's highest judicial body', the ICJ (Government of the Republic of Vanuatu, 2023; United Nations, 2023). The ICJ process was also supported by civil society, notably by the Civil Society Organisations Alliance, which includes non-governmental organisations such as Greenpeace, Oxfam, and Amnesty International (Honniball, 2022;

Islands Students Fighting Climate Change, 2023). Hence, the youth movement and civil society have been the engine driving the ICJ advisory opinion request, with their aim being the dissemination of the climate (in)justice narrative. For the ITLOS request, Tuvalu and Antigua and Barbuda mentioned climate injustice as a factor supporting their request (Browne, 2023; Pareti, 2021). For example, during the oral proceedings before the Tribunal, COSIS that the youth movement of small island nations supports COSIS, and the youth should be provided special consideration in climate change issues (International Tribunal for the Law of the Sea, 2023a: 28). Nevertheless, no direct momentum was found to be associated with the youth movement as the initial driving force behind the ITLOS request.

4.4 Domestic circumstances

First, no clear indication was found regarding whether audience cost triggered the momentum for the key states to resort to advisory opinions. They emphasised the vulnerabilities of SIDS and other countries to increasing climate disasters (International Tribunal for the Law of the Sea, 2023a: 17; Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu, 2023); however, this research could not whether these climate disasters led the public to pressure these key states. Vanuatu responded to the ideas of the students from the

¹⁶ Anonymous (2023) Interview with a Legal Expert Advising a Small Island Nation in the ICJ Advisory Proceedings.

University of South (located in Fiji).¹⁷ In this sense, the ICJ request, as by the government statements (Prime Minister Alatoi Ishmael Kalsakau of the Republic of Vanuatu, 2023; United Nations, 2023), was inspired by the group of law students rather than by an alignment with the general demands of the public of Vanuatu. No public pressure for an advisory opinion was found for the ITLOS request. Both Tuvalu and Antigua and Barbuda remarked on the climate disasters they are experiencing but did not clarify whether public opinion pressured them to resort to a third-party institution (the ICTs) (International Tribunal for the Law of the Sea, 2023a).

The second domestic circumstance (i.e. need) constituted the motivations of the key states requesting advisory opinions. States are vulnerable in dealing with the consequences of climate disasters. For example, Tuvalu announced its long-term adaptation plan called 'Te in COP 27 of the UNFCCC and advocated for COP 27 to establish 'a secure, guaranteed Loss and Damaged Financing Facility' (Prime Minister of Tuvalu, 2022) to support vulnerable states. Tuvalu also mentioned the need for 'the means to build raised reclamation land to save [them]selves' in the face of sea level rise, which requires input (Prime Minister of Tuvalu, 2021).

These illuminate the of loss and damage negotiations for the key states (United Nations General Assembly, 2022). Before the advisory opinion requests, the Alliance of Small Island States, whose membership includes these three states, succeeded in stipulating the concept of loss and damage in Article 8 of the Paris Agreement and achieved the establishment of a loss and damage fund in COP 27 (UN Climate Press Release, 2022). This dedicated fund is for developing states in need of resources to respond to climate disasters. Notwithstanding these achievements, the key states maintain that further discussion and development are needed regarding the concept of loss and damage (Browne, 2023; Prime Minister of Tuvalu, 2022; Republic of Vanuatu). Thus, the states expect that advisory opinions would clarify and specify the loss and damage provision in Article 8 of the Paris Agreement.

This desire is stronger in the ICJ process than in the process for ITLOS. For example, Vanuatu has stated that the ICJ advisory opinion may connect 'the matters of loss and damage to the wider international law, beyond the Paris Agreement', including the law of the sea (Republic of Vanuatu, 2023). Similar concerns regarding the loss and damage are repeated in the ITLOS process, although the motivation to clarify the loss and damage provision is not as evident here as in the ICJ process. One month before the request for the ITLOS advisory opinion, Tuvalu expressed its dissatisfaction with the COP negotiations concerning climate which made Tuvalu 'quickly [lose] faith in this institution' (Prime Minister of Tuvalu, 2022). Antigua and Barbuda also argued that operationalising and adequately funding the loss and damage fund is the COP's 'critical mission', warning if the COP fails this mission, 'it risks undermining global trust' (Browne, 2023).

¹⁷ Anonymous (2023) Interview with a Legal Expert Advising a Small Island Nation in the ICJ Advisory Proceedings.

5 Discussion

Both requests for advisory opinions were driven by several common motivations. The three key states' actions were clearly fuelled by the desire to clarify legal uncertainties of obligations under UNCLOS and climate change regimes. The need to improve the current unambitious NDC submissions has also been central to their concern. The key states recognise that the Paris Agreement represents a landmark in addressing climate change. However, they are also concerned that NDCs may jeopardise the ultimate goal of NDCs and the Paris Agreement, which is to ensure states' common but differentiated participation in GHG reduction. They hope the advisory opinions will reduce domestic litigation by contributing to legal certainty because most litigation occurs raised in the jurisdiction of developed states against governments to challenge unambitious climate policies and plans (Setzer & Higham, 2022: 9–17).

The three key states also resorted to advisory opinions as one form of legal statecraft (Guilfoyle, 2023b). They have not abstained from participating in climate change negotiations due to advisory opinion requests; rather, they are seeking to leverage advisory opinions to influence the negotiations, particularly those concerning loss and damages stemming from climate change (Bodansky, 2023: 6; Guo et al., 2023: 6; Wewerinke-Singh & Salili, 2019: 8). This motivation is reinforced by their need to respond to the adverse effects of climate change. Moreover, the three key states framed their request as an action for the sake of the international community rather than only for their own states. This framing prevents any direct challenges to their cause, as they may then be deemed as challenges to the entire international community (Guilfoyle, 2023a: 4).

This research also reveals their desire for advisory opinions to help shape the concept of climate (in)justice. The common motivations shared among the three key states explain the complementary relations between both requests. However, this complementary relation lacks systematic coordination, leading to the consideration that the three key states are exercising all available means for their ends by requesting as many advisory opinions as are legally and politically possible rather than following a strategic strategy. In contrast, linking advisory opinions to ongoing legal disputes, targeting or blaming specific states, and avoiding the audience cost of domestic public opinion were not part of their motivation.

The significant factor between these states' motivations is that Vanuatu more strongly emphasises social motivation, including advancing the climate (in)justice narrative. Vanuatu's request for an advisory opinion from the ICJ was initiated from the bottom-up; that is, from the youth movement at the University of South Pacific, marking an unprecedented initiation of advisory opinion processes. This bottom-up approach is also demonstrated in Vanuatu's rhetoric of emphasising future generations, wider social participation, and an active social network media use (Government of Vanuatu, 2023). The need to bring the climate change issue to a wider audience explains Vanuatu's request from the ICJ, perceived as the 'World Court'. However, this need to bring the issue to the 'World Court' is not echoed in the ITLOS request. The momentum of the social or youth movement was not observed in the ITLOS request. However, despite the different starting points, the ITLOS advisory proceedings have opened a discussion forum for many state and non-state actors. In the ITLOS advisory proceedings, more than thirty-four states, nine intergovernmental organisations, and ten non-governmental organisations have submitted their written submissions on the request (International Tribunal for the Law of the Sea, 2023b).

Unlike the focus of legal scholarship, the uncertainty in the advisory jurisdiction of ITLOS does not appear to be a concern for the Co-chairs of COSIS. When the request was made, the literature focused on the expansion of the advisory jurisdiction of ITLOS and the potential danger of requesting an advisory opinion such as COSIS by adopting a new international agreement (Guo et al., 2023: 3; Miron, 2023: 21; Tanaka, 2023: 215). Nevertheless, the statements, oral proceedings and interviews with legal experts showed that the Co-chairs of COSIS did not consider ITLOS' advisory jurisdiction over the request to be controversial. This conclusion is further supported by the written submissions of states and intergovernmental organisations, most of which support the advisory jurisdiction of the Tribunal. The findings suggest that the issues related to ITLOS advisory jurisdiction are mostly resolved in practice. The Co-chairs of COSIS had faith in ITLOS rather than questioning its advisory jurisdiction, which prompted their request for an advisory opinion from ITLOS.

6 Conclusion

Antigua and Barbuda, Tuvalu, and Vanuatu share some motivations for resorting to ICTs for advisory opinions. Nevertheless, their other motivations did show that they were leading them to select two specific ICTs: the ICJ and ITLOS. This research found that the main motivations for the key states to resort to advisory opinions stem from unambitious NDC submissions and their dissatisfaction with negotiations in the COP of the UNFCCC. As the three key states decided to turn to legal institutions outside the UNFCCC regime, their advisory opinion requests may be interpreted as a crucial challenge to the bottom-up approach of the Paris Agreement. However, the research disproved that these states are denying the negotiations under the UNFCCC regime or are showing a complete distrust of the Paris Agreement. They are instead seeking to clarify the legal norms and obligations under international law to enhance future negotiations under the UNFCCC regime.

States resorting to advisory opinions also challenge the function of the international rule of law. Three key states requesting an advisory opinion are attempting to achieve international cooperation vis-à-vis climate change and put 'normative constraints on the perceived legitimacy of state policies' (in this case, NDC submissions) (Guilfoyle, 2019: 1001). Moreover, requesting advisory opinion is not their only approach to shape the international rule of law for more stringent climate change law. In the case of advisory opinion requests, this research demonstrates that advisory opinion requests are among the many actions three key states are taking for climate justice. They and the international community are aware that an advisory opinion, albeit non-binding, has legal, political, economic, and social implications that may ultimately produce favourable results for them. Based on this advisory opinion, three key states are attempting to shake the grounds at all levels – international, transnational, and domestic – to achieve their goal of realising climate justice.

This research also shows that social motivations and scope of jurisdiction of ICTs motivated three key states to resort to either the ICJ or ITLOS. This insight will be useful in explaining states' choices.

Looking forward, the requests for advisory opinions on climate change may have also paved a new path for states to table transboundary environmental issues. This research has demonstrated the strengths the states see in advisory opinions when dealing with climate change issues. Likewise, transboundary environmental issues are also related to the con-

cerns of the international community. As such, states may resort to advisory opinions rather than contentious cases in the future. For example, they may request advisory opinions to clarify the legal uncertainties regarding the obligations to protect and preserve the environment in certain contexts or to gain political leverage in relevant negotiations. In such cases, this research can provide insights into states' possible motivations and the dynamics in international relations after an advisory opinion is rendered.

Declarations

Statements and declarations None.

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