

Climate Change and the International Court of Justice

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Abstract:

This Report focuses on the international campaign, initiated by the Republic of Palau, to secure an advisory legal opinion from the International Court of Justice (ICJ) on climate change. Palau, with a growing coalition of nations, requests that the United Nations General Assembly seek an ICJ opinion on the question of state responsibility for transboundary harm caused by greenhouse gas emissions. The urgency of climate change, coupled with widespread frustration at the lack of binding international commitments secured through the United Nations Framework Convention on Climate Change process, inspired the multistate coalition.

The Report is the product of a course taught in Fall 2012 at Yale Law School in New Haven, Connecticut, by Ambassador Stuart Beck of the Permanent Mission of Palau to the United Nations; Aaron Korman, Palau's Legal Adviser; and Douglas Kysar, Joseph M. Field '55 Professor of Law at Yale Law School. Eighteen graduate students enrolled at Yale Law School, the Yale School of Forestry and Environmental Studies, and Yale University contributed to the final Report, which was compiled and edited by Halley Epstein, Yale Law School '14. **The Report aims to outline the legal, political, and scientific justifications for the coalition's request and why the ICJ should issue an opinion on the matter.**

Part I, The Brief, presents the advocacy components of a request for an advisory opinion from the ICJ. Drawing from Intergovernmental Panel on Climate Change reports and other sources, the Brief outlines the scientific evidence of climate change and its transboundary effects, with attention to the effects of a warming world on some of the most vulnerable nations — Palau included. After explaining how to frame the legal question presented to the ICJ, the Brief evaluates the proposed question in the context of prior ICJ advisory opinion requests and responses. Finally, the most authoritative sources of law are analyzed for their value as advocacy tools in this process.

Part II, Background, offers an array of contextual and supporting materials. It introduces the Justices serving on the ICJ and provides insight into their international law experience, prior judicial decisions, and scholarship that might inform their approach to the climate change responsibility question. Next, the Report traces the principle of transboundary harm generally, in U.S. and European courts and across international agreements and conventions. Its analysis suggests that legal authorities support the application of the well-established principle of transboundary harm to the climate change context. The final Background section focuses on policy arguments likely to be persuasive to one of the campaign's most strident opponents as a way of illustrating why all nations would stand to benefit from application of the rule of law to the climate change context.

... 3. TREATY LAW

a) UN Framework Convention on Climate Change

In the climate change context, there are several applicable treaties which contain strong affirmations of various international obligations and responsibilities of states. The United Nations Framework Convention on Climate Change (“UNFCCC”) was opened for signature on May 9, 1992 and entered into force on March 21, 2004; currently it has been ratified by all UN member states, with the exception of South Sudan.⁷³ It is widely considered to be a foundational environmental treaty and the authoritative treaty on climate change.
(p. 19)

...b) Kyoto Protocol

Recognizing the need for an instrument with binding, quantified emissions reduction commitments for industrialized countries and the lack of concrete action to reduce greenhouse gas emissions since 1992, states met at the third session of the Conference of the Parties (COP 3) in Kyoto, Japan in December 1997 and negotiated the Kyoto Protocol.⁹⁰ The Protocol was opened for signature in March 1998 and entered into force on February 16, 2005 upon Russia’s ratification.⁹¹ It effectively requires developed countries to reduce emissions of carbon dioxide to five percent below 1990 levels from 2008 - 2012.⁹²
(p.22)

... c) United Nations Convention on the Law of the Sea (UNCLOS)

Given not just projected sea level rise but ocean acidification, coral reef bleaching, species extinction, and the generally disastrous effects of climate change on the world’s oceans, there is a significant likelihood that inclusion of measures to protect ocean environments will overlap with measures to reduce climate change. The United Nations Convention on the Law of the Sea, a 1982 treaty,¹⁰³ defines the rights and responsibilities of nations in their use of the world’s oceans, establishing guidelines for the management of marine natural resources. To date, 163 countries and the European Union have ratified the Convention.¹⁰⁴
(pp. 23-24)

A number of provisions contribute to the body of international environmental law codifying marine protections and implicated by climate change. Articles 192-206 of UNCLOS set forth general obligations of the parties to prevent, reduce, and control marine pollution, to cooperate on a global or regional basis, to notify other parties of imminent or actual damage to the oceans, and to adopt contingency plans and provide technical assistance to developing countries in combating marine pollution.¹⁰⁵ Articles 207-211 and 213-221 contain more specific obligations with respect to pollution from land-based sources, seabed activities, ocean dumping and maritime vessels and the obligations of parties to enforce their respective laws and any applicable international rules and standards relating to such activities.¹⁰⁶

Perhaps the most relevant provision for climate change is Article 212, which requires parties to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment “from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.”¹⁰⁷ Article 222 provides the enforcement of 212, requiring states to take “measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation.”¹⁰⁸

According to Stephen Kass, “the purpose of these provisions is clearly to require parties to regulate emissions from aircraft and marine vessels, which were seen in 1982 as the most significant sources of atmospheric pollution affecting the oceans.”¹⁰⁹

Roda Verheyen finds **additional support for state responsibility for climate change and the no-harm rule in UNCLOS Article 194.2, which obliges states to “ensure that activities under their jurisdiction and control are so conducted as to not cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.”**¹¹⁰
(p. 24)

Taken with Article 192 which sets forth states’ “obligation to protect and preserve the marine environment,”¹¹¹ these two articles are seen as the embodiment of the precautionary principle.¹¹²

111 UNCLOS art. 192.

112 Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe’s Precautionary Principle as U.S. Law*, 7 SANTA CLARA J. INT’L L. 1, 27 (2009).

(pp. 24-25)