

The ICJ Advisory Opinion and the legal value of COP and CMA decisions

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*This advice is provided by third parties in response to **Query 67/25***

Query:

The ICJ rendered its Advisory Opinion on the obligations of States in respect of climate change on the 23rd of July. In reviewing states obligations, the ICJ mentions COP and CMA decisions. In connection to this, the following questions were put forward.

1. What is the legal character of COP/CMA cover decisions?
2. What does the Court say on COP decisions?
3. What is the legal value of the Advisory Opinion?

Advice:

1. What is the legal character of COP/CMA decisions?

- **Decisions** are adopted by consensus by the governing body (COP, CMP or CMA).

- **Cover decisions** are often instigated by the COP Presidency and, when present, tend to be numbered as the first of the decisions adopted by the governing bodies (Decision 1 COP X, Decision 1 CMP 1 or Decision 1 CMA X). Cover decisions may contain important political messages about issues that are not addressed in the agenda or reflect the progress in the negotiations. They have also been used to launch work programmes and dialogues. Despite their label, cover decisions do not have a distinct status from other decisions. Importantly, not all COPs will have a cover decision as such, and therefore decision 1 of a governing body will not necessarily be a cover decision. For example, during COP 28, Decision 1 COP 28 was the one concerning the loss and damage fund and Decision 1 CMA 5 was the Global Stocktake decision. Similarly, at COP 29, Decision 1 CMA 6 was the NCQG decision.

In terms of legal character, until the International Court of Justice advisory opinion (ICJ AO), the general understanding was that COP and CMA decisions are not binding unless specified otherwise through the inclusion of an enabling clause, which grants parties binding decision-making. Such a clause is found in the treaty or within the decision itself. The understanding is, however, that even if not binding, COP and CMA decisions indicate political commitment and as such can have normative effect

when interpreting states' obligations. Cover decisions, owing to the breadth of topics they cover – some of which may be outside of the scope of the agenda, or their nature in terms of conveying a political message, are unlikely to have an enabling clause and as such to be binding.

The ICJ AO mentions COP and CMA decisions when discussing the obligations of states, introducing other scenarios where COP or CMA decisions can have legal effect as discussed below.

2. What does the ICJ AO say on COP decisions?

Obligations under treaty law

In its advisory opinion, the ICJ does not refer to COP **cover** decisions specifically but to COP and CMA decisions and their legal status. However, when resorting to examples of COP decisions to illustrate their points, the Court has used some “cover decisions” or Decision 1 of a certain COP/CMA (see paragraphs 68, 69, 184, 224). This does not mean that cover decisions have a distinctive status, or that they will always be present as more general political decisions, as explained above. The Court does not reflect on the specific status of cover decisions either, so there is no implication of them having a distinctive legal value.

The ICJ highlights that, when interpreting their obligations under the climate change treaties, states need to take into considerations the relevant decision of the COP, CMP and CMA. It further notes that in certain circumstances, these decisions have ‘certain legal effects’ (ICJ, para 184). This is the case when the treaty provides for it, through an enabling clause which provides that COPs may create legally binding obligations such as in Article 4(8), Paris Agreement.

Additionally, and this is where the Court innovates or expands, the ICJ takes the view that decisions taken by governing bodies may have certain legal effects even when there is no enabling clause, but when these decisions can be treated as ‘subsequent agreements’ according to Article 31(3)(a) of the Vienna Convention on the Law of Treaties ‘in so far as such decisions express agreement in substance between the parties regarding the interpretation of the relevant treaty’ (ICJ, para 184). This conclusion had already been established by the International Law Commission [draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties](#) (2018), which describes the role of decisions by (all) Conference of Parties in embodying ‘subsequent agreement or subsequent practice under article 31, paragraph 3.’ The ICJ AO endorses this conclusion and makes it applicable to the decisions by UNFCCC COPs and other governing bodies.

Article 31 of the VCLT concerns the general rule of interpretation. Article 31(3)(a) states that ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ shall be taken into account, together with the context of a treaty.

The ICJ illustrates this point in paragraph 224 of the Opinion, in which it cites two decisions that express the agreement in substance between parties on the interpretation of Articles 2 and 4 of the Paris Agreement. In decision 1/[CMA.3](#) Parties recognised that the impacts related to climate change will be much lower at 1.5°C, in contrast to a 2°C warming scenario. The ICJ then continues by underlining that decision 1/[CMA.5](#) explicitly encourages national action to be aligned with limiting global warming to 1.5°C. The Court thus argues that both decisions show consensus, and thus subsequent agreement, about 1.5°C being the primary temperature target through the strengthening of the agreement between states.

Hence, the ICJ interprets decisions from a governing body to represent agreement between states parties. In turn, such an agreement informs the interpretation of states' obligations under the treaty

thereby giving them normative power. As such, the ICJ does not find the legal character of a decision to be relevant in determining the agreement.

Obligations under customary international law

The relevance of COP and CMA decisions beyond the climate change treaties (upon states that have not ratified the UNFCCC or Paris Agreement) was examined by the ICJ as it assessed customary international law obligations. The ICJ finds that compliance with the customary international legal duty to cooperate requires states to consider the 'guidance provided by the COP decisions pertaining to financial transfers, technology transfers and capacity-building' (ICJ, para 218).

With regards to the customary international law duty to prevent significant harm to the environment, the ICJ finds that standards of due diligence that determine a state's compliance with its obligation to prevent harm can be reflected in certain COP decisions (ICJ, para 287). The ICJ also considers COP decisions to be 'relevant for the identification of customary international law, in so far as they reflect State practice and [...] express an opinio juris of states' (ICJ, para 288). While on a case-by-case basis, this implies that COP decisions may help in identifying customary international law. This would be significant as customary international law is also binding upon states that are not party to the UNFCCC or Paris Agreement.

The ICJ thus signals that COP or CMA decisions could have legal consequences even where they are not expressly stipulated by an enabling clause. This may inspire more robust negotiations and decisions, including clearer climate finance and ambition targets. On the other hand, it could also have the opposite effect, with states more reluctant to find consensus on the substance of subsequent decisions of governing bodies of the UNFCCC and Paris Agreement and/or seeking to dilute provisions (see [Voigt and Rioseco/Rao](#)). In view of this enhanced value of COP decisions in general and the often political use of cover decisions, Parties might consider using them differently after the ICJ AO.

3. What is the legal value of the advisory opinion?

According to Article 65 of the ICJ Statute, the ICJ has an advisory jurisdiction on "any legal question" from a body that is authorised to make such a request by the UN Charter. This includes the five main UN organs, including the United Nations General Assembly (UN Charter, art 96(1)). The objective of an advisory opinion is to seek clarity over the interpretation of international legal instruments. In contrast to contentious cases, advisory opinions are not binding precisely because they are not adjudicating, yet they hold significant moral weight and have significant authoritative interpretational value and can potentially be later used in other avenues for negotiation and litigation.

This is particularly applicable to the ICJ advisory opinion on climate change, given the nature of the question brought before the Court by the General Assembly, which is asking the Court to determine 'the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations' as well as the 'legal consequences' for states.

In answering this question, the ICJ identifies a range of obligations regarding mitigation, adaptation, international cooperation and others from a wide range of sources, including climate and non-climate treaties, customary international law and COP decisions. Whilst the advisory opinion cannot be enforced against any state automatically, the particular obligations the Court is identifying are legally binding upon states and have legal consequences by virtue of the treaty provision or other relevant norm that created it.