

Illustration: BINAY SINHA



The next step in climate efforts

In the context of the General Assembly resolution, India should not hesitate to make its submission to the ICJ, reflecting its views on climate-change issues

Considerable excitement has been generated on the adoption by consensus of the UN General Assembly resolution (A/RES/77/276) of March 29, 2023, which seeks advisory opinion from the International Court of Justice (ICJ) on "the obligation of States in respect of Climate Change". The resolution is considered a landmark because it was co-sponsored by 133 member countries. While advisory opinion from the ICJ is not legally binding on states, it carries a certain moral authority.

The ICJ's legal opinion is being sought on legal consequences for states that "by their acts and omissions damage the climate in such a way that it affects others, particularly small island developing states" and "present and future generations".

The resolution was nearly four years in the making and was spearheaded by the Pacific Island state of Vanuatu. It was eventually piloted by a Core Group of 18, known as ICJAD4, which includes other island states, African states, and even Germany and Portugal. India was not part of this group nor was it a co-sponsor, which, on the face of it, may appear unusual, given India's activism on the climate change issue in multilateral forums. But there may have been good reasons for India's studied reticence. The US, like India, joined the consensus but spelt out its reservations in a statement on its vote:

"We have serious concerns that this process could complicate our collective efforts and will not bring us closer to achieving these shared goals."

The statement added that issues posed to the ICJ were best addressed in the ongoing multilateral negotiations in the designated forums.

China reportedly expressed similar reservations

but also joined the consensus.

India shares these views but the country's delegation chose to refrain from giving an explanation — before or after the vote — registering its concern.

The resolution focuses on current acts and omissions. The notion of the historical responsibility of states primarily responsible for the stock of greenhouse gases already accumulated in the earth's atmosphere is missing. ICJ opinion may be used for laying the blame on countries like India whose emissions will inevitably rise in the course of their economic development, despite their ambitious efforts to limit such emissions and to achieve a faster transition from fossil fuels to renewable and cleaner sources of energy. Industrialised countries like Australia and Germany, and the rest of the European Union have supported the resolution and spoken in its support precisely because the idea of historical responsibility, which is a key element in the UN Framework Convention on

Climate Change (UNFCCC) of 1992, has been ignored. They would be happy for the spotlight to shift to current and projected emissions and put countries like India in the cross-hairs.

There is no reference in the resolution to the important issue of compensation for "loss and damage" from climate change, which now appears on the multilateral climate change agenda, thanks to a decision adopted at the Conference of Parties to the UNFCCC at Sharm-el-Sheikh, Egypt, in November last year. This must have been a concession to the developed countries which have strenuously opposed the notion of their legal responsibility to compensate countries that have suffered from climate change resulting from

years of their (developed countries') fossil fuel-based development. This is the key question which should have been placed before the ICJ and this should be pointed out by India.

According to a press release of the ICJ issued on April 19, 2023, written submissions would be invited from member states on the issues raised in the UN resolution and referred to the court for its advisory opinion. The UN and its specialised agencies are also permitted to submit documentation with respect to the issues raised. After these submissions are received and posted on the ICJ website, further comments are invited on them by member states and the UN and its agencies. In the final phase, the court holds public sittings, at which representatives of member states may make oral presentations, even if written submissions have not been made by some of them. The court will then conclude the deliberations and give its advisory opinion after considering the different perspectives placed before it.

Based on previous experience, it is expected that the court will announce its advisory opinion either by the end of the year or the beginning of next year.

India should not hesitate to make its submission to the ICJ, reflecting its own considered views on the issues raised. Nor should it be reluctant to comment on the submissions of other states. It should participate actively in the public hearings at the court. A view may be taken that since the resolution has commanded overwhelming support, it may be best for India to keep a low profile at the court as well and not rock the boat. This could result in sacrificing India's interests by default.

What should be the key elements in India's submission?

One, the submission should point out that there is already a climate change treaty in the form of the UNFCCC or the Rio Convention of 1992, in which the legal obligations of states for taking climate change action are clearly spelt out. The ICJ should reaffirm the validity of the principles and provisions of the UNFCCC rather than seek to establish another legal framework.

Two, in defining the legal obligations of states for climate change action, the fundamental principle of equity and equitable burden sharing must be reiterated.

Three, climate justice cannot ignore the aspect of historical responsibility. States that are responsible for the accumulation of greenhouse gases in the atmosphere and which are chiefly responsible for global climate change should take the lead in reducing emissions and support adaptation by developing countries. The principle of common but differentiated responsibility and respective capabilities which reflects this must be reiterated. A separate paper should detail the ambitious measures India itself has adopted in addressing the challenge of climate change.

And four, the submission should point out that it was a handful of industrialised countries which brazenly violated their legal obligations under the Kyoto Protocol and just walked away from it without submitting to the penal provisions under its compliance procedure. For starters, let the court hold them to account and enhance its own credibility.

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