International Court of Justice

Obligations of States in Respect of Climate Change
(Request for Advisory Opinion)

Written Statement of the Government of Japan

22 March 2024

Introduction

1. Since 1988, when the United Nations General Assembly (UNGA) recognized for the first time that "climate change was a common concern of mankind"[1], a general consensus has been formed that this is a global problem that requires a global response[2]. The UNFCCC and the Paris Agreement acknowledge it[3]. The protection of the climate system is hence a common duty of States, which flows from this common concern. International cooperation is essential to limit the magnitude and rate of temperature rise and to ensure that all countries may adequately adapt to the effects of climate change.

2. In this spirit, resolution 77/276 of the UNGA requests the Court to render an advisory opinion "on the obligations of States in respect of climate change"[4]. The operative part of the resolution is divided in three parts:

- a *chapeau* identifies some of the texts, rules and principles potentially applicable:

  "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, 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."

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[1] United Nations General Assembly (UNGA), Resolution 43/53, Protection of global climate for present and future generations of mankind, A/RES/43/53, 6 December 1988.

[2] According to preambular recital 6, "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response" (United Nations Framework Convention on Climate Change (UNFCCC), New York, 9 May 1992, United Nations, *Treaty Series*, Vol. 1171, p. 107 (entry into force: 21 March 1994)). In the same vein, the Paris Agreement recalls in its preambular recital 15, " the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change" (Paris Agreement, 12 December 2015, United Nations, Treaty Series, Vol. 3156, p. 79 (entry into force: 4 November 2016)).

[3] See UNFCCC, preambular recital 1 the Paris Agreement, preambular recital 11. See also Conference of the Parties to the United Nations Framework Convention on Climate Change, Decision 1/CP.27, "Sharm el-Sheikh Implementation Plan", UN Doc. FCCC/CP/2022/10/Add.1, 6 November 2022, preambular recital 8; Decision 1/CP.26, "Glasgow Climate Pact", UN Doc. FCCC/CP/2021/12/Add.1, 31 October 2021, preambular recital 7 and Decision 3/CP.25, "Enhanced Lima work programme on gender and its gender action plan", UN Doc. FCCC/CP/2019/13/Add.1, 16 March 2020, preambular recital 6.

[4] UNGA, Resolution 77/276, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, A/RES/77/276, 4 April 2023.

- question a) invites the Court to identify States' primary obligations in respect of climate change:

  "What are 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?"

- question b) calls the Court to identify further obligations for States, deriving from the "legal consequences…for States where they, by their acts and omissions, have caused significant harm":

  "(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

  (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

  (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

3. Japan's written statement follows the structure of the request for an advisory opinion. **Section I** seeks to identify the relevant applicable law that should assist the Court in its answer. **Section II** addresses the first question posed by the General Assembly and establishes that States' primary obligations are essentially those deriving from the UNFCCC and the Paris Agreement. **Section III** examines the second question posed by the General Assembly and underscores that specific financial commitments undertaken by the parties to the Paris Agreement do not represent a legal obligation under the relevant treaties.

I. The relevant applicable law

4. Like in the the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the Court must identify the relevant applicable law prior to answering the questions asked:

> "In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law."[5]

5. In that instance, after reviewing different *corpora* of international law, such as human rights[6], including the 1948 Genocide Convention,[7] as well as environmental treaties and principles[8], the Court concluded that:

> "*the most directly relevant applicable law governing the question of which it was seised*, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant."[9]

6. In the present case, as recalled above, the chapeau of the resolution 77/276 refers to certain treaty-instruments and to unwritten rules of international law. They could be classified in five eclectic categories:

- a "constitutional" treaty, i.e. the Charter of the United Nations;
- human rights instruments: the ICCPR, the ICESCR, the UDHR;
- treaties dealing with climate change: UNFCCC and the Paris Agreement[10];
- treaties dealing with the law of the sea: the UNCLOS;
- unwritten rules and principles (either customary or general principles of law): the duty of due diligence, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment.

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[5] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 239, para. 23. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004*, p. 165, para. 69.
[6] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, pp. 239-241, paras. 23-27.
[7] *Ibid*, pp. 240-241, paras. 26-27.
[8] *Ibid*., pp. 241-243, paras. 27-33.
[9] *Ibid.*, p. 243, para. 34, emphasis added.
[10] The Chapeau does not refer to the Kyoto Protocol, which is nonetheless mentioned in the preamble of the resolution 77/276.

7. Alongside the sources referred to in the operative part, the preamble of the resolution 77/276 also mentions a number of multilateral environmental treaties[11] and international instruments[12] and more generally the "relevant principles and relevant obligations of customary international law"[13].

8. In the face of this variety of sources referred to by the General Assembly, the Court's mission is to identify those constituting the **relevant** applicable law, by choosing those which constitute "*the most directly relevant applicable law governing the question*"[14]. Two criteria may help to assess the relevance of the sources invoked.

9. *First*, since the General Assembly asks the Court to identify States' **obligations**, the applicable law must be binding upon those States, being understood that legal instruments which "are not *per se* binding (…) cannot be the source of an international obligation"[15].

10. *Second*, these sources must be "governing the question", that is, they must be capable *ratione materiae* of constituting the basis for a cogent answer to the particular questions addressed to the Court. The specificity being assessed in light of the subject-matter of the instruments and principles invoked[16], the Court may confidently rely essentially on those which deal specifically with climate change. This is the case at least for question (a) which refers to States' primary obligations.

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[11] These are: "the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa" (UNGA, Resolution 77/276, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, A/RES/77/276, 4 April 2023, preambular recital 5).

[12] Such as: "Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development" (*ibid*.).

[13] *Ibid*.

[14] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 243, para. 34.

[15] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018*, p. 562, para. 171. See also *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 248, paras. 46 and 83.

[16] The ILC observed that "[a] rule may be general or special in regard to its subject matter" (ILC, Report of the Study Group on Fragmentation of international law, A/CN.4/L.682 and Add.1, 13 April 2006, p. 29, para. 112).

11. Except for the UNFCCC and the Paris Agreement, the other sources mentioned in the chapeau do not govern climate change issues directly and specifically. This is the case of the environmental treaties[17] and also of the principles of customary international law invoked, such as the duty of due diligence, the obligation of prevention of significant transboundary harm or harm to the environment, the duty to protect and preserve the marine environment. These principles, which contain obligations of conduct, are by nature, general in scope and circumstantial in their application, and they call for an assessment *in concreto*[18]. By contrast, question (a) is formulated in generic terms, and the answer to it does not call for the assessment of any circumstances. Therefore, these general principles invoked are of little help in providing a cogent answer to question a).

12. It is uncontested that important principles such as transboundary damage prevention and due diligence have developed in the field of international environmental law. Some of these principles are also referred to in the preamble of UNFCCC or in the provisions establishing the

[17] See fn 11 above.

[18] The case-law of international courts and tribunals is consistent. To quote a few instances: "']Due] diligence' is *a variable concept*. *It may change over time* as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also *change in relation to the risks involved in the activity*." (*Responsibilities and obligations of States with Respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion, ITLOS Reports 2011*, p. 43, para. 117, emphasis added). In the same vein: "[T]he obligation to 'preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures' is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."(*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 83, para. 197; see also *mutatis mutandis*, on the obligation of prevention as an obligation of conduct, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 221, para. 430. "[The] underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context (…) Determination of the content of the environmental impact assessment should be made *in light of the specific circumstances of each case*." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, pp. 706-707, para. 104, emphasis added; see also *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022*, p. 651, para. 114).

"principles"[19]. On the other hand, international legal regulations on GHG emissions are based on individual international agreements rather than customary principles.

13. The UNFCCC and the Paris Agreement are the ultimate expression of the consensus among States on the regulation of GHG emissions. This consensus is based on a delicate balance between different interests, accommodated to reach the ultimate objective of the Convention, which is to achieve the stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The hurdles which had to be overcome in the negotiations of these treaties makes it all the more important to preserve the integrity of the obligations stated therein. As the Court held in relation to another field of international law (i.e. investment protection):

> "The law on the subject has been formed in a period characterized by an intense conflict of systems and interests. (…) Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject."[20]

14. The UNFCCC and the Paris Agreement also have priority of application by virtue of the rule of the *lex specialis*, which operates in the relationship between two or more treaties as well as between treaties and customary international law. As the Court recalled in its judgment in the *Military and paramilitary activities* case:

> "In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim."[21]

15. The priority of application of treaty rules over customary international law is reinforced by the possibility for States to derogate, by agreement, from general international law (other than *jus cogens* norms). As regards climate change, the UNFCCC and the Paris Agreement are in fact not derogating from the general principles referred to in the *chapeau*, but

[19] UNFCCC, Article 3, para. 3.
[20] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 47, para. 89.
[21] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 137, para. 274.

are rather implementing them in the particular field of regulation of GHGs emissions with a view to protecting the climate system.

16. In this case, the generality of States' commitments derives not from their customary nature, but from the universality of States' adherence to these instruments. It must indeed be recalled that there are 198 Parties to the UNFCCC and 195 to the Paris Agreement. Thus, the relationship between treaties and general principles is in this field, one of cross-fertilization: while the general principles invoked in the *chapeau* informed the adoption of these treaties, their content is in return informed and nourished by the treaty-provisions agreed by States, which enjoy at present quasi-universal membership.

17. The principles of general international law invoked in the *chapeau* are therefore neither excluded nor set aside by the operation of treaty-rules[22]. To the extent that this is necessary, they may be used as interpretative tools[23], especially when assessing the object and purpose of the climate change treaties. However, these principles cannot substitute themselves or prevail over the treaty rules.

18. For these reasons, the Court should provide its answer based on the *lex specialis*, i.e. the treaties and other climate-related international instruments which stipulate specific obligations on climate action, while taking into account of the development of international environmental law.

[22] See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, p.708, para. 108; *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, R.I.A.A.*, vol. XXIII, 2000, p. 40, paras. 51-52.

[23] See *mutatis mutandis*, the reasoning of the Court concerning the relationship between human rights and humanitarian law in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 240, para. 25 and on the relationship between *jus in bello* and environmental law at para. 33 of the same advisory opinion.

II. States' primary obligations referred to in question (a)

19. Question (a) is drafted in broad and general terms:

> "*What are 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?*"

20. It must be emphasized from the outset that GHG emissions are not prohibited but are merely regulated by climate change treaties. The ultimate objective of the UNFCCC is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system[24]. Furthermore, neither the UNFCCC nor the Paris Agreement apply retroactively or have a retroactive scope. States' primary obligations under the climate change treaties must indeed be read in light of this basic considerations.

21. This being said, it is impossible, within the context of an advisory opinion, to answer to this question in an exhaustive manner. In this phase, Japan will focus this section of its written statement on the approach to differentiation of responsibilities, underlying the current status of agreement between States, as it has emerged during successive multilateral negotiations.

A. The principle of common but differentiated responsibilities and respective capabilities

22. The principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) is the first among the principles identified in Article 3 of UNFCCC[25]. It also

[24] UNFCCC, Article 2.

[25] "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities." (*Ibid*., Article 3, para. 1).

features in the Kyoto Protocol[26] and the Paris Agreement[27] and is highlighted in numerous decisions of State Parties[28].

23. This principle departs from the traditional approach of equality between the Parties, bound by a common set of treaty-obligations. Reflecting concerns which have been consistently voiced during negotiations, it states that commitments of parties should be differentiated, based on their different responsibilities and capabilities in the domain of the climate change.

24. This principle establishes "an aim or objective rather than an independent obligation"[29]. In other words, it does not have autonomous legal force. Like good faith in general international law, the principle of CBDR-RC in climate change treaties is "one of the basic principles governing the creation and performance of legal obligations'; it is not in itself a source of obligation where none would otherwise exist."[30]

25. Lacking normative autonomy, the principle of CBDR-RC is also open-ended, since it does not define a predetermined course of action. In the *Oil Platforms* case, the Court found

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[26] "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances" (Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), 11 December 1997, Article 10, United Nations, *Treaty Series*, Vol. 2303, p. 162 (entry into force: 16 February 2005), Article 10).

[27] "In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (Paris Agreement, preambular recital 3); "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (*Ibid.*, Article 2, para. 2); "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (*Ibid*., Article 4, para. 3) and "All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (*Ibid*., para. 19).

[28] See for instance: Conference of the Parties to the United Nations Framework Convention on Climate Change, Decision 1/CP.27, "Sharm el-Sheikh Implementation Plan", 6 November 2022, UN Doc. FCCC/CP/2022/10/Add.1, para. 15; Decision 1/CP.26, "Glasgow Climate Pact", 31 October 2021, UN Doc. FCCC/CP/2021/12/Add.1, para. 16 and Decision 1/CP. 20, "Lima Call for Climate Action", 1 December 2014, UN Doc. FCCC/CP/2014/10/Add.1**,** para. 3.

[29] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 320, para. 87. See also *ibid*., para. 93.

[30] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94; quoting *Nuclear Tests, I.C.J. Reports 1974*, p. 268, para. 46 and p. 473, para. 49.

that provisions of the kind had to be regarded as fixing "an objective, in the light of which the other treaty provisions are to be interpreted and applied"[31]. A similar approach is warranted with regard to CBDR-RC. Its legal gravitas derives from its interpretative function, which is in turn reinforced by its repetition in the operational provisions of the UNFCCC[32] and the Paris Agreement[33]. Differentiation thus cuts across the central obligations in these instruments.

26. While the term "differentiated" signals the need for distinguishing between the Parties, the criteria on which such differentiation could be based are not clearly established. Furthermore, they have evolved in time. In the 1980s, in the process leading up to Rio, there was a growing, albeit not universal understanding, that they could be based on the historical contributions to the environmental crisis. This understanding was articulated in Rio Principle 7[34], which assigned a leadership role to developed countries based on their enhanced contribution to environmental degradation.

27. When it came to translating this principle in binding terms, there was no consensus in favour of including a reference to the enhanced contributions of developed countries to global environmental degradation. Thus, the UNFCCC places common but differentiated responsibilities and respective capabilities on the same plane and attributes to the developed

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[31] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28

[32] "All Parties, taking into account their common but differentiated responsibilities" (UNFCCC, Article 4, para. 1).

[33] "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (Paris Agreement, Article 4, para. 3) and "All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (*Ibid*., para. 19).

[34] It provides that "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." (Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992, Principle 7).

countries a leading role, in light on their status and not on their historical contributions[35]. Differentiation is thus based on the present status of countries, rather than on their historical contributions.

28. The CBDR-RC principle was further clarified by the Paris Agreement, which adds to it the phrase "in the light of different national circumstances"[36]. This may be deemed to be merely a clarification – albeit an important one – since the "respective capabilities" found in the original formulations were already understood to be based on national circumstances. The new formulation represents in any case a compromise between the interests of different countries: it reaffirms the original principle but specifies that it is evolutionary in nature. This clarification opens the door for a flexible and evolutionary interpretation of the CBDR-RC: as national circumstances are themselves, by definition, evolving, so too will be the common but differentiated responsibilities of States.

29. The Paris Agreement, which is presently the reference for assessing States' obligations to ensure the protection of the climate system, has a dynamic and nuanced approach to differentiation in its operational provisions. The core obligations under the Paris Agreement underscore a careful balance between the "common responsibilities" incumbent upon Parties in general (i.e. all States having concluded the treaty) and the differential pace at which "developed and developing" States are expected to comply with their obligations.

[35] It is thus stated in Article 3: "1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.".

[36] Paris Agreement, Article 2, para. 2, Article 4, para. 3 and Article 4, para. 19.

30. To give a few examples:

- Under Articles 3 and 4, all Parties have an obligation to define their national determined contributions (NDCs), it being understood that developing countries will need more time[37].
- Under Article 4, paragraph 1, all Parties are required to contribute to the objective of the agreement[38], it being again understood that developing countries will need more time[39].
- The objective of progression is applicable to all Parties[40]. Hence, developed countries retain their role of leadership, while developing countries are expected to follow suit[41].

31. On the basis of the language of the provisions of the relevant conventions, Japan considers that CBDR-RC cannot thus constitute a basis for holding developed countries solely responsible for climate change and for arguing for further mitigation actions and financial assistance solely by developed countries, while avoiding constraints deriving from climate change treaties for other States. On the contrary, differentiation in the climate change regime as encompassed in the Paris Agreement is flexible (as it depends on the nature of the obligation considered) and dynamic (as it may evolve in time).

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[37] "As nationally determined contributions to the global response to climate change, *all Parties* are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of *all Parties* will represent a progression over time, while recognizing the need to support *developing country Parties* for the effective implementation of this Agreement" (Paris Agreement, Article 3). See also "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions" (*Ibid*., Article 4, para. 2).

[38] "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible" (*Ibid*., para. 1).

[39] "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement" (*Ibid*., Article 3). See also "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions" (*Ibid*., Article 4, para. 2).

[40] "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (*Ibid*., para. 3).

[41] "Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances" (*Ibid*., para. 4).

B. Abandonment of the annex-based approach in favor of the national determined contributions

32. The principle of CBDR-RC has played a structural role in the overall architecture of UNFCCC and in the design of the Kyoto Protocol. These two treaties made a binary distinction between "developed" and "developing" countries, which was reflected in the annex-based approach to the obligations of the Parties. Accordingly, under the UNFCCC, "developed country Parties and other Parties", which were nominally identified in Annex I[42] had stronger obligations than "developing country Parties[43], which were however not nominally identified.

33. This approach quickly revealed its shortcomings. The UNFCCC's classification is based on categories of countries established more than 30 years ago. This classification has not been revised since 1992 and it is no longer consistent with subsequent changes occurring in global GHG emissions and economic development. Maintaining that differentiation means reduced obligations for some categories of countries could thus potentially undermine the ultimate objective of the UNFCCC to stabilize GHG emissions.

34. The Kyoto Protocol cemented nonetheless this binary understanding of differentiation. It imposed quantified emission limitation and reduction commitments only on countries listed in its Annex B and excluded other countries' emissions from the ambit of its emissions targets. Consequently, the gap with the reality of global GHG emissions and economic development became even more evident.

35. One of the challenges of the negotiations of the Paris Agreement was to outstrip the legacy of this bipolar, rigid and static dichotomy. It succeeded not only through a clarification of the meaning of the principle of CBDR-RC[44], but also through the design of a structure

[42] Are included in that list: Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, European Economic Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.
[43] UNFCCC, Article 4, paras. 2 and 6, Article 12, paras. 2 and 5.
[44] See para. 27 above.

different from the annex-based structure of the UNFCCC and of the Kyoto Protocol. The Paris Agreement maintains the distinction between the "developed and developing country Parties"[45], but while these categories may still be relevant, they are nowhere defined and are certainly no longer based on Annexes I or II of the UNFCCC. Like CBDR-RC[46], the categories of countries in the Paris Agreement rest on flexible and dynamic concepts and are not constrained by rigid annexes that are part of a treaty and as such difficult to amend.

36. Thus, in accordance with the principle of CBDR-RC, the provisions of the Paris Agreement allow for differentiation between countries in several ways. In a nutshell, differentiation does not rest on the opposability of the core obligations concerning mitigation including quantitative reduction, but in the pace at which States are expected to comply with them[47]. At the same time differentiation has grown in flexibility. Thus, climate change measures under the Paris Agreement requires responsibility and response consistent with the actual emissions and capabilities of each Party.

C. A leadership role for the "developed country Parties"

37. The Paris Agreement refers to "developed country Parties" in a few of its provisions[48]. As stated in Article 4, paragraph 4, their particular role is to "continue taking the lead by undertaking economy-wide absolute emission reduction targets". By virtue of their leadership role, they are required to take more stringent mitigation commitments, as reflected in their national determined contributions (NDCs).

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[45] Paris Agreement, preamble, Articles 3, 4.1, 4.4-4.6, 4.15, 5.2, 6.6, 7.2-7.3, 7.6-7.7, 7.10, 7.13- 7.14, 9.1, 9.3-9.5, 9.7, 9.9, 10.5-10.6, 11.1-11.4, 13.2-13.3, 13.9-13.12, 13.14-13.15.Article 3, Article 4, paras. 1, 4-6, 15, Article 5, para. 2, Article 6, para. 6, Article 7, paras. 2-3, 6-7, 10, 13-14, Article 9, paras. 1, 3-5, 7, 9, Article 10, paras 5-6, Article 11, paras. 1-4, and Article 13, paras. 2-3, 9-12, 14-15.

[46] See paras. 28-31 above.

[47] See para. 29 above.

[48] Paris Agreement, 12 December 2015, preambular recital 16, Article 4, para. 4, Article 9, paras. 1, 3, 5, 6, 7, Article 11, para. 3, Article 13, para. 9.

38. Japan acknowledges this leadership role[49] and this is further reflected in the political commitments undertaken in other fora. For instance, the G7 Hiroshima Leaders' Communiqué, adopted on 20 May 2023 under Japanese Presidency, reflects this position:

> "Mindful of our leadership role, and noting that emissions have already peaked in all G7 countries, we recognize the critical role of all major economies in limiting increases in global temperature over this critical decade and in subsequent decades. In this context, we underscore that every major economy should have significantly enhanced the ambition of its NDC since the Paris Agreement; already peaked its GHG emissions or indicated that it will do so no later than 2025; and in particular, included economy-wide absolute reduction targets and that cover all GHGs in its NDC. Accordingly, we call on all Parties – especially major economies – whose 2030 NDC targets or long-term low GHG emission development Strategies (LTSs) are not yet aligned with a 1.5°C pathway and net zero by 2050 at the latest, to revisit and strengthen the 2030 NDC targets and publish or update their LTSs as soon as possible and well before UNFCCC-COP28, and to commit to net zero by 2050 at the latest."[50].

As indicated in the latter part of the quoted paragraph, their leadership role does not weaken other state's obligation consistent with their actual emission and capabilities.

III. The legal consequences referred to in question (b)

39. Question (b) is drafted in general and ambiguous terms:

> "*What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:*
> *(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?*
> *(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change*?"

[49] See also paras. 46-51 below.
[50] Ministry of Foreign Affairs of Japan, "G7 Hiroshima Leaders' Communiqué", 20 May 2023, available at: https://tinyurl.com/5msbd837, para. 18. See also *ibid*., para. 25.

40. It is unclear whether question (b) concerns the secondary rules of responsibility for wrongful act or those of accountability in the absence of a wrongful act. This ambiguity stems from the terms of the question itself. At first sight, concepts such as "legal consequences" and "acts and omissions" suggest that the question is phrased under the regime of international responsibility for wrongful act[51]. However, neither the term "violation" nor "wrongful act" is used. On the contrary, the question puts at its center the concept of "(significant) harm", reinforced by terms such as "injured", "affected" or "particularly affected" used to identify some categories of States to which the legal consequences are due. However, under the ILC Articles on States responsibility for internationally wrongful acts of 2001, the damage is not a condition for the establishment of responsibility[52]. By contrast, two other instruments adopted by the ILC have the concept of "harm" at their core, but their application is not premised on the existence of a violation of international law. These instruments are "Allocation of loss in the case of transboundary harm arising out of hazardous activities" (2006) and "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" (2007).

41. In Japan's view, question (b) cannot be answered by an application of the secondary rules of general international law on State responsibility for wrongful act. Rather, question (b) must be addressed in light of the specific legal consequences identified in the climate change treaties, that is under the angle of States' primary obligations established under those treaties. Indeed, the question (b) refers to "the legal consequences *under these obligations* for States". The demonstrative adjective "these" creates the link with the obligations referred to in question

[51] See also *mutatis mutandis Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, pp. 30-31, paras. 64-71.
[52] International Law Commission, Draft Articles (2001), p. 36, al. 9; see also M. Forteau, A. Miron, A. Pellet, *Droit international public*, LGDJ, Paris, 2022, pp. 1081 and 1082, para. 725.

(a). As shown above[53], "these" obligations derive mainly from the climate change treaties: This must equally be the case for "the legal consequences".

42. Article 8 of the Paris Agreement is among the relevant provisions as it deals specifically with "loss and damage associated with the adverse effects of climate change":

> "Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage."

43. In the international policy debate, loss and damage refers broadly to efforts to "avert, minimise and address loss and damage associated with climate change impacts, especially in developing countries that are particularly vulnerable to the adverse effects of climate change"[54]. Before the Paris Agreement, only the verb "address" was used in conjunction with loss and damage, while "averting, minimizing and addressing" has become common language after the Paris Agreement and the decisions after COP21. This might signal a shift towards emphasizing both *ex ante* ("adverting and minimizing") and *ex post* ("addressing") responses to loss and damage[55].

44. "Historical responsibility" has long been discussed in the negotiations on this topic. However, calls for compensation have been a major red line for many States. The COP's Decision 1/CP.21 embodies the Parties' agreement that Article 8 "does not involve or provide a basis for any liability or compensation"[56]. Article 8 of the Paris Agreement thus reflects the consensus reached between divergent positions. To the extent that its implementation results in

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[53] See paras. 4-18 above.

[54] Conference of the Parties to the UNFCCC, Decision 3/CP.18, "Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity", UN Doc. FCCC/CP/2012/8/Add.1, 28 February 2013, preambular recital 4.

[55] Elisa Calliari *et al.*, "Loss and damage" in Greet Van Calster and Leonie Reins (eds.)*, The Paris Agreement on Climate Change: A Commentary*, Edward Elgar, 2021, p. 205.

[56] Conference of the Parties to the UNFCCC, Decision 1/CP.21, "Adoption of the Paris Agreement", UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016, para. 51.

a financial assistance, it is not by virtue of a recognition of an international liability but for reasons of solidarity in the context of a cooperation policy.

45. On financial assistance, after several years of discussion, the first step was taken at COP27 held in Sharm el-Sheikh in 2022, when Parties decided to establish new funding arrangements, including a fund for responding to loss and damage. However, it was not until the draft decision presented at the opening of the latest conference (COP28 held in Dubai in November and December 2023) that the States finally decided the operationalisation of the new funding arrangements[57]. While these efforts do not represent a legal obligation under relevant treaties, they nevertheless are based on good faith efforts to achieve the shared objectives through cooperation.

[57] United Nations Climate Change, "Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4", available at: https://unfccc.int/sites/default/files/resource/cop28_auv_8g_lnd.pdf, accessed on 7 March 2024.

Conclusion

46. In conclusion, while the Paris Agreement allows for differentiation of pace in its implementation between countries in accordance with the principle of CBDR-RC, CBDR-RC has grown in flexibility and requires responsibility and response consistent with the actual emissions and capabilities of each Party. While the financial assistance for loss and damage does not represent a legal obligation, itis intended to strengthen solidarity through cooperation.

47. On the other hand, Japan is fully dedicated to helping other countries tackle climate change. This unfailing support is consistent with a long-term strategy and concrete actions as it is illustrated in its Development Cooperation Charter, which articulates the basic policy of Japan's development cooperation:

> "Climate change is a threat to the sustainable development of all countries in the world. In order to align Japan's development cooperation with the goals of the Paris Agreement and to improve the capacity of developing countries to respond to climate change, Japan will promote assistance for both mitigation measures (such as emissions reduction and removals enhancement of greenhouse gases) and adaptation measures (such as avoidance and reduction of damage caused by climate change), and contribute to both addressing the various development challenges of developing countries and promoting measures against climate change. To this end, Japan will further promote the mobilization of private finance and cooperation with international organizations and others to expand the scale of international assistance."[58]

Japan's policy of financial assistance is also stated in its National Security Strategy:

> "Japan will also stand at the forefront in galvanizing global efforts for minimizing negative impacts of climate change upon the international security environment. As part of these efforts, Japan will provide assistance to island nations and other developing countries where climate change poses imminent threats so that sustainable and resilient economies and societies can be built."[59]

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[58] Ministry of Foreign Affairs of Japan, "Official Development Assistance (ODA)", 10 October 2023, available at: https ://www.mofa.go.jp/files/100514705.pdf.

[59] Ministry of Foreign Affairs of Japan, "National Security Strategy of Japan", December 2022, available at: https://www.cas.go.jp/jp/siryou/221216anzenhoshou/nss-e.pdf, p. 17. See also United Nations Climate Change, "Long-Term Strategy under the Paris Agreement", 22 October 2021, available at: https://tinyurl.com/3z5rn9y8, p. 96. See also, *Ibid*., p. 97 and 98.

48. Japan started its action in the late 1990's with the Japan International Cooperation Agency which became a major bilateral development institution, in order to support the activities of developing countries in the field of climate change[60]. This institution has four priorities: "*promote low-carbon, climate-resilient urban development and infrastructure investment; support climate policy and institutional development; enhance climate risk assessment and countermeasures and enhance conservation and management of forests and other ecosystems*"[61]. In 2019, this agency had realized 178 projects around the world and financed 59 countries[62]. In addition, the Japan Bank for International Cooperation is involved in environmental operations called "Global action for Reconciling Economic growth and Environmental preservation". To support environmental projects in developing countries, it offers enhanced financing in the form of loans, guarantees and private equity, mobilizing resources from the private sector[63].

49. During multilateral negotiations, Japan has also regularly emphasized the need for countries that have the capabilities to assist the most vulnerable countries to address the consequences of climate change. At COP26 in 2021, Japan announced a contribution of 10 billion USD, which included support for the launch of the Innovative Climate Finance Facility, the work with the Asian Development Bank and other partners to support decarbonization in Asia and beyond[64]. Furthermore, Japan announced it would double its assistance for adaptation totaling approximately 14.8 billion USD in five years[65]. Japan's support to developing countries

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[60] Japan International Cooperation Agency, "Climate Change", available at: https://tinyurl.com/2p9wpwa7, accessed 7 March 2024.
[61] *Ibid*.
[62] Japan International Cooperation Agency, "Cooperation on Climate Change - Towards a sustainable and zero-carbon society", October 2021, available at: https://tinyurl.com/52fjk4km, p. 3.
[63] Japan Bank for International Cooperation, "Environment", available at: https://tinyurl.com/yckpk62k, accessed 7 March 2024.
[64] Prime Minister's of Japan, "COP26 World Leaders Summit Statement by Prime Minister KISHIDA Fumio", 2 November 2021, available at: https://japan.kantei.go.jp/100_kishida/statement/202111/_00002.html.
[65] *Ibid*.

during the two-year period from 2019 to 2020 reached approximately 24.5 billion USD.[66]

50. Japan has been a major contributor to the Green Climate Fund, which supports mitigation of GHG emission and adaptation to climate change in developing countries. Japan has contributed 1.5 billion USD in 2015-2018 as Initial Resources Mobilization (IRM), followed by another contribution of 1.5 billion USD in 2020-2023 for the first replenishment, making Japan second largest donor with total contributions of 3.0 billion USD for those periods. Recently, Japan announced its contribution up to 165 billion yen to the second replenishment in order to enhance the adaptive capacity and resilience of countries that are particularly vulnerable to climate change and to promote mobilization of private finance[67].

51. Most recently, during COP28, Japan welcomed the adoption of the decision on the operationalization of the new funding arrangements[68] for responding to loss and damage and announced its readiness to contribute 10 million USB to commence the operationalization of the Fund[69].

52. Japan will provide further reflections as necessary in the second phase of submission, taking the other states' submissions into account. Japan sincerely hopes that this submission would contribute to the consideration by the Court on this important topic.

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[66] Ministry of the Environment Government of Japan "Japan's Eighth National Communication and Fifth Biennial Report under the United Nations Framework Convention on Climate Change", December 2022, available at: https://www.env.go.jp/content/000102303.pdf, p. 8.

[67] Ministry of Foreign Affairs of Japan, "High-Level Pledging Conference of the Green Climate Fund for the Second Replenishment", 10 October 2023, available at: https://www.mofa.go.jp/ic/ge/page22e_001062.html.

[68] United Nations Climate Change, "Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4", available at: https://unfccc.int/sites/default/files/resource/cop28_auv_8g_lnd.pdf, accessed 07 March 2024.

[69] Ministry of Foreign Affairs of Japan, "Adoption of the decision on operationalization of the new funding arrangements, including a fund, for responding to loss and damage", 1 December 2023, available at: https://www.mofa.go.jp/ic/ch/pageite_000001_00021.html.

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