



INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE  
(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE PARTIES TO THE NAURU  
AGREEMENT OFFICE

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# PART A

## I. Introduction

1. This written statement is presented by the Parties to the Nauru Agreement Office (PNAO) under Article 66 of the Court's Statute, pursuant to States and organisations having presented written or oral statements shall be permitted to comment on the statements made by other states or organisations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case.
2. Pursuant to the Order of the President of the Court of 15 December 2023, the Parties to the Nauru Agreement Office (PNAO) hereby submits its written comments on the written statements presented in connection with the request for an advisory opinion contained in UN General Assembly Resolution 77/276, adopted by consensus on 29 March 2023. The written comments are in the context of the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Stocks, as well as related instruments, with a strong emphasis on the United Nations Convention on the Law of the Sea (UNCLOS). This written comments by the PNAO are provided without prejudice to the positions of individual Parties.
3. The written comments address certain specific issues arising from the written statements submitted by other States and international organizations. It is organised in three parts. Following this introductory part, part II addresses a number of specific issues organised under five sub-sections: (A) Jurisdiction of the court, (B) Conduct of States, (C) Governing law, (D) Legal consequences. The second part summarizes the conclusions reached by the written comments.
4. Overall, PNAO respectfully submits that the Court's answers to the questions put to it should emphasize that the Court does have the jurisdiction to provide an advisory opinion and there is no compelling reason for the Court not to, on the conduct responsible for climate change is clearly characterised in the resolution with respect to Question (a), "*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects.*" and with respect to Question (b), refers to "*acts and omissions*" whereby States "*have caused significant harm to the climate system and other parts of the*

*environment*”, the primary obligations of States in relation to climate change are not limited to the UNFCCC and the Paris Agreement, consistently, a breach of the primary obligation would engage the international responsibility for that State.

## PART B

### II. Issues arising from the written statements submitted to the Court

#### A. Jurisdiction of the Court

5. Several states have raised a number of issues in their written statements in relation to whether the Court should exercise discretion on whether to give the requested advisory opinion. These issues are identified as follows: (i) the question(s) are not precise enough (Iran); phrased in ‘broad terms’ (Joint Denmark, Finland, Iceland, Norway, Sweden statement, although it is not argued that the Court should decline to render its advisory opinion; see also South Africa); (ii) the question “*invites the Court to enter lex ferenda*” (Iran); (iii) the Court may consider reformulating the question (Iran; see also South Africa); (iv) the Court should “*take care in exercising its jurisdiction because of the political nature of ongoing negotiations on the international law of climate change*” and because the primary obligations arise under the UNFCCC, the Kyoto Protocol and the Paris Agreement (Saudi Arabia); (v) pronouncements from multiple international courts/tribunals on climate change may lead to “*fragmentation in international law, creating uncertainty and potentially allowing for forum shopping*” (South Africa). These arguments are explained and refuted in turn.
6. Firstly, it is appropriate to establish the jurisdiction of the Court in these proceedings. The relevant provisions are Article 96(1) of the UN Charter and Chapter IV of the Statute of the ICJ, particularly Article 65(1). Article 96(1) of the UN Charter states that: “*The General Assembly [ ... ] may request the International Court of Justice to give an advisory opinion on any legal question*”. Article 65(1) of the ICJ Statute states that: “*The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.*”<sup>1</sup>
7. On the issues identified earlier, several considerations are particularly relevant:

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<sup>1</sup> Res. 77/276 on Request for an Advisory Opinion of the I.C.J. on the Obligations of States in Respect of Climate Change (U.N.G.A.)

- (a) In responding (i) and (ii), similar issues were raised in relation to the COSIS request for an advisory opinion to ITLOS. ITLOS determined that:

*“the questions raised by the Commission are clear and specific enough to enable it to give an advisory opinion. The Tribunal considers that sufficient information and evidence have been made available on which to base its findings. The Tribunal further finds that the Request is compatible with its judicial functions, as it is called upon to clarify and provide guidance concerning the specific obligations of States Parties to the Convention by interpreting and applying the provisions of the Convention, in particular the provisions of Part XII, and other relevant rules of international law. As the Tribunal made clear in the SRFC Advisory Opinion, it “does not take a position on issues beyond the scope of its 49 judicial functions”*

- (b) It is important in this context that the formulation of the question was adopted by consensus following intense negotiations on the specific wording. Moreover, the resolution was adopted by consensus and co-sponsored by an unprecedented 132 states and adopted by consensus. On that basis it is difficult to imagine that the question does not reflect exactly what the General Assembly needs the Court to clarify.

- (c) Moreover, in its Advisory Opinion on the *Legality of Nuclear Weapons*, the Court had made clear that it can answer abstract questions:

*“it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is ‘a mere affirmation devoid of any justification’, and that ‘the Court may give an advisory opinion on any legal question, abstract or otherwise” (Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61; see also Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I. C.J. Reports 1954, p. 51 ; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27, para. 40)”<sup>2</sup>.*

- (d) Responding to (iii), it should be recalled that the Court has only reformulated the questions put to it in exceptional cases, on grounds which are far from applicable in the present case.<sup>3</sup>

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<sup>2</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, para. 15.

<sup>3</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 50.

- (e) Responding to (iv), similar issues were raised in relation to the COSIS advisory opinion from ITLOS regarding the proceedings of the UNFCCC and the Paris Agreement in relation to determining necessary measures under article 194, paragraph 1, of UNCLOS. ITLOS determined that:

*“The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.”<sup>4</sup>*

- (f) More fundamentally, the Court has emphasized that it cannot second-guess the General Assembly’s judgement on the political usefulness of an advisory opinion—a consideration weighing even more heavily when the resolution requesting the opinion was adopted by consensus, thus sending an unequivocal signal that, at this precise juncture, the Court’s advice is deemed crucial. Climate negotiations can greatly benefit from an authoritative statement regarding the main obligations and their implications for the conduct which is the cause of climate change. In the Kosovo advisory opinion, the Court expressly mentioned that:

*“Nor does the Court consider that it should refuse to respond to the General Assembly’s request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, in response to a submission that a reply from the Court might adversely affect disarmament negotiations,*

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<sup>4</sup> Request for an Advisory Opinion submitted by the Commission of Small Islands States on Climate Change and International Law, Advisory Opinion, ITLOS, 2024. ([https://itlos.org/fileadmin/itlos/documents/cases/31/Advisory\\_Opinion/C31\\_Adv\\_Op\\_21.05.2024\\_orig.pdf](https://itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf))

*faced with contrary positions on this issue “there are no evident criteria by which it can prefer one assessment to another”<sup>5</sup>*

- (g) In responding to (v), it should be noted, that the existence of pending proceedings on related issues has never prevented the Court to render an advisory opinion. Far from fragmenting international law, these other procedures will give the Court the benefit to know and consider the positions of the judicial bodies specifically established to interpret the relevant treaties.

## B. Conduct of States

8. The COSIS advisory opinion from ITLOS on climate change clarified the obligation of states with respect to GHG emissions as:

*“article 194, paragraph 2, of the Convention imposes upon States Parties a particular obligation applicable to the transboundary setting in addition to the obligation to prevent, reduce and control marine pollution from anthropogenic GHG emissions. Under this provision, States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. It is an obligation of due diligence. The standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.”*

9. The conduct responsible for climate change is expressly characterized in the text of the resolution, first in very general terms (Question (a) refers to “*anthropogenic emissions of greenhouse gases*”), then in more detail so as to guide the identification of the relevant obligations (preambular paragraph 5, in fine, refers to “*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects.*”) and finally in great specificity for the Court to consider whether, as a matter of principle, the conduct is consistent or inconsistent with international law and, in the latter case, what are the specific legal consequences (Question (b) refers to “*acts and omissions*” whereby States “*have caused significant harm to the climate system and other parts of the environment*”).
10. The specific conduct to be evaluated is defined in Question (b) “*acts and omissions*” whereby one or more States “*have caused significant harm to the climate system and other parts of the environment*”. This conduct can be

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<sup>5</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 35.

assessed at the levels of individual States, a specific group of States, or the conduct in general (whether it is, in principle, consistent or inconsistent with international law). There is evidence on the record allowing the Court to address any of these three assessments. The court has taken this approach previously.

11. In its advisory opinion on the Legality of Nuclear Weapons, the Court was consulted about the permissibility “under international law” of the “threat or use of nuclear weapons” with regard to “any circumstance”. The General Assembly did not specify any individual State or group thereof or, still, any specific set of circumstances of threat or use. The Court addressed the conduct in general, at times distinguishing between “nuclear-weapon States” and “non-nuclear-weapon States” as well as identifying other relevant subjects such as individual bearers of the human right to life.

### C. Governing law

12. Some written statements have raised a number of issues that characterize differently the current state of international law in relation to the conduct responsible for climate change. These can be identified as (i) some States have argued, mainly in response to Question (a) in Resolution 77/276, that international legal obligations in respect of climate change are found in the treaties of the climate change regime, mainly the UNFCCC and the Paris Agreement (USA, OPEC, Saudi Arabia, Kuwait, China, Japan, South Africa, Brazil); (ii) some States have also argued, this time in response to Question (b), that the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Act (**ARSIWA**)<sup>6</sup> are inapplicable (China, OPEC, United Kingdom, Japan, European Union) or has limited utility (Saudi Arabia; Joint statement Denmark; Finland, Iceland, Norway, Sweden; South Africa; New Zealand; Korea; Russian Federation; Australia).

13. The obligations of states under different conventions were raised in relation to the COSIS advisory opinion from ITLOS regarding the proceedings of the UNFCCC and the Paris Agreement in relation to determining necessary measures under article 194, paragraph 1, of UNCLOS. ITLOS determined that:

*“The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the*

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<sup>6</sup> Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2).



*Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.”*

14. COSIS advisory opinion from ITLOS, interprets the UNCLOS to include obligations for states to address climate change impacts to the marine environment. This aligns with the Paris Agreement’s objective of limiting global temperature rise and reducing GHG emissions.

15. The ITLOS advisory opinion, clarifies that GHG emissions are a form of marine pollution and that stringent measures with respect to state obligations are required to protect the marine environment from climate change impacts.

16. With respect to the obligations of states, it is generally recognised that the ARSIWA apply irrespective of the primary rules (the obligations) which have been breached<sup>7</sup>. Only if the treaty in question contains special secondary rules will the ARSIWA give way to such rules, and only for the specific aspects addressed in such rules. Neither the UNFCCC nor the Paris Agreement contain special secondary rules defining the content of State responsibility. Second, the application of the ARSIWA to the relevant conduct (anthropogenic emissions of greenhouse gases from a State) has been expressly recognized and examined by the European Court of Human Rights in *Verein Klimasenioren Schweiz v. Switzerland*, where the ECtHR noted that:

*“the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take*

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<sup>7</sup> Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, document A/CN.4/SER.A/2001/Add.1 (Part 2), general commentary, para. 5 (“the present articles are concerned with the whole field of State responsibility. Thus, they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.”).

*measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see Duarte Agostinho and Others, cited above, §§ 202-03). The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not [ ... ]*

*This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, albeit in other contexts, M.S.S. v. Belgium and Greece, cited above, §§ 264 and 367, and Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia, nos. 75734/12 and 2 others, §§ 160-61 and 179-81, 19 November 2019). It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party”<sup>8</sup>*

17. Third, the text of the operative part of Resolution 77/276 specifically uses, both in the English and French versions, the terminology of ARSIWA. In Question (b), the terms “injured” States (“lésés” in the French version of Resolution 77/276) and “specially affected” States (“spécialement atteints” in the French version) are borrowed from Article 42 ARSIWA. Fourth, the UN General Assembly has specifically used the terminology of “legal consequences”, which the Court understands in its case law as a reference to State responsibility.<sup>9</sup>

## D. Legal consequences

18. Given the unique opportunity provided by these advisory proceedings, it is important to be as specific as possible with respect to the legal consequences of the violative conduct identified in Question (b)(i) and (ii) of Resolution 77/276.

19. Regarding the legal consequences:

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<sup>8</sup> *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442-443.

<sup>9</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, paras. 175-182.

- a. With respect to “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”:
- i. Under the obligation of cessation and non-repetition: requirement to adopt the necessary legislation in accordance with the best available science and to recognize the binding character of policies included in nationally determined contributions under the Paris Agreement; recognition that geoengineering and carbon dioxide removal is not cessation;
  - ii. Under the obligation of reparation (restitution): recognition that a State’s maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with UNCLOS, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise; and that the statehood and sovereignty of a State will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impacts of climate change-related sea-level rise;
  - iii. Under the obligation of reparation (compensation): compensation for loss and damage, not as a mere primary rule (aid or financial assistance) but also as a secondary rule of State responsibility;
  - iv. Under the obligation of reparation (satisfaction): the recognition that a State’s maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with UNCLOS, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise; and that the statehood and sovereignty of a State will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impacts of climate change-related sea-level rise;
  - v. legal consequences of serious breaches of obligations owed *erga omnes* or to the international community as a whole.

## PART C

### III. Conclusions

20. On the basis of the foregoing considerations, PNAO respectfully submits that the following elements should be part of the answers of the Court to the questions raised by the General Assembly in its request for an advisory opinion contained in Resolution 77/276: the Court does have the jurisdiction to provide an advisory opinion and there is no compelling reason for the Court not to, the conduct responsible for climate change is clearly characterised in the resolution with respect to Question (a), “*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects.*” and with respect to Question (b), refers to “*acts and omissions*” whereby States “*have caused significant harm to the climate system and other parts of the environment*”, the primary obligations of States in relation to climate change are not limited to the UNFCCC and the Paris Agreement, consistently with a breach of the primary obligation would engage the international responsibility for that State.

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