

**INTERNATIONAL COURT OF JUSTICE**

**OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE  
(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN  
ADVISORY OPINION)**

**WRITTEN COMMENTS OF  
THE FEDERATED STATES OF MICRONESIA**

15 AUGUST 2024

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## **CHAPTER I**

### **INTRODUCTION**

1. In accordance with the Order of the President of the Court of 20 May 2024, the Federated States of Micronesia hereby submits its Written Comments on the Written Statements filed in connection with the request for an advisory opinion contained in United Nations General Assembly (“UNGA”) resolution 77/276, which was adopted by the UNGA without a vote on 29 March 2023.
2. The present Written Comments address a limited number of issues arising in one or more Written Statements filed in the present request. The Federated States of Micronesia reserves the right to address during the oral proceedings for the present request any other issues arising in the Written Statements as well as other Written Comments filed in the present request that the present Written Comments do not address.

## CHAPTER II

### ISSUES ARISING FROM THE WRITTEN STATEMENTS SUBMITTED TO THE COURT

#### A. The governing law for the advisory opinion is not limited to the United Nations Framework Convention on Climate Change or the Paris Agreement

3. The UNGA, in resolution 77/276, made clear that it was requesting the Court to consider not just the United Nations Framework Convention on Climate Change (“UNFCCC”) or the Paris Agreement as the sole governing law applicable to all parts of the question posed in the request, but to also identify all relevant obligations from a much broader swath of international law, inclusive of treaty law, customary international law, and principles of international law. The UNGA also requested that the Court assess the legal consequences arising from State actions or omissions that constitute violations of such obligations under international law, particularly with respect to establishing primary responsibility for causing significant harm to the climate system and other parts of the environment. Thus, a broad landscape of legal obligations begets a broad landscape of legal consequences.
4. This broad approach is particularly important because neither the UNFCCC nor the Paris Agreement addresses to any substantive degree – if at all – the various other elements of international law raised in UNGA resolution 77/276, including issues pertaining to human rights, the law of the sea, the rights of Indigenous Peoples and of local communities, conservation of biological diversity, ozone layer law, and principles and obligations under customary international law.
5. An illustrative example is the recent advisory opinion issued by the International Tribunal for the Law of the Sea (“ITLOS”) in Case No. 31 (“Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law”). In the advisory opinion, ITLOS determined that “anthropogenic [greenhouse gas (“GHG”)] emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4 of the [United Nations Convention on the Law of the Sea (“UNCLOS”)].”<sup>1</sup> In assessing the relationship between UNCLOS and the Paris Agreement, ITLOS further determined that “*the Paris Agreement is not lex specialis to the [United Nations Convention on the Law of the Sea (“UNCLOS”)]* and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the [UNCLOS]. Furthermore . . . the protection and preservation of the marine environment is one of the goals to be achieved by the [UNCLOS]. Even if the Paris Agreement had an element of *lex specialis* to the [UNCLOS], it nonetheless should be applied in such a way as not to frustrate the very goal of the [UNCLOS].”<sup>2</sup> ITLOS further elaborated that it “does not consider that the

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<sup>1</sup> *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, Case No. 31, ITLOS Reports 2024 (21 May 2024), para. 179.

<sup>2</sup> *Id.*, at para. 224 (emphasis added).

obligation under article 194, paragraph 1, of the [UNCLOS] would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. *The [UNCLOS] and the Paris Agreement are separate agreements, with separate sets of obligations.* While the Paris Agreement complements the [UNCLOS] in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, *the former does not supersede the latter.* Article 194, paragraph 1 [of the UNCLOS] 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>3</sup>

6. The Federated States of Micronesia urges the Court to show proper appreciation for the approach taken by ITLOS in Case No. 31, insofar as it pertains to addressing each source of international on its own merits with respect to its relevance to answering the different parts of the question in UNGA resolution 77/276, including on the issue of legal consequences, rather than deferring automatically (if not wholly) to the UNFCCC and the Paris Agreement for answers to the question.

**B. The question referred to the Court in UNGA resolution 77/276 is a solitary one, with multiple parts, and the Court must address all parts of the question, including the parts pertaining to legal consequences**

7. The UNGA, in its resolution 77/276, “[d]ecide[d], in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

‘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,

(a) 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;

(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:

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<sup>3</sup> Id., at para. 223 (emphases added).

- (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?”<sup>4</sup>
8. The use of the word “question,” the use of a singular set of quotation marks encompassing the entirety of the “question” presented, and the use of a semi-colon between sub-paragraphs (a) and (b) rather than a question mark indicate that there is a singular question presented to the Court, with multiple parts therein, including a chapeau (i.e., the section of the question directing the Court to have “particular regard” to a number of international legally binding instruments, human rights, and other rules and principles of international law when issuing the requested advisory opinion) and two parts requesting the Court to identify obligations of States under international law and legal consequences under these obligations for States that have breached these obligations in the particular context outlined in the question presented. If the Court is to issue the requested advisory opinion with full fidelity to UNGA resolution 77/276, then the Court must treat the request as containing a singular question, with multiple interlinked parts; as opposed to a request containing multiple questions, which the Court might choose to answer only in part.
  9. A number of Written Statements insist that the Court can choose to focus on the part(s) of the question pertaining to the identification of legal obligations while refraining from addressing the part(s) of the question addressing legal consequences. However, as demonstrated above, the multiple parts flow from and reinforce each other; the parts on legal consequences depend on a preceding identification of relevant legal obligations whose breaches give rise to legal consequences.
  10. Additionally, contrary to assertions made in a number of Written Statements, the wording of the chapeau of sub-paragraph (b) of the question presented does not preclude a determination of a breach of the obligations identified under sub-paragraph (a), with that breach giving rise to legal consequences identified under sub-paragraph (b). To the extent that Court identifies legal obligations in sub-paragraph (a) that pertain to, *inter alia*, the avoidance by one or more States of the causing of “significant harm to the climate system and other parts of the environment” with respect to the States, groups, and individuals referenced under sub-paragraph (b), the Court can further determine that the causation of such “significant harm” by one or more States constitutes a breach of the obligations identified in sub-paragraph (a) and thus give rise to legal consequences that the Court identifies in sub-paragraph (b). This underscores the importance of treating the present request as containing a single question with multiple parts, interrelated and indivisible.

**C. The relevant conduct giving rise to breaches of legal obligations and thus triggering legal consequences can be cumulative in nature rather than discrete and/or contemporary**

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<sup>4</sup> G.A. Res. 77/276, U.N. Doc. A/RES/77/276 (Mar. 29, 2023) (emphasis added).

11. According to article 15 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (“ARISWA”), the relevant conduct – whether acts or omissions – that gives rise to a breach of primary obligations under international law can constitute a “composite act” – specifically, “a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs. . . . In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”<sup>5</sup>
12. Thus, a State cannot claim that it is no longer in breach of its international obligations with respect to the harms caused by that State’s anthropogenic greenhouse gas emissions simply because that State’s emissions have peaked or declined. For as long as those emissions – or their impacts – are impermissible under international law, including because the State has not taken legally sufficient mitigation actions, then that State suffers legal consequences for breaches resulting from that “composite act.”

**D. ARISWA applies except when a treaty has special rules on secondary State responsibility**

13. It is generally understood that ARISWA applies regardless of what primary legal obligations for a State are at issue, including those obligations under a treaty. The sole exception is when a treaty has specific rules on secondary State responsibility that are at variance to ARISWA, and even then, only with respect to the specific elements addressed in those specific rules under that treaty.<sup>6</sup>
14. A number of Written Statements assert that even if there is a broad number of treaties and other sources of international law beyond the UNFCCC and the Paris Agreement that establish legal obligations with respect to addressing anthropogenic greenhouse gas emissions and their adverse effects, legal consequences for breaching those obligations can only be found in the UNFCCC and the Paris Agreement. However, as noted above, neither the UNFCCC nor the Paris Agreement has special/specific rules with respect to State responsibility (i.e., legal consequences) for breaches of the obligations in those treaties, let alone for breaches of obligations in other treaties and other sources of international law pertaining to anthropogenic greenhouse gas emissions. The UNFCCC and the Paris Agreement have generic provisions on dispute settlement, but those provisions do not in and of themselves specify what legal consequences, if any, would arise from breaches of primary obligations under those two instruments. Furthermore,

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<sup>5</sup> Articles on the 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), art. 15.

<sup>6</sup> Id., at 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.”)

the mechanism established under article 15 of the Paris Agreement to facilitate implementation and promote compliance with the provisions of the Paris Agreement consists of a committee that “shall be expert-based and *facilitative* in nature and function in a manner that is transparent, *non-adversarial and non-punitive*.”<sup>7</sup> Relying on that committee to determine legal consequences for breaches of legal obligations that apply to Parties to the Paris Agreement is inappropriate because legal consequences, by their nature, cannot be “non-punitive.” Hence, the UNFCCC and the Paris Agreement do not displace ARISWA.

15. It also bears mentioning that the application of ARSIWA to the relevant conduct (anthropogenic greenhouse gas emissions from a State) has been expressly recognized and examined by the European Court of Human Rights in *Verein Klimaseniorinnen Schweiz v. Switzerland*.<sup>8</sup>

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<sup>7</sup> Paris Agreement preamble, art. 15(2), Dec. 12, 2015, 3156 U.N.T.S. 1 (emphases added).

<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.



## CHAPTER III

### CONCLUSION

16. The Federated States of Micronesia welcomes the historic participation of the international community in the present advisory proceedings, as exemplified by the unprecedented number of Written Statements submitted for the proceedings and the volume of supplementary materials provided. These all underscore the dire nature of the climate crisis and the need for all elements of the international community to do their parts in addressing that crisis, including the Court through the exercise of its advisory jurisdiction to render an advisory opinion with maximum impact.

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