INTERNATIONAL COURT OF JUSTICE

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

WRITTEN COMMENTS OF JAPAN

15 August 2024

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WRITTEN COMMENTS OF JAPAN

Introduction

1. The Government of Japan observes that the numerous written statements by States and international organizations submitted in the first phase of the written proceedings highlight some points of consensus. They all reveal general awareness and recognition that climate change is "one of the greatest challenges of our time"[1], indeed "a common concern for the human kind"[2].

2. There is also broad agreement that climate change effects, as well as appropriate measures to mitigate and adapt to climate change, must rely on the best available science. In this respect, the reports of the Intergovernmental Panel on Climate Change (IPCC) have been widely recognized, explicitly or implicitly, as authoritative assessments of the scientific knowledge on climate change[3]. Other international courts and tribunals have had the occasion to confirm the legal

[1] United Nations General Assembly (UNGA), Resolution 67/210, Protection of global climate for present and future generations of humankind, A//RES/67/210, 21 December 2012 (UN Dossier No. 125), para. 2. See also 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 (UN Dossier No. 2); Written Observations of Vanuatu, para. 26; Written Observations of the United Kingdom, para. 4.1; Written Observations of Egypt, para. 5; Written Observations of Philippines, para. 1; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 66.

[2] UNGA, Resolution 43/53, Protection of global climate for present and future generations of mankind, A/RES/43/53, 6 December 1988 (UN Dossier No. 104); 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, UN Dossier No. 4), Preamble, recital 1; Paris Agreement, 12 December 2015, United Nations, *Treaty Series*, Vol. 3156, p. 79 (entry into force: 4 November 2016, UN Dossier No. 16), Preamble, recital 11; Written Observations of China, para. 3; Written Observations of Barbados, para. 16; Written Observations of Australia, para. 2.4; Written Observations of Netherlands, para. 3.73.

[3] A few participants addressed specifically the relevance of the reports of the IPCC (see for instance: Written Observations of Uruguay, paras. 15-16; Written Observations of Vanuatu, paras. 54-58; Written Observations of United Kingdom, para 4.2; Written Observations of Egypt, para. 25; Written Observations of Romania, paras. 12-15), while addressed took this relevance for granted and simply referred to those reports as evidence (see for instance: Written Observations of France, para. 8; Written Observations of Brazil, paras. 30-31; Written Observations of Colombia, para. 2.1; Written Observations of Ecuador, para. 1.9; Written Observations of South Africa, para. 24; Written Observations of IUCN, para.45(c)).

relevance of the scientific conclusions reached by this body[4], taking into account the nuances and degrees of (un)certainty that the IPCC itself attaches to its conclusions[5]. Japan shares this view and underscores that, in answering the two questions submitted to it, the Court should hold that States' obligations need concretely to be assessed in light of "best available scientific knowledge"[6] at the moment when an issue arises as to their specific scope. The best available science plays indeed a prominent role: it serves as the basis of the definition of the scope of States' obligations, including of the NDCs, together with socio-economic considerations. It also informs the interpretation of these obligations and provides a stick yard for oversight and implementation.

3. Participants to the proceedings display however a diversity of approaches concerning the applicable law and the scope of the questions before the Court. Logically, they also differ significantly on the substance of the answers to be given to those questions. Japan will examine below the arguments which plead in favour of a reasonably restrictive view of the applicable law (**section I**). It will then dwell on the essential obligations of States to ensure the protection of the climate system, as they stem from the climate change treaties (**section II**). It will finally consider the applicability of the secondary rules of State responsibility for wrongful acts to GHG emissions (**section III**).

[4] ECtHR, *Verein Klimaseniorinnen Schweiz and Others* v. *Switzerland*, Application no. 53600/20, 2024, paras. 107-120; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS, paras. 47-51*.

[5] The IPCC distinguishes between several confidence levels: "A level of confidence is expressed using five qualifiers: very low, low, medium, high and very high, and typeset in italics, for example, medium confidence. The following terms have been used to indicate the assessed likelihood of an outcome or result: virtually certain 99–100% probability; very likely 90–100%; likely 66–100%; about as likely as not 33–66%; unlikely 0–33%; very unlikely 0–10%; and exceptionally unlikely 0–1%. Additional terms (extremely likely 95–100%; more likely than not >50–100%; and extremely unlikely 0–5%) are also used when appropriate. Assessed likelihood is typeset in italics, for example, very likely." (Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers* (UN Dossier No. 75), p. 4, fn 4).

[6] Paris Agreement (UN Dossier No. 16), Preamble, recital 4; Article 4, para. 1; Article 7, para. 5; Article 14, para. 1.

I. Scope of the questions and applicable law

A. Scope of the request and relationship between the questions

1. General and abstract questions of law

4. It must be recalled that resolution 77/276 of the UNGA was adopted by consensus and the wording of the legal questions contained therein represent a careful balance achieved after extensive consultations [7]. Thus, although the questions addressed to the Court are extremely broad, in Japan's view, there is no need to reformulate them[8]. Moreover, no participant made any concrete proposals to that effect during the first phase of the written procedure. However, precisely because the questions are broad and ambiguous, the Court must clarify their scope before giving its opinion[9].

5. The Court's opinion is expected to have an *effet utile* and assist the United Nations, States and other international organizations in fulfilling their responsibilities. From this point of view, the Court's mission is less oriented than in the previous cases of exercise of the advisory jurisdiction. Indeed, in most of them, the requests were connected to a specific factual situation which the Court kept in mind when it provided its answers[10]. The advisory opinion *Legality of the Threat or Use of Nuclear Weapons* stands as an exception to that, since the Court

[7] See for instance the statement by Vanuatu: "A task of this core group was to conceptualize and balance the text of the draft resolution and legal questions to go to the International Court of Justice. The core group deliberated in great depth and at great length on the draft resolution before sharing it with United Nations membership in November 2022. This then led to the core group presenting the draft text, which was followed by three rounds of informal consultations and several informal expert consultations and engagements with the broader membership. These consultations were used to gather comments and feedback to put into what is now the final text we have introduced in the General Assembly. The intense and engaged negotiations within the core group and with the broader United Nations membership were an indication of both the importance of this initiative and the collective desire to work towards addressing the climate crisis." (*Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), p. 4).

[8] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

[9] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, paras. 135-136.

[10] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 76, para. 10.

was invited to address an abstract question of law (the legality of the threat or use of nuclear weapons) unconnected to a specific factual situation (other than on-going multilateral negotiations on a ban of nuclear weapons). As Japan underlined in its Written Submissions, the Court overcame the difficulties by identifying "the most directly relevant applicable law governing the question"[11].

6. Japan agrees with the majority of participants which consider that the broad formulation and the theoretical character of the questions asked do not constitute compelling reasons for the Court not to exercise its jurisdiction in the present case. However, for its answer to be effectual, the Court must give due consideration to the objectives of the General Assembly and ascertain the meaning of the questions in the light of those objectives. The statements delivered after the adoption of the resolution are informative to that effect. Virtually all States insisted that the advisory opinion could be instrumental in achieving the Paris Agreement goals and that is the only objective shared by all the speakers[12]. Thus, in clarifying States' obligations, the advisory opinion is expected to contribute to the interpretation and implementation of the UNFCCC and of the Paris Agreement.

2. The chapeau and the applicable law (primary and secondary rules)

a) Primary rules

7. The dispositive part of resolution 77/276 of the UNGA is introduced by a chapeau indicative of the potential applicable law. That chapeau is only indicative. The references in the chapeau are not binding upon the Court, nor are they impairing its ability and duty to identify the applicable law. It is thus for the Court to state the law applicable to the situation submitted to it[13], by selecting the rules and principles those which are relevant and necessary to respond to the questions submitted to it[14]. It is also for the Court to interpret the questions themselves with a view to fulfil the objectives sought by the General Assembly.

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[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 243, para. 34 and Written Observations of Japan, paras. 4-8.

[12] *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), Vanuatu, p. 3; *ibid*., Australia, p. 15; Germany, p. 18; Portugal, p. 24; Canada, p. 27 and *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.65, Brazil, p. 10.

[13] *Mutatis mutandis*, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, paras. 137-138.

[14] See *mutatis mutandis*, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Zeeland), Merits, Judgment, I.C.J. Reports 1974*, p. 181, para. 18.

8. The chapeau identifies several treaties and unwritten principles[15] and invites the Court to "have particular regard to" them (in French "*Eu égard en particulier à*"; in Spanish: "*Teniendo especialmente en cuenta*"). Some participants have relied upon this phrase to expand the applicable law beyond the list of references identified in the chapeau to the entire *corpus iuris gentium*[16]. If the word "particular" (*en particulier*/*especialmente*) suggests that the enumeration is indeed not exhaustive, the terms "have regard" (*eu égard à*/ *teniendo en cuenta*) imply that the sources listed must only be taken into account.

9. However, the listed references in the chapeau are not necessarily the applicable law. A distinction must indeed be drawn between the *applicable* law and the law to which the Court may *have regard* to answer the questions submitted to it. The applicable law stems from the rules and principles which *govern* the situation, that is the rules and principles capable of constituting the basis for a cogent answer. As the Court noted in its advisory opinion *Legality of the Threat or Use of Nuclear Weapons*, it is "the most directly relevant applicable law governing the question of which it was seised"[17].

10. *Ratione materiae*, the applicable law is triggered by the subject matter of the situation submitted to the Court, which concerns "the protection of the climate-system and other parts of the environment from anthropogenic emissions of greenhouse gases". The climate change treaties (i.e., the UNFCCC and the Paris Agreement) are the only instruments to regulate anthropogenic GHG emissions. Climate change may undoubtedly have an impact on the enjoyment of rights and on the implementation of obligations under other instruments (such as human rights treaties or the UNCLOS). However, these instruments are not directly responsive

[15] These are « 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" (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, (UN Dossier No. 2)).

[16] See Written Observations of Kenya, para. 2.8; Written Observations of Micronesia, paras. 42-43; Written Observations of African Union, para. 45; Written Observations of Cook Islands, para. 132; Written Observations of Dominican Republic, para. 4.4; Written Observations of Saint Lucia, para. 39; Written Observations of Thailand, para. 4; Written Observations of Uruguay, para. 69; Written Observations of Vanuatu, para. 133.

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

to the questions asked; they do not govern the matter submitted to the Court[18]. They are however part of the normative environment in light of which the applicable law – i.e., the climate change treaties – evolves as a whole.

11. According to the principle of systemic interpretation, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[19]. This is also reflected in Article 31, paragraph 3 c) of the Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT"), which states that, in interpreting a treaty, "[t]here shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties". However, this normative framework, made of treaty-rules and customary principles, is not to be confused with the applicable law. In its advisory opinion *Legality of the Threat or Use of Nuclear Weapons*, the Court distinguished between the applicable law and the law to be taken into account. It thus held that the principles and treaties relating to the protection of the environment did not contain specific rules governing the question before it, but that they could be taken into account when interpreting the applicable law. The relevant normative framework may "have a certain bearing on the interpretation"[20] of the applicable law. "But this is as far as the relationship between the two (…) can be explained in legal terms"[21].

b) Secondary rules or primary rules?

12. It should be observed that, although the chapeau refers only to primary rules of international law, it is understood that the Court applies *ex officio* the secondary rules which codify customary international law, such as those on responsibility[22]. The distinction between primary rules and secondary rules is well established, including by the ILC in its introduction to the 2001 Articles on State Responsibility:

[18] See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, pp. 43-46, paras. 58-63.

[19] *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. 31, para. 53.

[20] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 219, para. 114.

[21] *Ibid*.

[22] *Mutatis mutandis*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 60, para. 125.

> "The emphasis is on the secondary rules of State responsibility: that is to say, *the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom*. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law."[23]

13. This distinction obviously comes to mind when examining the articulation between the two questions submitted to the Court. Question (a) clearly makes a call for the Court to define the content of the international obligations (i.e., of primary rules), and thus to restate the relevant substantive international law. Question (b) on the other hand appears to refer to secondary rules of responsibility for wrongful act, by using terms such as "legal consequences" and "acts and omissions"[24]. At the same time, Question (b) does not use words such as "breach", "violation", "responsibility" or "liability"[25].

14. The situation is therefore different from the one in the advisory opinion *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, where the Court was called upon to determine the lawfulness of policies and practices of Israel in specific territories. The Court observed that the question itself was based on an assumption that those policies and practices were contrary to international law and that Israel's conduct was characterized as constituting a violation of international law[26]. Consequently, the Court considered that "determining the legal consequences of an action involved an assessment of whether that action 'is or is not in breach of certain rules and principles of international law' (*I.C.J. Reports 2004 (I)*, p. 154, para. 39). In the present case, too, as mentioned above, the Court considers that question (a)

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[23] International Law Commission (ILC), Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Y*earbook of the International Law Commission*, 2001, vol. II (2), p. 31, para. 1 of the commentary to the preamble. See also *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, paras. 64-71.

[24] Written Observations of Japan, para. 40.

[25] ITLOS was also confronted with this dilemma and concluded that the absence of any textual indication (such as "responsibility" or "liability") was indicative of the fact that the questions only covered primary obligations (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, paras. 145-146).

[26] ICJ, advisory opinion, 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para. 74.

requires an assessment of the conformity with international law of those policies and practices of Israel identified in the request."[27] In the present case, not only are words such as "violation" absent from Question (b), but more importantly, unlike Israel's "policies and practices", the "acts and omissions" referred to therein are not specifically identified, either *ratione materiae* – which acts and omissions? – nor *ratione personae* – which States? Hence, the Court does not have before it "sufficient information 'to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character'"[28].In the present case, the views on the meaning of question (b) are divided. As Japan and other States noted in their written observations[29], the drafting of Question (b) leaves open the possibility for the Court to provide an answer rooted in primary obligations. Many participants consider indeed that the application of secondary rules on responsibility for wrongful act is, if not excluded, at least inadequate to provide an effectual answer to Question (b)[30], while others argue strongly in favour of the application *ne varietur* of the ILC Articles on State Responsibility [31].

3. Issues of intertemporal law

15. Many participants insisted that the questions call for answers based exclusively on *lex lata*. There is a common understanding that the advisory opinion would not create additional obligations, but merely clarify the existing ones[32]. In

[27] *Ibid*.

[28] Ibid., para. 46 quoting *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46.

[29] See Written Observations of Japan, para. 40; Written Observations of OPEC, paras. 119-120; Written Observations of United Kingdom, paras. 136-137; Written Observations of European Union, paras. 348-355.

[30] Written Observations of OPEC, paras. 119-120; Written Observations of United Kingdom, paras. 136-137; Written Observations of European Union, paras. 348-355; Written Observations of Saudi Arabia, paras. 6.7-6.8; Written Observations of France, paras. 177-211; Written Observations of New Zealand, para. 140; Written Observations of China, paras. 133-135; Written Observations of Korea, paras. 46-49; Written Observations of Iran, para. 158; Written Observations of Kuwait, paras. 85-124; Written Observations of Russia, pp. 16-18. See also paras. 85-96 below.

[31] See for instance: Written Observations of Democratic Republic of Congo, para. 268; Written Observations of Singapore, paras. 4.2-4.3; Written Observations of Solomon Islands, paras. 230-231; Written Observations of Kenya, paras. 6.87-6.90; Written Observations of Melanesian Spearhead Group, para. 292; Written Observations of Philippines, para. 115; Written Observations of Albania, para. 129; Written Observations of Sierra Leone, para. 3.134; Written Observations of Saint Vincent and the Grenadines, para. 128.

[32] *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), European Union p. 7; Viet Nam, p. 16; Germany, p. 18; Republic of Korea, p. 22; Norway, p. 26 and *Official Records of the General Assembly*,

introducing the resolution, the Secretary-General of the United Nations confirmed that it expected the advisory opinion to "provide much-needed clarification on *existing* international legal obligations"[33].

16. This limitation, inherent to the Court's function (which is to state the existing law and not to legislate[34]), applies if the Court were to decide that the questions before it are governed, essentially or exclusively, by the climate change treaties. It applies *a fortiori* if the Court were to assess the existence and scope of States' substantive obligations under other sources of international law, including customary principles such as prevention of significant harm and the duty of due diligence, as a number of participants advocated for.

17. These limitations have a bearing on the determination of the scope of both questions. Obviously, "the obligations of States under international law" referred to in question (a) are those which are presently binding on *all* States[35]. All participants agree on the relevance of the UNFCCC and the Paris Agreement. These treaties are not only in force, but also enjoy universality[36]. The requirement of generality excludes from the applicable law regional treaties[37] or treaties which are not universally accepted[38].

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seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.65, Slovenia, p. 13; Russian Federation, p. 16.

[33] *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), p. 2 (emphasis added). For similar statements by other States, see Written Observations of United Kingdom, para. 27.4; Written Observations of United States of America, paras. 1.1-1.3; Written Observations of the Russian Federation, p. 4; Written Observations of the Republic of Korea, para. 4.

[34] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, para. 18.

[35] Japan agrees with the many States which insisted that both questions are intended to encompass the obligations of "*all* States", see *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), European Union p. 8, Australia pp. 14-15, Iceland, p. 23, Norway, p. 26, United States of America, p. 28, Austria, p. 29; see also *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV, Switzerland, p. 14.

[36] There are 195 Parties to the Paris Agreement, 198 Parties to the UNFCCC and 192 to the Kyoto Protocol.

[37] For instance, every regional human rights instruments or the Convention for the protection of the Mediterranean Sea against pollution (16 February 1976, United Nations, *Treaty Series*, Vol. 1102, p. 27 (entered into force 12 February 1978)).

[38] See for instance: Convention on Long-Range Transboundary Air Pollution ratifications, 13 November 1979, United Nations, *Treaty Series*, Vol. 1302, p. 217 (entry into 16 March 1983), 51 ratifications; Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, 30 November 1999, United Nations, *Treaty*

18. Since the obligations are to be found in *contemporary lex lata*, close attention must be paid to the successive nature of the climate change treaty regime and to the fact that the Paris Agreement supersedes to a large extent of the Kyoto Protocol, whose essential obligations expired and thus ceased to be binding on several States, including Japan[39]. Furthermore, the meaning and scope of treaty-obligations are obviously determined by the provisions and "[i]t is the duty of the Court to interpret the Treaties, not to revise them"[40]. Thus, the search for greater effectiveness in the fight against climate change cannot justify attributing to the provisions of the UNFCCC and of the Paris Agreement (or of other applicable treaties, if any) a meaning contrary to their language and their spirit. In the same vein, any perceived lacunae or shortcomings in the treaties cannot be filled in through judicial interpretation.

19. The *lex lata* limitation also has a bearing on the determination of the scope of Question (b). Assuming *arguendo* that the ILC Articles on State Responsibility was the applicable legal framework, its Article 13 recalls the basic principle that:

> "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

This principle of non-retroactivity applies to treaty[41] and customary obligations[42].

20. This is an avatar of the general principle of intertemporal law, as stated by Judge Huber in the *Island of Palmas* arbitration:

> "[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[43]

Series, Vol. 2319, p. 80 (entry into force: 17 May 2005), 31 ratifications; Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, United Nations, *Treaty Series*, Vol. 1989, p. 309 (entry into force 10 September 1997), 45 ratifications.

[39] See for instance, Written Observations of United Kingdom, paras. 40-71.

[40] *Interpretation of Peace Treaties (Second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229.

[41] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, pp. 457, paras. 100-102.

[42] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, pp. 131-134, paras. 145-161.

[43] *Island of Palmas (Netherlands/United States of America), R.I.A.A.*, Vol. II, 1928, p. 845.

21. The Court has endorsed this principle in the field of State responsibility specifically:

> "the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred."[44]

22. For a breach to give rise to responsibility, the obligation must be in force and a conduct can only be a breach if the obligation existed at that time. It is therefore essential to determine the date from which the rule whose violation may be invoked has become legally binding on the State in question, whether this be the entry into force of a treaty or the crystallization of a customary norm[45]. Given the particular characteristics of climate change obligations[46], it can be difficult to specify the critical date for the rule whose violation is invoked and for the conduct alleged to be a breach.

23. Yet, this is an indispensable exercise if the Court decides to examine Question (b) in light of the ILC Articles on State Responsibility. The Court may only rely on assumptions, based on the positions expressed during proceedings by some participants. Japan considers that this is not necessary, as the "legal consequences" referred to therein are encompassed in States' primary obligations under the climate change treaties[47].

24. If only a few States examined the question of intertemporal law in their first round of written submissions it is also because, when resolution 77/276 was adopted, Question (b) was understood to address at most future possible breaches[48] and future possible consequences. The United Kingdom stated after the adoption of resolution 77/276 that "the questions are clearly focused on assisting States in

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[44] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 124, para. 58; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 52, para. 104; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, pp. 456-458, paras. 96-104.

[45] See also Written Observations of France, para. 186; Written Observations of Russian Federation, p. 16; Written Observations of Lichtenstein, para. 80; Written statement of Netherlands, para. 5.7, Written Observations of United Kingdom, para. 137.4.2; Written Observations of United States of America, para. 5.4.

[46] See also paras. 89-96 below.

[47] Written Observations of Japan, para. 41 and paras. 73-84 below.

[48] Several States insisted indeed that its drafting should not prejudge that the question is about breaches: *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), United States of America, p. 28; Republic of Korea, p. 22; Iceland, p. 23; Norway, p. 26.

understanding their obligations under international law so that they are able to comply with them *in the future and understand the consequences if they breach them*."[49]

25. Rather than stating abstract legal consequences in case of future violations of contemporaneous climate change law, some States have called the Court to examine the legality of past GHG emissions, without specifying a critical date, but which is likely to go back decades, and even centuries, before the adoption of the climate change treaties[50]. To get around this temporal difficulty concerning the applicable law, several States[51] are arguing that past GHG emissions can be assessed in light of the principle of prevention of significant transboundary harm and of the due diligence obligations.

26. When pronouncing on the temporal dimension of the applicable law, the Court will focus on the rules and instruments in force at the time when the alleged wrongful act occurred. None of those States have established that, prior to the entry into force of the climate change treaties (the earliest date would then be 21 March 1994 for the UNFCCC) States had any obligations to reduce GHG emissions[52]. Indeed, prior to that date, international customary and treaty law did not contain any specific prescription regarding the regulation of GHG emissions. The written submissions do not even attempt to show that there existed a customary rule prohibiting a certain level of GHG emissions at the time; no practice and no *opinio*

[49] *Ibid*., United Kingdom, p. 20 (emphasis added). Similar statements were made by Germany (*ibid*., p. 18); Republic of Korea (*ibid*., p. 22); Iceland (*ibid.*, p. 23); Norway (*ibid.*, p. 26); Canada (*ibid.*, p. 27), United States of America (*ibid.*, p. 28).

[50] Some participants invite the Court to situate the critical date at the beginning of industrialization in the West (see for instance, Written Observations of Melanesian Spearhead Group, para. 298; Written Observations of Democratic Republic of Congo, paras. 64, 193, 271-276; Written Observations of Egypt, paras. 57-67; Written Observations of United Arab Emirates, paras. 146-152; Written Observations of Timor-Leste, para. 328; Written Observations of Saint-Lucia, paras. 88-89; Written Observations of OACPS, para. 148; Written Observations of Kiribati, pp. 51-53; Written Observations of India, para. 76.

[51] See for instance: Written Observations of Vanuatu, paras. 268-278 and 415, Written Observations of Costa Rica, paras. 44-49; Written Observations of Melanesian Spearhead Group, paras. 297-300; Written Observations of Barbados, para. 10.

[52] There is no need to address here the emissions of GHG such as the substances listed in Annex A of the Montreal Protocol on Substances That Deplete the Ozone Layer (16 September 1987, United Nations, *Treaty Series*, Vol. 1522, p. 3 (entered into force 1 January 1989, UN Dossier No. 26)); or in the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent (8 July 1985, United Nations, *Treaty Series*, Vol. 1480, p. 215 (entered into force 2 September 1987)). The emissions of such gases is not central to the question submitted to the Court which focusses essentially on CO2.

juris is established. There is no doubt that the Court may and must consider the evolution of climate change law, in particular with regard to the obligations concerning the reduction of GHG emissions[53]. It is also established that:

> "The Court may also rely on legal instruments which postdate the period in question, when those instruments confirm or interpret pre-existing rules or principles."[54]

27. Hence, the Court may rely on climate change treaties themselves to determine the meaning and scope of principles such as prevention of transboundary harm and due diligence, to the extent that these treaties confirm or interpret these preexisting principles. Yet, as it will be further analysed below[55], climate change treaties do not merely confirm or interpret these pre-existing principles. Rather, they complement and implement them in relation to GHG emissions. As such, they adopt *new* groundbreaking decision. Every effort in the climate change treaties regime, including COP and CMA decisions such as the one reached last year: the Fund for loss and damage[56], is celebrated as progress to address climate change. In the same vein, the adoption of the Paris Agreement in 2015 and, in particular, of its long-term temperature goal[57], were acclaimed as a historical achievement.

28. Thus, whenever substantive decisions are adopted within the climate change treaty regime, often after marathon sessions and last-minute concessions reflected in the carefully designed formula, all acknowledge their importance because they are practical and effective measures adopted by consensus to strengthen the global response to the threat of climate change. Such reactions rather

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[53] See para. 66 below.

[54] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 130, para. 143.

[55] See paras. 35-48 below.

[56] Conference of the Parties to the UNFCCC, Decision 2/CP.27, "Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage", UN Doc. FCCC/CP/2022/10/Add.1, 6 November 2022 (UN Dossier No. 168); Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 2/CMA.4, "Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage", UN Doc. FCCC/PA/CMA/2022/10/Add.1, 6 November 2022 (UN Dossier No. 175) and Conference of the Parties to the UNFCCC, Decision 1/CP.28, "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", UN Doc. FCCC/CP/2023/11/Add.1, 30 November 2023.

[57] This is to hold global average temperature increase to "well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Article 2, para. 1a)).

stand for a negative *opinio juris*, confirming that an equivalent customary rule did not exist at the time of the adoption of these treaties[58].

29. This insurmountable obstacle cannot be overcome by the theory of breaches consisting of continuous acts[59] or of composite acts[60]. Indeed, a continuous or a composite act cannot affect the legality of past conduct, which was legal at the moment when it occurred, and which would no longer be lawful after the emergence of a new international obligation. In its commentary under these provisions, the ILC insisted that "the existence and duration of a breach of an international obligation depends for the most part *on the existence and content of the obligation*"[61] and "takes into account the question of the *continuance in force*

[58] As underlined by the ILC to identify the *opinio juris*, public statements "may also indicate lack of acceptance as law", and "are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice", Conclusion 10, para. 3 (ILC, Draft Articles on identification of customary international law, Y*earbook of the International Law Commission*, 2018, vol. II (2), p. 103, para. 3 of the commentary to conclusion 10).

[59] Article 14 of the ILC Articles on State Responsibility establishes that:

"2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation." (ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, Article 14, in UNGA, Resolution 56/83, Responsibility of States for internationally wrongful acts, 12 December 2001).

Some States invoked this provision: see Written Observations of Democratic Republic of Congo, paras. 254 and 276; Written Observations of Sierra Leone, para. 3.137; Written Observations of Vanuatu, paras. 527-528; Written Observations of Antigua and Barbuda, para. 536.

[60] According to Article 15 the ILC Articles on State Responsibility:

"1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. 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." (ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, Article 15, in UNGA, Resolution 56/83, Responsibility of States for internationally wrongful acts, 12 December 2001). Some participants invoked this Article, see Written Observations of Vanuatu, paras. 527-535; Written Observations of Saint Lucia, paras. 87-97; Written Observations of Mauritius, para. 210(b); Written Observations of Commission of Small Island States, para. 149; Written Observations of Albania, para. 130(d); Written Observations of African Union, para. 231; Written Observations of Melanesian Spearhead Group, para. 299; Written observations of OACPS, paras. 147-156.

[61] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Y*earbook of the International Law Commission*, 2001, vol. II (2), p. 59, para. 1 of the commentary to the Article 14 (emphasis added).

of the obligation breached"[62]. Continuous and composite acts lead to prolonging an act which was already unlawful at the moment when it occurred into the future, being understood that "the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation"[63].

30. The same applies to general principles such as prevention of transboundary harm and due diligence. These obligations are usually construed as best-efforts obligations. Moreover, the standards relevant for the application of those principles are evolutionary: there is a progression *ratione temporis* and *ratione materiae*[64]. This evolution is reflected in the adoption of successive treaties which mark a progression of goals and a strengthening of implementation methods.

31. Specifically, the international community has underlined the necessity to protect the climate-system from the effects of GHG emissions since late 1980s- the 1990s[65]. Nearly every year since its first text on the subject, namely Resolution no. 43/53 on the protection of global climate for present and future generations of mankind adopted on 6 December 1988, the issue of global climate protection for present and future generations has been put on the agenda of the General Assembly, resulting in the adoption of numerous resolutions[66].

[62] *Ibid*.

[63] *Ibid.*, p. 62, para. 14 of the commentary to the Article 14.

[64] The Seabed Disputes Chamber of ITLOS, in its 2011 Advisory Opinion on *Responsibilities in the Area*, highlighted the evolutionary nature of the due diligence standard and held that 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 … [and] be more severe for the riskier activities" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 83, para. 205; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 239.

[65] Both the ITLOS and the ECtHR underlined that the resolution 43/53 of 6 December 1988 was the first in which the UNGA recognized that "climate change is a common concern of mankind" (ECtHR, *Verein Klimaseniorinnen Schweiz and Others* v. *Switzerland*, Application no. 53600/20, 2024, para. 148 and *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 47).

[66] Resolution 76/205 (UN Dossier No. 134) on the protection of global climate for present and future generations of mankind, 17 December 2021 is the latest resolution under this item.

32. The UNFCCC stands as the nucleus of the system. This is a framework convention, setting the objective[67] and establishing the governance structure for the international climate regime. It is also a substantive convention, providing for general commitments regarding mitigation, adaptation and financial support[68], without establishing any legally binding targets and timetables. The UNFCCC laid the grounds for further action, which was concretized by the Paris Agreement.

33. The Paris Agreement marks the moment when States agreed on an overarching quantified goal of GHG emissions reduction[69]. While the goal is aspirational, the Agreement contains a common set of core binding obligations for all Parties which aim at achieving : adoption of NDCs which should lead to an effective implementation of domestic mitigation measures with an expectation of progression over time; financial commitments; a common transparency and accountability framework; every five years, a global evaluation of the progress achieved through the global stocktake, which is also the moment when States should put forward more ambitious emission reduction targets. Their scope will be briefly discussed below.

34. In terms of reduction of GHG emissions, it is thus obvious that the standards of due diligence have evolved and are expected to evolve in time. One cannot judge the legality of past conduct (during 19th century, in the 1950s, in the 1990s) in light of the present standards.

B. The interaction between climate change treaties and customary principles

35. The Court and ITLOS have recognized the customary value of principles of environmental law such as the obligation of prevention of transboundary harm and the due diligence obligation[70]. These principles have inspired the adoption of

[67] According to Article 2, this objective is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Paris Agreement (UN Dossier No. 16)).

[68] *Ibid*., Articles 4, 5, 6 and 12.

[69] This is specified in its Article 2, para. 1: "(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".

[70] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241, para. 29; *Gabčíkovo-Nagymaros Project (HungarylSlovakia), Judgment, I.C.J. Reports 1997*, p. 41, para. 53; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, pp. 55-56, para. 101; *Dispute over the Status and Use of the Waters of the Silala (Chile* v.

the UNFCCC and the subsequent development of the treaty regime, adapting them to the particularities of climate change caused by anthropogenic GHG emissions.

36. These principles aimed at the protection of the environment and of the climate system come in competition and need to be reconciled with other general principles, such as the right to development, to which some participants referred[71]. At the domestic level, the adoption of measures of mitigation and adaptation equally requires the balancing between competing interests, which only the national authorities may appreciate and achieve, and this explains that States envoy a margin of appreciation in implementing their obligations.

37. The European Court of Human Rights recognized that:

> "Climate change is a polycentric issue. Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such 'green transitions" necessarily require a very complex and wide ranging set of coordinated actions, policies and investments involving both the public and the private sectors. Individuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations. (…) [W]hile the challenges of combating climate change are global, both the relative importance of various sources of emissions and the necessary policies and measures required for achieving adequate mitigation and adaptation may vary to some extent from one State to another depending on several factors such as the structure of the economy,

Bolivia), Judgment, I.C.J. Reports 2022, pp. 644-645, para. 83; *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. See also *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. 50, para. 145; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 355.

[71] See Written Observations of Timor Leste, paras. 316-332; Written Observations of Tonga paras. 263-272; Written Observations of Dominican Republic, paras. 4.47-4.48; Written Observations of Sierra Leone, paras. 3.100-3.111; Written Observations of Bahamas, paras. 157-158; Written Observations of China, para. 28; Written Observations of Iran, paras. 143-145; Written Observations of African Union, paras. 199-203; Written Observations of Egypt, paras. 212-220; Written Observations of Namibia, paras. 115-120; Written Observations of Bolivia, para. 43; Written Observations of Bangladesh, paras. 116-119.

> geographical and demographic conditions and other societal circumstances. Even if in the longer term, climate change poses existential risks for humankind, this does not detract from the fact that in the short term the necessity of combating climate change involves various conflicts, the weighing-up of which falls, as stated previously, within the democratic decision-making processes…"[72]

38. This plurality of principles was already acknowledged in soft law instruments such as the 1972 Stockholm Declaration [73] and the 1992 Rio Declaration[74]. Significantly, the recital 8 of the preamble of the UNFCCC recalls these competing principles:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources *pursuant to their own environmental and developmental policies*, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[75]

It is further reflected in Article 3, paragraph 3 (Principles) of the Paris Agreement which states:

> "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change *should be cost-effective so as to ensure global benefits at the lowest possible cost*. To achieve this, such policies and measures should *take into account different socio-economic contexts*, be comprehensive, cover all relevant sources, sinks

[72] ECtHR, *Verein Klimaseniorinnen Schweiz and Others* v. *Switzerland*, Application no. 53600/20, 2024, paras. 419 and 421.

[73] Declaration of the United Nations Conference on the Human Environment, 16 June 1972, in Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev.1 (UN Dossier No. 136), Principle 21.

[74] Rio Declaration on Environment and Development, 14 June 1992, in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26/Rev.1 (Vol. I), p. 3 (UN Dossier No. 137), Principle 2.

[75] UNFCCC (UN Dossier No. 4), Preamble, recital 8.

and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors."[76]

39. Similarly, the preamble of the Paris Agreement strikes a careful balance by recalling the diversity of considerations which need to be taken into account when adopting measures to protect and preserve the climate system[77]. This balance is a quintessential characteristic of the climate change regime, on which its broad acceptance by States is premised. The general architecture of the treaty and the wording of its provisions reflect this balance.

40. Climate change treaties implement and complement the customary principles of prevention of transboundary harm and due diligence, whose scope is general and pluri-dimensional, as they are likely to find application in different areas of law. It stems from the Court's case-law that there is no unique standard to guide their application.

41. The Court has clarified that the two principles are interconnected when they are applied to the protection of the environment:

"the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. (…) A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[78]

42. It is also established that these are obligations of conduct:

"[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of [a wrongful

[76] Paris Agreement, Preamble, recitals 7 to 10.

[77] See "in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (UNFCCC (UN Dossier No. 4), Preamble, recital 8)) and "responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty" (*Ibid*., Preamble, recital 21).

[78] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, pp. 55-56, para. 101.

act]: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent [a wrongful act] so far as possible."[79]

43. Finally, the implementation of these principles is variable, as it is the assessment of whether they have been complied with or not:

"[T]he notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned."[80]

"[D]ue diligence is a 'variable concept' (…). It is difficult to describe due diligence in general terms, as the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies. There are several factors to be considered in this regard. They include scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved. The standard of due diligence may change over time, given that those factors constantly evolve."[81]

44. The climate change treaty regime and more specifically the Paris Agreement incorporate these general principles and provides specific obligations, which are immediately operational. In its 2024 advisory opinion, ITLOS confirmed that the climate change treaties establish the relevant standards for assessing the meaning of the general principles of prevention and due diligence:

"Relevant international rules and standards are another reference point for assessing necessary measures [to prevent pollution of the marine environment]. In the context of climate change, such international rules and standards are found in various climate-related treaties and instruments. (…)

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[79] *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; see also *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 111; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, paras. 234, 237-238.

[80] *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; see also *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 111; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, paras. 234, 237-238.

[81] *Ibid*., quoting *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117.

> Most of the participants in the proceedings referred to the UNFCCC and the Paris Agreement as being relevant to the assessment of necessary measures."[82]

45. Some provisions of the Paris Agreement provide for a more stringent obligation on the part of the States: for instance, due diligence requires the adoption of a domestic legal framework, its good faith implementation and oversight in this implementation. This remains an obligation of conduct, understood as an obligation to act towards the reduction of GHG emissions[83]. However, under the Paris Agreement, "*[e]ach Party shall prepare*, *communicate* and *maintain* successive nationally determined contributions that it intends to achieve" (Article 4, paragraph 2, emphasis added). The exercise of a certain level of vigilance in their enforcement and of administrative control is similarly strengthened by the mechanism of oversight established by the Paris Agreement[84].

46. Under the customary duty of due diligence, States enjoy a large margin of discretion to determine the content of the domestic legislative measures. While they continue to enjoy a margin of appreciation under the Paris Agreement, the treaty also provides for objective parameters to be taken into account when the NDCs are adopted. Among these, there is the global temperature goal and the timeline for emission pathways set forth in the Paris Agreement (Article 2, paragraph 1, Article 3, Article 4, paragraphs 1 and 3); the best available scientific knowledge to inform the decisions to be adopted at the domestic level[85]; or the international standards further adopted during different COPs.

47. In short, in the field of climate change, the application of these general principles is guided by the provisions of the Paris Agreement. As the ILC Study Group on Fragmentation concluded, "[i]t is a generally accepted (…) that when

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[82] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 215; see also *ibid*., para. 286.

[83] "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. 79, para. 197). In the same vein, see *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 235.

[84] See paras. 80-84 below.

[85] See also *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, paras. 206-207, 216-218, 239, 316-317, 361, 405 and 414.

several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations"[86]. However, systemic interpretation cannot possibly lead to a conclusion according to which the general principles prevail over treaty-rules and prevent the Parties to the Paris Agreement from relying on its clauses in order to assess the scope and the limits of their obligations[87].

48. The Paris Agreement and the decisions adopted by the Meetings of the Parties are indeed the most recent and dynamic expression of States' commitments, as well as their responsibilities in respect of climate change. That includes the unique legal character of each provision of the Paris Agreement.

II. Substantive obligations relevant for answering Question (a)

49. Question (a) asks the Court to specify:

> "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?"

50. As noted above, in Japan's view, the Court may provide a comprehensive answer based on the Paris Agreement. There is no doubt that the Agreement is a treaty, as defined in the VCLT. As such, it is an instrument binding upon the 195 Parties which concluded it. No reservations may be made to it (Article 27).

51. The Paris Agreement is an agreement which, in enhancing the implementation of the UNFCCC and its objective, aims to strengthen the global

[86] ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, in UNGA, Fifty-eighth session, 1 May-9 June and 3 July-11 August, 2006, UN Doc. A/CN.4/L.682, p. 8.

[87] See *mutatis mutandis Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 219, para. 114. In the same vein, in the *Right of passage* case, the Court concluded that "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules." (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 44).

response to the threat of climate change[88]. As such, the UNFCCC and the Paris Agreement must be interpreted in conformity with one another. The provisions of the UNFCCC referring to "related legal instruments" [89] apply to the Paris Agreement. The Paris Agreement also makes use of the UNFCCC's institutions, including the COP and financial mechanisms.

A. THE PARIS AGREEMENT: MAIN SUBSTANTIVE OBLIGATIONS

52. The Paris Agreement's central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise in this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Additionally, the Agreement aims to increase the ability of States to deal with the impacts of climate change, and to make finance flows consistent with a low GHG emissions and climate-resilient pathway.[90]

53. To reach these ambitious yet necessary goals, appropriate mobilization and provision of financial resources, a new technology framework and enhanced capacity building are needed to be put in place, thus supporting action by developing countries and the most vulnerable countries. The Agreement also provides for an enhanced transparency framework for action and support. Some of the key aspects of the Agreement are set out below, while the provisions on financial assistance and oversight of implementation are discussed in the context of the analysis of Question (b).

1. The target provisions

54. ***Long-term temperature goal*** (Art. 2) – The Paris Agreement, in seeking to strengthen the global response to climate change, reaffirms the goal of limiting global temperature increase to well below 2 degrees Celsius, while pursuing efforts to limit the increase to 1.5 degrees. The aspirational 1.5° C goal requires drastic comprehensive measures. For this reason, the goal is expressed in aspirational terms ("pursuing efforts to limit"), but it sets a clear direction of travel for the climate change regime. In the outcome of the Global Stocktake, the Parties resolved to

[88] Paris Agreement, Article 2, Paragraph 1.

[89] UNFCCC (UN Dossier No. 4), Article 2 (ultimate objective), Article 7, para. 2 (power of the COP to review implementation) and Article 14 (dispute settlement).

[90] United Nations Climate Change, "Key aspects of the Paris Agreement", available at: https://tinyurl.com/4wkrxs64, accessed on 2 June 2024.

pursue efforts to limit the temperature increase to 1.5° C through underscoring the impacts of climate change. The long-term temperature goal indicates a way forward and clearly implies that more mitigation action is needed[91].

55. ***Global peaking*** **and 'climate neutrality'** (Art. 4) –To achieve this temperature goal, the Parties aim to reach global peaking of GHGs as soon as possible, recognizing peaking will take longer for developing country Parties, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the century. The provisions themselves do not contain a specific timeline, but the temporal trajectory has been specified by subsequent COPs.

2. Mitigation (Article 4)

56. The Paris Agreement provides for an obligation to mitigate future emissions and recognizes that mitigation[92] is indispensable to avert the worsening impacts of climate change.

57. Article 4, paragraph 2 is the central provision[93] which provides that the mitigation obligation shall be implemented through the adoption of NDCs:

> "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."

[91] Paris Agreement (UN Dossier No. 16), "ambitious efforts" (Article 3), "reach […] as soon as possible" (Article 4, para. 1), "Each Party's successive nationally determined contribution will represent a progression […] and reflect its highest possible ambition (Article 4, para. 3), "undertaking economy-wide absolute emission reduction targets."; "continue enhancing their mitigation efforts" (Article 4, para. 4), "Parties are encouraged to take action" (Article 5, para. 2), "Promote mitigation and adaptation ambition" (Article 6, para. 8(a)).

[92] IPCC defines mitigation of climate change as: "A human intervention to reduce emissions or enhance the sinks of greenhouse gases" and climate policy mitigation measures "are technologies, processes or practices that contribute to mitigation, for example renewable energy technologies, waste minimisation processes and public transport commuting practices" (Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability- Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers*, 2022, Annex II, p. 2915).

[93] Article 5 establishes correlative obligations, encouraging Parties to conserve and enhance, as appropriate, sinks and reservoirs of GHGs, including forests.

58. This is a carefully negotiated text, which alternates between strong and soft commitments. It must be noted that, unlike the majority of provisions in the Paris Agreement that apply to "Parties"[94], the first sentence of this provision applies to "each Party", thus creating individual obligations of mitigation. Second, this provision uses the imperative "shall" [95] both in relation to preparing, communicating and maintaining NDCs, as well as pursuing domestic mitigation measures. However, while the obligation to establish and maintain a NDC is unconditional, the phrase "intends to achieve" shows that the implementation of the NDCs rests on a good faith expectation of compliance by the Parties with their own NDCs, but stops short of requiring them to do so. This understanding is reinforced by the end of the clause ("with the aim of achieving the objectives of [their] contributions").

59. This obligation of objective is clearly an obligation of conduct, whose scope remains to be defined. It is however certain that neither the Paris Agreement nor the subsequent COP decisions specify a precise, objective calculation of a global budget of GHG or the sharing of efforts among the Parties. Hence, there is no international rule specifying what achieving these targets would require from an individual Party. This is entirely within the margin of appreciation of the Parties, when they define their individual NDCs, in balancing between their mitigation obligations and their domestic socio-economic imperatives. While the COP may establish guidelines to that effect[96], NDCs reflect the diversity of criteria that Parties rely on to implement their mitigation objectives.

60. **The principle of progression.** Each Party's successive NDC is expected to progress beyond its current NDC and to reflect its highest possible ambition (Article 4, paragraph 3 uses the less imperative "will": "Each Party's successive

[94] Paris Agreement (UN Dossier No. 16), Article 3, Article 4, paras. 1-2, 8, 13, 15-16, 19, Article 5, paras. 1-2, Article 6, paras. 1, 3, 8, Article 7, paras. 2, 4-7, Article 8, paras. 1, 3, Article 9, para. 2, Article 10, paras. 1-2, Article 11, para. 4, 12 and Article 14, para. 3.

[95] On the imperative value of "shall", see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 321, para. 92; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 39, para. 95.

[96] Paris Agreement (UN Dossier No. 16), Article 4.13-4.14; Conference of the Parties to the UNFCCC, Decision 1/CP.21, "Adoption of the Paris Agreement", 29 January 2016, UN Doc. FCCC/CP/2015/10/Add.1 (UN Dossier No. 155), paras. 20-25; Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 4/CMA.1, "Further guidance in relation to the mitigation section of decision 1/CP.21", 15 December 2018, UN Doc. FCCC/PA/CMA/2018/3/Add.1 (UN Dossier No. 155).

NDC will represent a progression…"). This expectation of progression applies to each Party but also collectively. Article 14, paragraph 3 provides that:

> "The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action."

61. This progression principle was viewed as crucial by many States, since the NDCs submitted in the run-up to the Paris Agreement were acknowledged by Parties themselves to be insufficient[97]. Hence, the subsequent COPs have stated its recognition for strengthened timeline and measures to be adopted. The Sharm el-Sheikh Implementation Plan adopted at COP27 "[r]ecognizes that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030"[98].

62. **The global stocktake**[99], which is the central outcome of COP28 in Dubai (December 2023), recognizes that GHG emissions need to be cut 43% by 2030, compared to 2019 levels, to limit global warming to 1.5°C. It also notes that collectively, the Parties are not driving to meeting the Paris Agreement goals. Hence, concrete measures are recommended. The global stocktake calls on the Parties to take part in global efforts including a tripling of renewable energy capacity and doubling energy efficiency improvements at a global scale, or transitioning away from fossil fuels in a just, orderly and equitable manner[100].

3. Adaptation

63. Adaptation is defined in Article 7, paragraph 1 of the Paris Agreement as the action of "enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change in the context of the temperature goal of the

[97] Conference of the Parties to the UNFCCC, "Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions", 30 October 2015, UN Doc. FCCC/CP/2015/7.

[98] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 1/CMA.4, "Sharm el-Sheikh Implementation Plan", 20 November 2022, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (UN Dossier No. 174), para. 15.

[99] According to Article 14 a "global stocktake" shall be made in 2023 and every 5 years thereafter, to assess collective progress toward achieving the purpose of the Agreement in a comprehensive and facilitative manner (Paris Agreement (UN Dossier No. 16).

[100] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 1/CMA.5, "Outcome of the first global stocktake", 30 November 2023, UN Doc. FCCC/PA/CMA/2023/16/Add.1, para. 28(d).

Agreement"[101]. Adaptation aims to significantly strengthen national adaptation efforts, including through support and international cooperation. It recognizes that adaptation is a global challenge faced by all.

64. The adaptation commitments are softer than those regarding mitigation, simply because the actions are country-driven. While Article 7, paragraph 9 entails an individual obligation ("Each Party shall…engage in adaptation planning processes and the implementations of actions…"), most of the adaptation obligations are addressed to "Parties" and contain a terminology underlying soft commitments, leaving a large margin of discretion ("Parties should", "as appropriate"[102]). The Parties are thus encouraged to submit and update adaptation communications (possibly as part of their NDCs), to identify priorities and needs for listing on a public registry[103], and to strengthen cooperation on adaptation[104].

B. DIFFERENTIATION IN MITIGATION OBLIGATIONS

65. The first round of written statements reveals significant points of common recognition regarding the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). Most participants seem to acknowledge that this principle is treaty-based[105] and has not acquired the status of customary international law[106]. Differential treatment for developed and developing States is warranted only when the underlying international legal obligations provide for it[107].

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[101] The IPCC's definition is the following: "the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities. In natural systems, … human intervention may facilitate adjustment to expected climate and its effects." (Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability- Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers*, 2022, Annex II, p. 2915).

[102] Paris Agreement (UN Dossier No. 16), Article 7, para. 5, 7(a), 9-10 and Article 13, para. 8.

[103] Paris Agreement (UN Dossier No. 16), Article 7, para.10 read with Article 13, para. 8.

[104] *Ibid*., Article 7, para. 7.

[105] To recall, Article 3 of the UNFCCC refers to this principle as one of the principles to guide the Parties in their actions to achieve the objective of that Convention and to implement its provisions. Article 2, paragraph 2, of the Paris Agreement also states that "[t]his 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".

[106] See however Written Observations of Brazil, para. 27; Written Observations of Pakistan, para. 43, Written Observations of Thailand, paras. 18-25; Written Observations of Kenya, paras. 5.23-5.25.

[107] See also, *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*, pp. 52-55 paras 151-163. In its 2024 advisory Opinion, ITLOS did not consider the principle to be incorporated in UNCLOS. It simply observed that it had commonalities with a

Certain types of obligations, such as the due diligence, leave room for modulation, but this modulation is circumstantial, not normative. In the present case, the Court is not called to rule on specific circumstances, but in the abstract. Differentiation is therefore anchored in climate change treaties and its content is determined by them. Specifically, the application of the principle of CBDR-RC in the field of climate change law is guided by the Paris Agreement.

66. The core obligations under the Paris Agreement allow for differentiation. They distinguish between "developed" and "developing" countries, without defining the two concepts. It is however clear that the Paris Agreement has abandoned the UNFCCC and Kyoto Protocol's annex-based approach to differentiation, which was both outdated and rigid. This is another significant convergence of views, and only a minority of participants has argued in the first round of written pleadings that differentiation should still be annexed-based[108].

67. It is also agreed that "it is not only for developed States to take action, even if they should 'continue taking the lead'. All States must make mitigation efforts"[109]. Regarding mitigation, the principle requires to overcome the dichotomy between developed and developing States, and calls for a more nuanced approach, which acknowledges the specific national circumstances, capacities, and vulnerabilities[110]. Differentiation is thus allowed in respect to mitigation, since the provisions relating to the purpose of the Agreement[111], progression[112], and long-term low GHG development strategies[113] refer to it. The mentioning of the concept is always accompanied by the qualification "in light of different national circumstances". As

few of the provisions of the Convention: see *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, paras. 229 and 326.

[108] See Written Observations of Saudi Arabia, para. 4.13; Written Observations of OPEC, paras. 46, 84-85.

[109] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, paras. 229, 326. Among the written statements, see Written Observations of France, para. 47; Written Observations of Russia, p. 19; Written Observations of European Union, paras. 203-205, 209, 211-212, 215-219; Written Observations of Russia, p. 19; Written Observations of Thailand, paras. 20-21; Written Observations of Timor Leste, para. 128; Written Observations of Colombia, para. 3.56; Written Observations of Antigua and Barbuda, para. 276; Written Observations of Iran, para. 38.

[110] See Written Observations of Kenya, para. 5.38; Written Observations of Germany, paras. 56-58; Written Observations of Liechtenstein, para. 79; Written Observations of European Union, para. 205; Written Observations of Russian Federation, p. 19; Written Observations of Antigua and Barbuda, para. 280; Written Observations of Tonga, para. 171.

[111] Paris Agreement (UN Dossier No. 16), Article 2, para. 2.

[112] *Ibid*., Article 4, para. 3.

[113] *Ibid*., Article 4, para. 19.

national circumstances are themselves, by definition, evolving, so too will be the common but differentiated responsibilities of States[114].

68. Differentiation in the climate change regime as encompassed in the Paris Agreement is flexible (since it depends on the nature of the obligation considered) and dynamic (since it may evolve in time). Japan acknowledges the leadership role of developed countries, which entails more stringent mitigation obligations, as reflected in their NDCs. At the same time, the application of the CBDR-RC cannot lead to undermine the realization of the primary objective of the Paris Agreement to limit the increase of temperature to 1.5°C above pre-industrial levels[115].

69. Hence, the CBDR-RC cannot be a blank-cheque for some States to increase their share of emissions in a manner that would ultimately undermine this common goal. Such a conception runs also contrary to Article 4, paragraph 2 which provides that "Parties *shall pursue domestic mitigation measures*". Such a regressive view of the principle of CBDR-RC would be also contrary to the principle of progression (Article 4, paragraph 4, states: "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.").

70. Many States also insisted that the principle of CBDR-RC implies enhanced assistance commitments for developed States[116]. Japan acknowledges that this is part of the leadership role of developed countries in the Paris Agreement and will examine these aspects in the next section.

[114] The crucial role of the respective national capabilities was also recognized by ITLOS when discussing the principle of prevention under UNCLOS: "Thus, the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic and financial capabilities." (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024*, *ITLOS*, para. 225).

[115] See, para. 52 above.

[116] See Written Observations of Bangladesh, paras. 130-131; Written Observations of Bolivia, paras. 27-32; Written Observations of Brazil, paras. 38-55; Written Observations of Costa Rica, para. 64; Written Observations of Ecuador, para. 3.60; Written Observations of Nepal, paras. 23-24; Written Observations of Solomon Islands, paras. 92-93, 101-114; Written Observations of Tonga, paras. 173-175, 194-206.

III. BASES FOR ANSWERING QUESTION (B)

71. Question (b) is worded as follows:

> "(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?"

72. Japan considers that these legal consequences can be addressed primarily through the substantive obligations of climate change treaties **(A)**. The ILC Articles on Responsibility of States for Internationally Wrongful Acts may only play a subsidiary role and, in any case, they are not appropriate to deal with the question of past GHG emissions **(B)**.

A. QUESTION (B) AS REFERRING TO SUBSTANTIVE FINANCIAL OBLIGATIONS UNDER CLIMATE CHANGE TREATIES

73. Japan recalls, in line with its initial Written Observations, that these legal consequences are determined primarily by climate change treaties[117]. As stated:

> "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 (a) […] '[T]hese' obligations derive mainly from the climate change treaties: This must equally be the case for 'the legal consequences'."[118]

[117] Written Observations of Japan, paras. 41-45.

[118] *Ibid*., para. 41. In the same vein see, Written Observations of United Kingdom, para. 136; Written Observations Saudi Arabia, para. 6.3; Written Observations of OPEC, para. 17; Written Observations of United Arab Emirates, paras. 16-17; Written Observations of Iran, paras. 31-31.

1. Substantive financial commitments

74. The aim of the Paris Agreement is not to attribute responsibility for the adverse effects of climate change to any particular or group of States, but to promote a sense of equity and solidarity. In this respect, Article 8 addresses the question of "loss and damage". 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"[119].

75. This Article reflects a substantive commitment for Parties and does not reflect a secondary rule, i.e. the legal consequences entailed by the consequences of a breach of the primary rule[120]. Indeed, the COP expressly stated that the Warsaw International Mechanism, to which this provision is associated[121], "does not involve or provide a basis for any liability or compensation"[122]. "Historical responsibility" has long been a subject of debate in the drafting of conventional obligations. In the end, the Parties agreed on a system of cooperation and solidarity and the Paris Agreement and the First global stocktake make no reference to "historical responsibilities"[123].

76. Reflecting and implementing the principle of CBDR-RC, Article 9 obliges developed countries to provide financial resources to assist developing countries with adaptation and mitigation, "in continuation of their existing obligations under the Convention". The Parties other than developed States are encouraged to contribute[124]. The Parties also have a number of new reporting requirements concerning the projected levels of public finance[125] and introduces an expectation

[119] 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 (UN Dossier No. 158), preambular recital 4.

[120] See paras. 12-13 above.

[121] Paris Agreement (UN Dossier No. 16), Article 8, paras. 2-3.

[122] Conference of the Parties to the United Nations Framework Convention on Climate Change, Decision l/CP.21, "Adoption of the Paris Agreement", UN Doc. FCCC/CP/2015/ 10/Add.1, 29 January 2016 (UN Dossier No. 155), para. 51. See in the same vein, Written Observations of European Union, paras. 326-332.

[123] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 1/CMA.5, "Outcome of the first global stocktake", 30 November 2023, UN Doc. FCCC/PA/CMA/2023/16/Add.1.

[124] Paris Agreement (UN Dossier No. 16), Article 9, para. 2.

[125] This is an obligation for developed States and encouragement for other States (*Ibid*., Article 9, para. 5).

of progression, recommending that the mobilization of climate finance should represent a progression beyond previous efforts[126].

77. The main recipients of these financial assistance commitments are "developing country Parties, especially those that are *particularly vulnerable to the adverse effects of climate change* and have significant capacity constraints, such as *the least developed countries* and *small island developing States*"[127]. These financial commitments are in line with the general logic of this treaty regime which promotes a cooperation policy rather than "legal consequences" for damage resulting from a breach of international obligations.

78. In this respect, COP28 was another breakthrough moment. The conference got underway with a historic agreement on the operationalization of funding arrangements for addressing loss and damage, including a new dedicated fund[128]. The establishment of the fund is an important symbol of global solidarity reflecting both the urgency of the climate emergency and a step forward in addressing climate change as a common concern of humankind. Pledges to address loss and damage came out in moments after the decision was gavelled, totalling more than USD 600 million to date.

79. The UNFCCC and the Paris Agreement have thus established a comprehensive regime which addresses compliance and harm to particularly vulnerable States and affected peoples, but the choice was to do so in a non-adversarial way[129].

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[126] *Ibid*., Article 9, para. 3.

[127] *Ibid*., Article 9, para. 4 (emphasis added).

[128] This historic agreement builds on the decision adopted a year earlier at COP 27/CMA 4 where nations agreed to set up a fund to support vulnerable countries and communities already experiencing the adverse impacts of climate change (Conference of the Parties to the UNFCCC, Decision 2/CP.27, "Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage", UN Doc. FCCC/CP/2022/10/Add.1, 6 November 2022 (UN Dossier No. 168); Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 2/CMA.4, "Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage", UN Doc. FCCC/PA/CMA/2022/10/Add.1, 6 November 2022 (UN Dossier No. 175).

[129] In the same vein, see Written Observations of Saudi Arabia, para. 6.7; Written Observations of Portugal, para. 111; Written Observations of European Union, para. 326.

2. Oversight and implementation

80. The Paris Agreement seeks to establish procedural obligations to promote accountability. As several States and international organizations have underlined[130], the climate change treaties establish several features to encourage compliance in a cooperative manner. The Paris Agreement provides a non-judicial oversight system consisting of detailed transparency and reporting obligations, for a committee mechanism and for a clause of dispute settlement including through judicial means.

81. Article 13 establishes a transparency framework consisting of several reviews of progress made[131]. Applying to both developed and developing countries, the aim is to provide clear information to other Parties on the implementation of their respective NDCs and the adaptation measures put in place[132], as well as on the support received and provided[133]. For this purpose, a biennial report is transmitted containing information on emissions by sources and removals by sinks of greenhouse gases and progress made in implementing and achieving its NDC[134] and on financial and technological support provided towards developing countries[135]. Furthermore, States are invited to provide information on the consequences of climate change and adaptation[136], and on support received for the care of developing countries[137]. All this information is reviewed twice, first technically by experts, then multilaterally, in order to ensure that progress is realized[138].

82. In accordance with Article 15, when a Party considers that another Party has not fulfilled its obligations, it can turn to the Paris Agreement compliance mechanism, consisting of a committee composed of experts which functions "in a manner that is transparent, non-adversarial and non-punitive"[139].This committee produces an annual report discussed at the Conference of the Parties serving as the meeting of the Parties to this Agreement (CMA)[140]. Subsequent Conferences of the

[130] Written Observations of Saudi Arabia, paras. 6.5-6.6; Written Observations of Kuwait, paras. 93-107, Written Observations of New Zealand, para. 130; Written Observations of Iran, paras. 158-161; Written Observations of OPEC, para. 97; Written Observations of South Africa, para. 131.
[131] Paris Agreement (UN Dossier No. 16), Article 13.
[132] *Ibid*., para. 5.
[133] *Ibid*., para. 6.
[134] *Ibid*., para. 7.
[135] *Ibid*., para. 9.
[136] *Ibid*., para. 8.
[137] *Ibid*., para. 10.
[138] *Ibid*., para. 11.
[139] *Ibid*., Article 15, para. 2.
[140] *Ibid*., para. 3.

Parties to the Paris Agreement have established the modalities and competencies of this committee[141].

83. The settlement of disputes by judicial means plays a subsidiary role and it is based on Parties' special consent. Indeed, Article 14 of the UNFCCC (Settlement of disputes) provides first for "negotiation or any other peaceful means"[142]. If diplomatic means prove unsuccessful, the Parties may either make a declaration recognizing the jurisdiction of the ICJ or of an arbitral tribunal (Article 14, paragraphs 2 to 4)[143] or use the system of mandatory conciliation, which may be triggered at the request of any of the Parties (Article 14, paragraphs 5 to 7)[144].

84. Thus, the climate change treaties contain detailed, operational commitments imposing on developed States obligations of financial assistance, which implement the underlying preoccupations of equity reflected in the principle of CBDR-RC. They also enable the Parties to have a collective oversight of the implementation of their obligations, with a marked preference for non-adversarial mechanisms. However, judicial oversight is in principle not excluded, though only a handful of the Parties have so far subscribed to it.

B. Question (b) as referring to the ILC Articles on State Responsibility

85. A violation of the UNFCCC and of the Paris Agreement commitments – with all the nuances and degrees in terms of softness or hardness – may be analysed pursuant to the ILC's Articles on State Responsibility. However, this basic assumption does not seem to respond to the expectations of those participants which strongly argue for its application to past GHG emissions, in violation of the principle of non-retroactivity[145], with a view to obtaining compensation[146].

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[141] See for an historic, Written observations of Australia, paras. 2.54-2.60.

[142] UNFCCC (UN Dossier No. 4), Article 14.

[143] Only a few States made such a declaration: Tuvalu, Solomon Islands, Netherlands, Cuba.

[144] Note however that Article 14.7 of the UNFCCC provides that: "Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation." COP has not adopted any decision to that effect.

[145] See paras. 19-34 above.

[146] See for instance, Written Observations of Vanuatu, paras. 589-597; Written Observations of Colombia, paras. 4.13-4.14; Written Observations of Solomon Islands, paras. 241-242; Written Observations of Kenya, paras. 6.97-6.100; Written Observations of Philippines, paras. 128-131; Written Observations of Bahamas, paras. 243-244; Written Observations of African Union, paras. 281-294.

86. The first difficulty in using the ILC's articles for answering Question (b) stems from the fact that neither the alleged wrongful act, nor the relevant international obligations are specified therein. As the ILC stated:

> "There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (b), when such conduct constitutes 'a breach of an international obligation of the State'. (…)
>
> In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract."[147]

87. If Question (b) refers indeed to the legal consequences stemming from a responsibility of wrongful act, the Court cannot provide a cogent answer without reformulating the question based on the pleadings of some participants. Yet, their views were not shared by all the States when they adopted resolution 77/276[148].

88. And even so, on a conceptual level, the application of the ILC's Articles on State Responsibility meets many other challenges, even if it applies only to GHG emissions after the entry into force of the various climate change treaties. Japan will underline two of these difficulties: the first concerns the establishment of the violation of an international obligation; the second relates to causation between the alleged wrongful act and the harm.

1. Breaches of obligations of conduct with respect to mitigation

89. Article 12 of the ILC Articles on State Responsibility provides that:

[147] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Y*earbook of the International Law Commission*, 2001, vol. II (2), p. 54, paras. 1-2 of the commentary to the preamble of Chapter III.

[148] See para. 24 above.

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

90. As underlined above, GHG emissions are not *per se* prohibited. States established a common long-term temperature goal, whose accomplishment rests on their commitments of progressive mitigation[149]. These are clearly obligations of conduct and States enjoy a large margin of discretion in this respect[150]. Furthermore, while all States are bound by this obligation, its implementation is differentiated[151].

91. The establishment of the breach of these obligations is therefore dependent on the circumstances. The ILC insisted that:

> "it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation."[152]

2. Difficulties relating to causation

92. Compensation is predicated on the existence of a damage and the establishment of a causal nexus between the wrongful act and that damage. The issue "is whether there is a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered"[153].

93. However, as the Court has already acknowledged:

> "In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is

[149] See paras. 56-61 above.
[150] See para. 59 above.
[151] See paras. 65-69 above.
[152] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Y*earbook of the International Law Commission*, 2001, vol. II (2), p. 55, para. 2 of the commentary to the Article 12.
[153] *Case concerning 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. 234, para. 462.

for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered."[154]

94. As many States have pointed out, in the case of climatic damage, the causal nexus, which must be direct and certain, is difficult to establish[155]. The difficulties, not to say the impossibility to establish such a direct nexus, are more pronounced in case of harmful effects related to climate change than in the case of "classical" environmental damages, with which international courts have dealt with so far[156].

95. The European Court of Human Rights has recently highlighted that:

"In the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution."[157]

96. In the same vein, while ITLOS did not deny the applicability of Article 194, paragraph 2, of the UNCLOS, it did not fail to point out:

"It is acknowledged that, given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how

[154] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 26, para 34.

[155] Written Observations of Switzerland, para. 77; Written Observations of Singapore, para. 4.16; Written Observations of Korea, para. 46. Some States stated that causality couldn't be demonstrated, see for instance Written Observations of the State of Kuwait, para. 124; Written Observations of the Republic of Indonesia, para. 74; Written Observations of Russia, p. 17.

[156] As the ECtHR noted: "The Court's existing case-law in environmental matters concerns situations involving specific sources from which environmental harm emanates. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the existence of a causal link between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable. Furthermore, the measures taken, or omitted, with a view to reducing the impugned harm emanating from a given source, whether at the regulatory level or in terms of implementation, can also be specifically identified. In short, there is a nexus between a source of harm and those affected by the harm, and the requisite mitigation measures may be identifiable and available to be applied at the source of the harm." (ECtHR, *Verein Klimaseniorinnen Schweiz and Others* v. *Switzerland*, Application no. 53600/20, 2024 para. 415).

[157] *Ibid*., para. 439.

anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States. (…) [T]his difficulty has more to do with establishing the causation between such emissions of one State and damage caused to other States and their environment."[158]

CONCLUSION

97. To summarize, in Japan's view:

- The standards of due diligence have evolved and are expected to evolve in time. One cannot judge the legality of past conduct (during 19th century, in the 1950s, in the 1990s) in light of the present standards.

- Whenever substantive decisions are adopted within the climate change treaty regime, often after marathon sessions and last-minute concessions reflected in carefully designed formula, all observers acknowledge their importance because they are practical and effective measures adopted by consensus to strengthen the global response to the threat of climate change. Such reactions rather stand for a negative *opinio juris*, confirming that an equivalent customary rule did not exist at the time of the adoption of these treaties.

- The Paris Agreement and the decisions adopted by the Meetings of the Parties are indeed the most recent and dynamic expression of States' commitments, as well as their responsibilities in respect of climate change.

98. The UNFCCC and the Paris Agreement are the primary sources of States' obligations under international law concerning the protection of the climate system from anthropogenic emissions of greenhouse gases. These specialized climate change treaties create legally binding obligations for Parties, whose nature and scope were carefully addressed.

99. In answering the questions, it is essential for the Court to preserve the delicate balance of interests reflected in these treaties. Japan hopes that its

[158] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory opinion, 21 May 2024, ITLOS*, para. 252.

perspective on the questions asked and the possible answers to them may contribute to this need for balance and to the enhancement of the climate change treaty regime.

100. By putting the emphasis on the UNFCCC and the Paris Agreement, the Court may give cogent answers both to question (a) and to question (b). It will also fulfil States' expectations, as they were expressed in the process of the adoption of the resolution containing the request for the advisory opinion, which all insisted that the advisory opinion could be instrumental in achieving the Paris Agreement goals[159].

[159] *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.64 (UN Dossier No. 3), Vanuatu, p. 3; *ibid*., Australia, p. 15; Germany, p. 18; Portugal, p. 24; Canada, p. 27 and *Official Records of the General Assembly*, seventeen-seventh session, 64th plenary meeting, 29 March 2023, A/77/PV.65, Brazil, p. 10.

Respectfully Submitted,

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