

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF THE KINGDOM OF THE NETHERLANDS

15 AUGUST 2024

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1. Introduction

- 1.1 In Resolution 77/276, adopted on 29 March 2023, the General Assembly of the United Nations requested the Court to render an advisory opinion on the *Obligations of States in respect of Climate Change* ('Request').
- 1.2 The Kingdom of the Netherlands, ('the Kingdom'),¹ as a Member State of the United Nations and by virtue of Article 92 of the UN Charter also as a Party to the Statute of the Court, availed itself of the opportunity afforded by the Orders of the Court of 20 April, 4 August and 15 December 2023, respectively, to submit a written statement further to the Request. The Written Statement of the Kingdom of the Netherlands ('Written Statement') was submitted to the Court on 21 March 2024.
- 1.3 In its Order of 15 December 2023, the Court designated 24 June 2024 as the time limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court. In its Order of 30 May 2024, the Court extended this time limit to 15 August 2024. The Kingdom of the Netherlands wishes to avail itself of the opportunity afforded by that Order to present written comments to the Court.
- 1.4 The Kingdom of the Netherlands wishes, in view of other written statements submitted to the Court, to underline and elaborate on a number of issues related to the questions posed in the Request. The Kingdom of the Netherlands will pay particular regard to developments in the field of the law of the sea and international human rights law since the submission of its Written Statement, notably the Advisory Opinion issued by the International Tribunal for the Law of the Sea ('ITLOS', the 'Tribunal') on *Climate Change and International Law* (Case no. 31) ('UNCLOS Advisory Opinion') on 21 May 2024,² as well as the judgement of the European Court of Human Rights ('ECtHR') in *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (App no. 53600/20)³ and the decisions of the ECtHR in *Duarte Agostinho and Others v. Portugal* (App no. 39371/20)⁴ and *Carême v. France* (App no. 7189/21).⁵

¹ The Kingdom of the Netherlands wishes to emphasize that the 'Kingdom of the Netherlands' comprises of the European part of the Kingdom, as well as a group of islands in the Caribbean part of the Kingdom (consisting of Aruba, Curaçao, the Dutch part of Sint Maarten, Bonaire, Sint Eustatius and Saba).

² ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024 (hereinafter 'ITLOS Case no. 31, Advisory Opinion').

³ ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024 (hereinafter '*Klimaseniorinnen*').

⁴ ECtHR, *Duarte Agostinho and Others v. Portugal* (dec.) [GC], no. 39371/20, 9 April 2024 (hereinafter '*Duarte Agostinho*').

⁵ ECtHR, *Carême v. France* (dec.) [GC], no. 7189/21, 9 April 2024 (hereinafter '*Carême*').

2. Comments pertaining to the mitigation of and adaptation to climate change

- 2.1 The Kingdom of the Netherlands notes that in some written statements in the present advisory proceedings it is argued that obligations pertaining to the protection of the climate system from anthropogenic emissions flow exclusively from the United Nations Framework Convention on Climate Change ('UNFCCC'), the Kyoto Protocol and the Paris Agreement. The Kingdom of the Netherlands recognizes these instruments as the main sources under international law on the obligations addressing climate change, but notes that it has made reference in its Written Statement to agreements addressing transboundary atmospheric pollution and ozone depletion as agreements that are relevant to the fight against climate change as well.⁶
- 2.2 Furthermore, it is important to underline, following the UNCLOS Advisory Opinion, that treaties do not "operate in isolation".⁷ Referencing the Court, the Tribunal states that treaties are to be "interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation".⁸ Having regard to the principle of harmonization as defined by the International Law Commission ('ILC'), several norms bearing on a single issue should, to the extent possible, "be interpreted so as to give rise to a single set of compatible obligations".⁹ Factual physical relationships in particular, such as "the close interaction that naturally occurs due to the physical relationship between the atmosphere and the oceans",¹⁰ aptly explain the relevance of other instruments in the fight against climate change, in this example the United Nations Convention on the Law of the Sea ('UNCLOS'), and related instruments, such as the Agreement under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.
- 2.3 Furthermore, the Kingdom of the Netherlands observes that some written statements presented in these advisory proceedings suggest that the climate change agreements form a self-contained *lex specialis* regime and thereby render other international legal instruments inapplicable to the

⁶ Written Statement of the Kingdom of the Netherlands, submitted on 21 March 2024, with respect to the *Request for an Advisory Opinion on the Obligations of States in respect of Climate Change*, currently pending before the ICJ (hereinafter 'Written Statement of the Kingdom of the Netherlands'), Section 3, under B.

⁷ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 135.

⁸ *Ibid.*, reference to *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, para. 53.

⁹ International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two.

¹⁰ Draft Guidelines on the Protection of the Atmosphere, with commentaries, adopted by the International Law Commission at its seventy-second session, UN Doc. A/76/10 (2021) (hereinafter 'ILC Draft Guidelines on the Protection of the Atmosphere'), Preamble.

questions posed in the present Request. The Kingdom of the Netherlands follows the view of the Tribunal on this matter, according to which “the Paris Agreement is not *lex specialis* to the Convention [of the Law of the Sea] and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention”.¹¹

2.4 On the relationship between the UNCLOS and the Paris Agreement, the Tribunal emphasizes that “[t]he Convention [of the Law of the Sea] and the Paris Agreement are separate agreements, with separate sets of obligations”.¹² However, the Paris Agreement, as well as other international instruments on climate change, inform the contents of measures to be taken to comply with obligations regarding the protection and preservation of the marine environment that flow from the UNCLOS.¹³ In this regard, the Tribunal clarifies that simply fulfilling obligations and commitments under the Paris Agreement does not automatically entail that States have satisfied their obligation under Article 194 of the UNCLOS.¹⁴ Importantly, participating in global efforts addressing climate change may not fulfil the obligation under Article 194, paragraph 1, of the UNCLOS. States must take all necessary measures, including individual actions, as appropriate.¹⁵

2.5 In its Written Statement, the Kingdom of the Netherlands presented its view that States are bound by the customary obligation to develop, adopt and implement a mitigation policy under climate change law. The Tribunal confirms that the obligation to take mitigation measures, which is a means of implementing a mitigation policy, also flows from the UNCLOS, with Article 194, paragraph 1, of the UNCLOS imposing upon States “a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions”.¹⁶ In this regard, the Tribunal underlines that the obligation “does not entail the immediate cessation of marine pollution from anthropogenic GHG emissions”.¹⁷

2.6 Moreover, the Kingdom of the Netherlands observed in its Written Statement that the climate change agreements prescribe distinct mitigation and adaptation obligations. In the context of adaptation, the Tribunal considers that Article 192 of the UNCLOS, in addition to mitigation measures, also requires States to “implement measures to protect and preserve the marine

¹¹ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 224.

¹² *Idem.*, para. 223.

¹³ *Idem.*, paras. 222 and 388.

¹⁴ *Idem.*, para. 223.

¹⁵ *Idem.*, para. 202.

¹⁶ *Idem.*, para. 223.

¹⁷ *Idem.*, para. 199.

environment in relation to climate change impacts and ocean acidification that include resilience and adaptation actions as described in climate change treaties”.¹⁸

2.7 Furthermore, the Kingdom of the Netherlands notes that recent developments also indicate that obligations relating to the mitigation of climate change may flow from international human rights law. On 9 April 2024, the ECtHR rendered its judgment in the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*¹⁹ and its decisions in *Carême v. France*²⁰ and *Duarte Agostinho and Others v. Portugal*,²¹ the latter to which the Kingdom of the Netherlands was a Respondent State. The Kingdom of the Netherlands wishes to note that the ECtHR has outlined its general considerations on the issue of climate change and the ECHR in the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* judgment.²² The Kingdom of the Netherlands will thus take this judgment as the starting point for its views related to human rights in this part of the Written Comments.

2.8 In these cases, the ECtHR noted that “climate change is one of the most pressing issues of our time”,²³ and has taken, as a matter of fact,

that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.²⁴

In this respect, the ECtHR recognized that a link between climate change and human rights exists, as the Kingdom of the Netherlands has also observed in its Written Statement.²⁵

2.9 Furthermore, in addition to a general observation on the link between human rights and climate change, the ECtHR has more specifically stated that, under Article 8 of the European Convention on Human Rights (‘ECHR’), the right to respect for private and family life “must be seen as

¹⁸ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 391.

¹⁹ *Klimaseniorinnen*, *supra* note 3.

²⁰ *Duarte Agostinho*, *supra* note 4.

²¹ *Carême*, *supra* note 5.

²² *Duarte Agostinho*, *supra* note 4, para. 165, referring to *Klimaseniorinnen*, *supra* note 3, paras. 410-422, and *Carême*, *supra* note 5, para. 76, referring to *Klimaseniorinnen*, *supra* note 3, paras. 487-488.

²³ *Klimaseniorinnen*, *supra* note 3, para. 410.

²⁴ *Idem.*, para. 436.

²⁵ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under C, para. 3.25.

encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life”.²⁶ While this pertains to Article 8 of the ECHR, the ECtHR emphasized that the principles developed under Article 2 of the ECHR, which encompasses the right to life, are to a large extent similar to those under Article 8 of the ECHR – principles which, “when seen together, provide a useful basis for defining the overall approach to be applied in the climate-change context under both provisions”.²⁷

2.10 In order to ensure protection from serious adverse effects of climate change, the ECtHR continues that “the State’s primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change”.²⁸ This duty also applies to adaptation, as these measures are aimed at “alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection”²⁹ and supplement mitigation measures.

2.11 In its Written Statement, the Kingdom of the Netherlands stated that it is of the view that, under climate change law, it is imperative that States develop, adopt and implement a mitigation policy.³⁰ Furthermore, the Kingdom argued that Article 2, paragraph 2, of the International Convention on Civil and Political Rights enshrines the obligation to “take necessary steps [...] to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant”, and that this obligation must be understood, especially when interpreted in light of the international obligations set out in the Written Statement, to require the development, adoption and implementation of a mitigation policy.³¹

2.12 As the Kingdom of the Netherlands considers mitigation measures as a means of implementing a mitigation policy, the conclusion drawn by the ECtHR in the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* on the obligation to adopt and effectively apply in practice regulations and measures capable of mitigating climate change, corresponds with the views expressed by the Kingdom of the Netherlands in its Written Statement with respect to the obligation to develop, adopt and implement a mitigation policy.

²⁶ *Klimaseniorinnen*, *supra* note 3, para. 519.

²⁷ *Idem.*, para. 537.

²⁸ *Idem.*, para. 545.

²⁹ *Idem.*, para. 552.

³⁰ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under C, para. 3.35.

³¹ *Idem.*, paras. 3.30 and 3.35.

2.13 Furthermore, in *Duarte Agostinho and Others v. Portugal and 32 Others*, the ECtHR confirmed its current understanding of jurisdiction under Article 1 of the ECHR. The ECtHR found no grounds for establishing the States' extraterritorial jurisdiction under the ECHR with respect to climate change.³² This is in line with the view of the Kingdom of the Netherlands as presented in its Written Statement, according to which States are required to protect those within their jurisdiction against the adverse effects of climate change, by means of reasonable and appropriate measures of protection.³³

3. Comments pertaining to the protection of the atmosphere

3.1 The Kingdom of the Netherlands wishes to highlight several elements of the Tribunal's analysis which underline and elaborate on obligations related to the protection of the atmosphere. The significance of the interpretation of the Tribunal in this regard originates from Guideline 9 of the Draft Guidelines on the Protection of the Atmosphere, which stipulates that:

The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules [...] of the law of the sea [...], should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with principles of harmonization and systemic integration, with a view of avoiding conflict.³⁴

3.2 As the Kingdom of the Netherlands indicated in its Written Statement,³⁵ the atmosphere is a shared resource. The Kingdom of the Netherlands would like to underline the connection between shared resources and cooperation, recalling the understanding of Judge *ad hoc* Charlesworth of the duty to cooperate:

The concept of a duty of co-operation is the foundation of legal régimes dealing (inter alia) with shared resources and with the environment. It derives from the principle that the conservation and management of shared resources and the environment must be based on shared interests, rather than the interests of one party.³⁶

³² *Duarte Agostinho*, *supra* note 4, paras. 181 – 214.

³³ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under C, para. 3.35.

³⁴ ILC Draft Guidelines on the Protection of the Atmosphere, *supra* note 10, Guideline 9.

³⁵ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under D, para. 3.67.

³⁶ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Merits, Separate Opinion of Judge *ad hoc* Charlesworth, *I.C.J. Reports* 2014, para. 13.

- 3.3 The Tribunal recognizes that the duty to cooperate is reflected in and permeates the entirety of Part XII of UNCLOS, which is concerned with the protection and preservation of the marine environment.³⁷ Interpreting Article 197 of the UNCLOS, the Tribunal considers the obligation to cooperate an obligation of conduct which States are required to fulfil in good faith.³⁸ With respect to Article 197 of the UNCLOS, this specifically entails the meaningful participation in the formulation and elaboration of international rules, standards and recommended practices for the protection of the marine environment.³⁹ The Kingdom of the Netherlands considers the same to hold for the climate change agreements and for climate change related agreements.
- 3.4 As for the obligation to prevent significant harm, the Kingdom of the Netherlands indicated in its Written Statement that it has developed in a transboundary context, which is distinct from the global context characterizing climate change: cumulative and numerous separate GHG emissions causing cumulative and diffuse global effects. In its Written Statement, the Kingdom of the Netherlands acknowledged the distinct characteristics of climate change and the difficulties involved in the analogous application of the obligation to prevent significant transboundary harm to the climate change context.⁴⁰ The Kingdom of the Netherlands argues that the customary no harm-rule could nevertheless be applicable to activities that, by their nature, may cause or create a risk of causing significant harm to the climate system or other parts of the environment through anthropogenic GHG emissions throughout their lifecycles.⁴¹
- 3.5 The Tribunal analyzes the relationship between the obligation to prevent harm and climate change in the context of Article 194, paragraph 2, of the UNCLOS, which obliges States to take all necessary measures so as to not cause damage by pollution to other States, and to ensure that pollution does not spread beyond the areas in which States exercise jurisdiction. In its Advisory Opinion, the Tribunal considers Article 194, paragraph 2, of the UNCLOS to apply to the climate change context, despite the diffused and cumulative causes and global effects of climate change. The Tribunal finds the difficulty of establishing how anthropogenic GHG emissions cause damage to other States to be an issue of establishing causation, which should be distinguished from the question of applicability of the norm.⁴² The Kingdom of the Netherlands follows this rationale and wishes to restate its *opinio juris* that the customary obligation to prevent significant harm is applicable to activities that cumulatively cause significant harm to the climate system.

³⁷ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 297.

³⁸ *Idem.*, para. 309.

³⁹ *Idem.*, para. 307.

⁴⁰ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under D, para. 3.64.

⁴¹ *Idem.*, para. 3.65.

⁴² ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 252.

- 3.6 The unique characteristics of climate change also have implications for the interpretation of the customary norm of environmental impact assessments. The Tribunal states that “[i]n the context of pollution of the marine environment from anthropogenic GHG emissions, planned activities may not be environmentally significant if taken in isolation, whereas they may produce significant effects if evaluated in interaction with other activities”.⁴³ The Tribunal considers that environmental impact assessments may take into account not only “the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment”.⁴⁴ Moreover, the Tribunal finds that evaluating socio-economic impacts of the activities in question could form part of the assessment.⁴⁵ The Kingdom of the Netherlands presented a similar understanding of the application of environmental impact assessments to the context of climate change in its Written Statement, including the conduct of project environmental impact assessments and/or strategic environmental assessments, as appropriate.⁴⁶ In this regard, the Kingdom of the Netherlands recalls that it would not be necessary to establish a causal link with the occurrence of *specific* harm for the purposes of injunctive relief to prevent (further) significant harm and/or related procedural injury, such as the failure to take climate impacts into account during an environmental impact assessment.⁴⁷ The failure to conduct an environmental impact assessment would fall into the category of procedural injury.
- 3.7 Furthermore, pursuant to Guideline 3 of the Draft Guidelines on the Protection of the Atmosphere, States have the obligation to “protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation”.⁴⁸ In its Written Statement, the Kingdom of the Netherlands noted that the formulation of Guideline 3 has been modelled on Article 192 of the UNCLOS.⁴⁹ It therefore considers it useful to refer to the interpretation of the Tribunal in connection with the interpretation of Guideline 3.
- 3.8 Guideline 3 of the Draft Guidelines on the Protection of the Atmosphere, similarly to Article 192 of the UNCLOS, is “formulated in such a way as to prescribe not only the required conduct of States but also the intended objective or result of such conduct.”⁵⁰ Similarly to Article 192 of the UNCLOS, the Kingdom of the Netherlands observes that Guideline 3 requires States not to achieve prevention, reduction or control of atmospheric degradation, but to take all appropriate

⁴³ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 365.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under D, para. 3.71.

⁴⁷ *Idem.*, Section 5, under A(i), para. 5.13.

⁴⁸ ILC Draft Guidelines on the Protection of the Atmosphere, *supra* note 10, Guideline 3.

⁴⁹ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under D, para. 3.66.

⁵⁰ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 238.

measures to that end. In its Written Statement, the Kingdom of the Netherlands clarified that this is an obligation of conduct, requiring States to exercise due diligence.⁵¹

- 3.9 The Tribunal elaborates on the obligation of due diligence in the context of the interpretation of Article 194, paragraph 1, of the UNCLOS, which obliges States to take all necessary measures to prevent, reduce and control marine pollution from any source. It may be noted that Guideline 3 of the Draft Guidelines on the Protection of the Atmosphere stipulates that *appropriate* measures must be taken to prevent, reduce or control atmospheric pollution and atmospheric degradation, in contrast to the *necessary* measures required under Article 194, paragraph 1, of the UNCLOS. States must act with due diligence in taking such measures.⁵² Necessary measures may vary depending on the means and capabilities of States.⁵³ Moreover, the Tribunal underlines that the obligation to take necessary measures imply the due diligence obligation of States to ensure compliance of non-State actors under their jurisdiction or control with such measures.⁵⁴
- 3.10 The Tribunal clarifies that the standard of due diligence varies based on specific circumstances surrounding the implementation of the obligation, and that it may vary over time following evolvement of several factors. These factors include the urgency, scientific and technological information, relevant international rules and standards, and risk of harm.⁵⁵ The Tribunal states that the obligation of due diligences requires States to establish “a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective”.⁵⁶ Moreover, States must adequately account for the risk associated with activities under their jurisdiction or control, even when scientific evidence of the risk of potential harm is insufficient.⁵⁷
- 3.11 More broadly, the Tribunal states that scientific certainty is not a prerequisite for the determination of necessary measures in the regulation of marine pollution caused by anthropogenic GHG emissions.⁵⁸ The Kingdom of the Netherlands wishes to note in this context that it considers the precautionary principle a principle of international environmental law.

⁵¹ Written Statement of the Kingdom of the Netherlands, *supra* note 6, Section 3, under D, para. 3.68.

⁵² ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 234.

⁵³ *Idem.*, para. 225.

⁵⁴ *Idem.*, para. 396.

⁵⁵ *Idem.*, para. 239.

⁵⁶ *Idem.*, para. 235.

⁵⁷ *Idem.*, para. 242.

⁵⁸ *Idem.*, para. 213.

3.12 Finally, the Kingdom of the Netherlands wishes to refer to the affirmation by both the Tribunal and the ECtHR of the status of IPCC reports as the best available scientific guidance on the risk associated with climate change regionally and globally.⁵⁹

4. Comments pertaining to equity in the context of climate change

4.1 The Kingdom of the Netherlands also wishes to make a few observations on the principles guiding climate change law, as enshrined in Article 3 of the UNFCCC, noting that a number of written statements have elaborated on these principles. The contribution of the Kingdom of the Netherlands will focus in particular on (international and intergenerational) equity.

4.2 Equity is an integral principle entrenched in the UNFCCC and the Paris Agreement. In this respect, Article 3, paragraph 1, of the UNFCCC provides that Parties

should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.

4.3 This principle is referred to in both the Preamble and the operative part of the Paris Agreement, pursuant to which the Parties agreed that the pursuit of the objective of the Paris Agreement will be “guided by its principles, including equity”,⁶⁰ and committed themselves to implementing the Paris Agreement so as to reflect equity.⁶¹

4.4 The Court has described equity as “a direct emanation of the idea of justice”.⁶² In international law, the principle of equity is a “general principle directly applicable as law”.⁶³ The Court applies equity *infra legem*, which constitutes “a method of interpretation of the law in force, and is one of its attributes”.⁶⁴ The Court may choose, among possible interpretations of positive law, the interpretation that best approaches the requirements of justice. In spite of the absence of rigid rules dictating the weight of each element of the case, the task of the Court to bring about an equitable result is not a discretionary or conciliatory exercise, nor is it an operation of distributive justice.⁶⁵

⁵⁹ *Idem.*, para. 208; *Klimaseniorinnen*, *supra* note 3, para. 429.

⁶⁰ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted in 2015) 3156 UNTS 79 (hereinafter ‘Paris Agreement’), Preamble.

⁶¹ Paris Agreement, Article 2(2).

⁶² *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports* 1982 (hereinafter ‘*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*’), para. 71.

⁶³ *Ibid.*

⁶⁴ *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, *I.C.J. Reports* 1986, p. 554.

⁶⁵ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *supra* note 62, para. 71.

4.5 In his Separate Opinion in the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, Judge Weeramantry reflected on the role of equity in international law. Regarding the invocation of equity by treaty, Judge Weeramantry opined that equity often is

a means by which a developing branch of the law is brought into line with contemporary thinking, thereby enabling perspectives which have not yet crystallized into legal rules to make their impact upon the law in question.⁶⁶

4.6 Having regard to considerations of equity, several instruments within the field of environmental protection and climate change endorse the need to consider the special situation and needs of developing countries.⁶⁷ This special consideration for developing countries has crystallized into the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances ('CBDR-RC-NC'), which is a principle that emerged from, and operates in, the context of the climate change agreements. The principle is operationalized in the Paris Agreement through differentiation across mitigation, adaptation, transparency, and cooperation and assistance obligations. To address loss and damages borne by developing countries particularly vulnerable to climate change, the Conference of Parties to the Paris Agreement established the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, as noted in Section 5 of the Written Statement of the Kingdom of the Netherlands.⁶⁸

4.7 In the UNCLOS Advisory Opinion, the Tribunal points towards commonalities of the principle of CBDR-RC-NC and the reference to "available means and capabilities" in the context of the implementation of Article 194, paragraph 1, of the UNCLOS. The Tribunal underscores that "the reference to available means and capabilities should not be used as an excuse to unduly postpone, or even be exempt from, the implementation of the obligation".⁶⁹ Furthermore, the Tribunal emphasizes that, notwithstanding the leading role of developed nations, all States must take mitigation efforts.⁷⁰

⁶⁶ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgement, Separate Opinion of Judge Weeramantry, *I.C.J. Reports* 1993, para. 76.

⁶⁷ ILC Draft Guidelines on the Protection of the Atmosphere, *supra* note 10, Commentary to the Preamble, para. 4; United Nations General Assembly, *United Nations Conference on the Human Environment*, UN Doc. A/RES/2994 (adopted in 1972) (hereinafter 'Stockholm Declaration'), Principle 12; Rio Declaration on Environment and Development, in the Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. 1) (adopted in 1992) (hereinafter 'Rio Declaration'), Principle 6.

⁶⁸ FCCC/CP/2013/10/Add.1, Decision 2/CP.19.

⁶⁹ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 226.

⁷⁰ *Idem.*, para. 229.

- 4.8 With respect to the climate change agreements, the Kingdom of the Netherlands notes that the mitigation obligation under the Paris Agreement is subject to the CDBR-RC-NC principle, but that the implementation of the obligation is to nevertheless reflect progression and the highest possible ambition of each Party as expressed in Article 4, paragraph 3, of the Paris Agreement.⁷¹ Moreover, the Paris Agreement grants equity a role in further developing the climate change regime by informing Parties how to update and enhance their actions and support, through the obligation of Parties to periodically comprehensively and facilitatively assess collective progress in light of equity.⁷²
- 4.9 Apart from CDBR-RC-NC, the principle of equity is reflected in other key principles and concepts regarding climate change, including the emerging principles of intergenerational equity and sustainable development.
- 4.10 The principle of intergenerational equity is reflected in the many references to future generations in climate change agreements,⁷³ and is explicitly referred to in the Preamble of the Paris Agreement. Nevertheless, it has not yet been authoritatively determined whether the principle of intergenerational equity has crystallized into a general principle of international law.⁷⁴ In the understanding of Judge Cançado Trindade, States must interact with the environment “in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations”.⁷⁵ The Preamble of the Draft Guidelines on the Protection of the Atmosphere recognizes that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account.⁷⁶ In the UNCLOS Advisory Opinion, the Tribunal, reaffirming the Court, links the very definition of the environment to future generations, stating that the environment “represents the living space, the quality of life and the very health of human beings, including generations unborn”.⁷⁷
- 4.11 In the context of human rights, the ECtHR has emphasized the intergenerational aspect with regard to climate change in the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*

⁷¹ Paris Agreement, Article 4(3).

⁷² Paris Agreement, Article 14(1).

⁷³ ILC Draft Guidelines on the Protection of the Atmosphere, *supra* note 10, Commentary to the Preamble, para. 4; See for example Principle 1 and 2 of the Stockholm Declaration and Principle 3 of the Rio Declaration.

⁷⁴ Reports of International Arbitral Awards, *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, Volume XXVII, pp. 35-125, para. 58; see also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports* 2010, paras. 114 – 131.

⁷⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports* 2010, para. 120.

⁷⁶ ILC Draft Guidelines on the Protection of the Atmosphere, *supra* note 10, Preamble.

⁷⁷ ITLOS Case no. 31, Advisory Opinion, *supra* note 2, para. 166 (referring to *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* 1996, para. 29).

judgment. In this aspect, the ECtHR has expressed that “in the specific context of climate change, intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations”,⁷⁸ and that thus “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”.⁷⁹ Moreover, the ECtHR highlights a critical challenge in climate governance, stating that:

having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious.⁸⁰

4.12 Finally, equity also manifests itself in the (emerging) principle of sustainable development, which is another guiding principle of the UNFCCC.⁸¹ Sustainable development encompasses another tension inherent to the issue of climate change, as it seeks to strike a balance between environmental protection, economic development and social development in the long term.⁸² Sustainable development is understood as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”,⁸³ by which it embodies elements of both intragenerational equity and intergenerational equity. The Court refers to the essence of sustainable development as the “interconnectedness between equitable and reasonable utilization of a shared resource and a balance between economic development and environmental protection”.⁸⁴

⁷⁸ *Klimaseniorinnen*, *supra* note 3, para. 420.

⁷⁹ *Klimaseniorinnen*, *supra* note 3, para. 419.

⁸⁰ *Idem.*, para. 420.

⁸¹ United Nations Framework Convention on Climate Change (adopted in 1992) 1771 UNTS 107, Article 3; *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, Separate Opinion of Judge Weeramantry, *I.C.J. Reports* 1997; Reports of International Arbitral Awards, *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, Volume XXVII, pp. 35-125, para. 58; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports* 2010, paras. 132-147.

⁸² United Nations General Assembly, *Resolution of the Nineteenth Special Session on Progress Achieved Towards meeting Objectives of the Earth Summit with Annex on a Programme for the Further Implementation of Agenda 21*, A/Res/S-19/2, 28 June 1997.

⁸³ World Commission on Environment and Development, *Brundtland Report ('Our Common Future')* (Oxford University Press, 1987), pp. 8-9, 40, 43-66 and 75-90.

⁸⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports* 2010, para. 177.

Respectfully,

A handwritten signature in blue ink, appearing to read 'René J.M. Lefebber', with a horizontal line underneath.

Professor Dr. René J.M. Lefebber

Legal Adviser

Representative for the Government of the Kingdom of the Netherlands