Non corrigé
Uncorrected

CR 2024/45

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Monday 9 December 2024, at 10 a.m., at the Peace Palace,

President Salam presiding,

***on the* Obligations of States in respect of Climate Change**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le lundi 9 décembre 2024, à 10 heures, au Palais de la Paix,

sous la présidence de M. Salam, président,

***sur les* Obligations des États en matière de changement climatique**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Yusuf
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Registrar	Gautier

Présents :	M.	Salam, président
	M^me^	Sebutinde, vice-présidente
	MM.	Tomka
		Yusuf
	M^me^	Xue
	MM.	Bhandari
		Iwasawa
		Nolte
	M^me^	Charlesworth
	MM.	Brant
		Gómez Robledo
	M^me^	Cleveland
	MM.	Aurescu
		Tladi, juges
	M.	Gautier, greffier

The Government of the United Mexican States is represented by:

HE Ms Carmen Moreno Toscano, Ambassador of the United Mexican States to the Kingdom of the Netherlands,

Mr Pablo Adrian Arrocha Olabuenaga, Legal Adviser, Ministry of Foreign Affairs,

Mr Alfonso Ascencio Herrera, Minister, Deputy Head of Mission, Embassy of the United Mexican States in the Kingdom of the Netherlands,

Ms Alicia Patricia Perez Galeana, Counsellor, Head of Multilateral Legal Affairs, Embassy of the United Mexican States in the Kingdom of the Netherlands.

The Government of the Federated States of Micronesia is represented by:

Mr Clement Yow Mulalap, Legal Adviser.

The Government of the Republic of the Union of Myanmar is represented by:

HE U Soe Lynn Han, Ambassador of the Republic of the Union of Myanmar to the Kingdom of Belgium, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg, the Republic of Croatia and the European Union,

Mr Zaw Minn Aung, Deputy Director General, Consular and Legal Affairs Department,

Ms Aye Chan Lynn, Assistant Director, Consular and Legal Affairs Department,

Ms Yu Za Na Khin Zaw, First Secretary, Embassy of the Republic of the Union of Myanmar in the Kingdom of Belgium.

The Government of the Republic of Namibia is represented by:

HE Ms Mekondjo Kaapanda-Girnus, Ambassador of the Republic of Namibia to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg and Head of Mission to the European Union,

Ms Gladice Pickering, Executive Director, Ministry of Justice,

Mr Ndjodi Ndeunyema, Counsel, Solicitor, England and Wales,

Ms Phoebe Okowa, Professor of Public International Law, Queen Mary University of London, member of the International Law Commission, Advocate of the High Court of Kenya,

Mr Charles Jalloh, Professor of International Law and Richard A. Hausler Chair in Law, University of Miami School of Law, member and Special Rapporteur of the International Law Commission,

Ms Lilian Mbaeva, Deputy Director, Treaties and Agreements, Ministry of International Relations and Cooperation,

Ms Tangi Shikongo, Chief Legal Officer, Ministry of Justice,

Mr Robert Xamseb, Senior Legal Officer, Ministry of Justice,

For the complete list of delegations of all participants, please refer to CR 2024/35.

Le Gouvernement des États-Unis du Mexique est représenté par :

S. Exc. M^me^ Carmen Moreno Toscano, ambassadrice des États-Unis du Mexique auprès du Royaume des Pays-Bas,

M. Pablo Adrian Arrocha Olabuenaga, conseiller juridique, ministère des affaires étrangères,

M. Alfonso Ascencio Herrera, ministre, chef de mission adjoint, ambassade des États-Unis du Mexique au Royaume des Pays-Bas,

M^me^ Alicia Patricia Perez Galeana, conseillère, cheffe des affaires juridiques multilatérales, ambassade des États-Unis du Mexique au Royaume des Pays-Bas.

Le Gouvernement des États fédérés de Micronésie est représenté par :

M. Clement Yow Mulalap, conseiller juridique.

Le Gouvernement de la République de l'Union du Myanmar est représenté par :

S. Exc. U Soe Lynn Han, ambassadeur de la République de l'Union du Myanmar auprès du Royaume de Belgique, du Royaume des Pays-Bas, du Grand-Duché de Luxembourg, de la République de Croatie et de l'Union européenne,

M. Zaw Minn Aung, directeur général adjoint, département des affaires juridiques et consulaires,

M^me^ Aye Chan Lynn, directrice adjointe, département des affaires juridiques et consulaires,

M^me^ Yu Za Na Khin Zaw, première secrétaire, ambassade de la République de l'Union du Myanmar au Royaume de Belgique.

Le Gouvernement de la République de Namibie est représenté par :

S. Exc. M^me^ Mekondjo Kaapanda-Girnus, ambassadrice de la République de Namibie auprès du Royaume de Belgique, du Royaume des Pays-Bas et du Grand-Duché de Luxembourg, et cheffe de la mission auprès de l'Union européenne,

M^me^ Gladice Pickering, directrice générale du ministère de la justice,

M. Ndjodi Ndeunyema, conseil, *Solicitor* (Angleterre et pays de Galles),

M^me^ Phoebe Okowa, professeure de droit international public à l'Université Queen Mary de Londres, membre de la Commission du droit international, avocate, Haute Cour du Kenya,

M. Charles Jalloh, professeur de droit international et titulaire de la chaire de droit Richard A. Hausler à la faculté de droit de l'Université de Miami, membre et rapporteur spécial de la Commission du droit international,

M^me^ Lilian Mbaeva, directrice adjointe, traités et accords, ministère des relations internationales et de la coopération,

M^me^ Tangi Shikongo, juriste en chef, ministère de la justice,

M. Robert Xamseb, juriste principal, ministère de la justice,

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Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2024/35.

Ms Johanna Shilumbu, Legal Officer, Ministry of Justice,

Ms Salmi Kapena, Legal Officer, Ministry of Justice,

Mr Icarus Chan, member of the Bar of the State of New York,

Mr James Goldstone, Executive Director of the Open Society Justice Initiative,

Ms Blanche Engelbrecht, Second Secretary (Political Affairs), Embassy of the Republic of Namibia in the Kingdoms of Belgium and the Netherlands, in the Grand Duchy of Luxembourg and Mission to the European Union.

The Government of Japan is represented by:

Mr Nakamura Kazuhiko, Director General for Global Issues, Ministry of Foreign Affairs,

HE Mr Minami Hiroshi, Ambassador of Japan to the Kingdom of the Netherlands,

Ms Takamura Yukari, Professor, Institute for Future Initiatives, The University of Tokyo,

Ms Alina Miron, Professor of International Law, University of Angers, member of the Paris Bar, Founding Partner of FAR Avocats,

Mr Mizuno Mitsuaki, Director of International Judicial Proceedings Division, International Legal Affairs Bureau, Ministry of Foreign Affairs,

Mr Maehira Tomoyoshi, Deputy Director, Climate Change Division, International Cooperation Bureau, Ministry of Foreign Affairs,

Mr Sato Hiroshi, Assistant Director, Social Treaties Division, International Legal Affairs Bureau, Ministry of Foreign Affairs,

Ms Hagiwara Sakura, First Secretary, Embassy of Japan in the Kingdom of the Netherlands,

Mr Kimura Masahiro, First Secretary, Embassy of Japan in the Kingdom of the Netherlands,

Mr Goto Kazuki, Researcher, Embassy of Japan in the Kingdom of the Netherlands.

M^me^ Johanna Shilumbu, juriste, ministère de la justice,

M^me^ Salmi Kapena, juriste, ministère de la justice,

M. Icarus Chan, membre du barreau de l'État de New York,

M. James Goldstone, directeur général de l'Open Society Justice Initiative,

M^me^ Blanche Engelbrecht, deuxième secrétaire, affaires politiques, ambassade de la République de Namibie aux Royaumes de Belgique et des Pays-Bas, et au Grand-Duché de Luxembourg, et mission auprès de l'Union européenne.

Le Gouvernement du Japon est représenté par :

M. Nakamura Kazuhiko, directeur général des enjeux mondiaux, ministère des affaires étrangères,

S. Exc. M. Minami Hiroshi, ambassadeur du Japon auprès du Royaume des Pays-Bas,

M^me^ Takamura Yukari, professeure, Institute for Future Initiatives, Université de Tokyo,

M^me^ Alina Miron, professeure de droit international à l'Université d'Angers, membre du barreau de Paris, associée fondatrice du cabinet FAR Avocats,

M. Mizuno Mitsuaki, directeur du service des procédures judiciaires internationales, bureau des affaires juridiques internationales, ministère des affaires étrangères,

M. Maehira Tomoyoshi, directeur adjoint, service des changements climatiques, bureau de la coopération internationale, ministère des affaires étrangères,

M. Sato Hiroshi, sous-directeur, service des traités relatifs aux questions sociales, bureau des affaires juridiques internationales, ministère des affaires étrangères,

M^me^ Hagiwara Sakura, première secrétaire, ambassade du Japon au Royaume des Pays-Bas,

M. Kimura Masahiro, premier secrétaire, ambassade du Japon au Royaume des Pays-Bas,

M. Goto Kazuki, chercheur, ambassade du Japon au Royaume des Pays-Bas.

The PRESIDENT: Good morning. Please be seated. The sitting is open.

For reasons duly made known to me, Judge Abraham is unable to join us for this morning's sitting.

The Court meets this morning to resume its hearings on the request for an advisory opinion submitted to it by the General Assembly of the United Nations on the question of the *Obligations of States in respect of Climate Change*. During this sitting, the Court will hear the oral statements of Mexico, the Federated States of Micronesia, Myanmar, Namibia and Japan. Each of the delegations has 30 minutes at its disposal for its presentation. The Court will observe a short break after the presentation of Myanmar.

I shall now give the floor to Her Excellency Ms Carmen Moreno Toscano, speaking on behalf of Mexico. Madam, you have the floor.

Ms MORENO TOSCANO:

I. INTRODUCTION

1. Mr President, Madam Vice-President, distinguished Members of the Court, my name is Carmen Moreno Toscano, Ambassador of Mexico to the Kingdom of the Netherlands. It is an honour and a privilege for me to appear before the International Court of Justice on behalf of Mexico in this hearing on the historic request for an advisory opinion on the *Obligations of States in respect of Climate Change*.

2. Mexico approaches these proceedings with deep respect for the Court's role in advancing international law, and as a committed State party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

3. The Court has jurisdiction to render the requested advisory opinion under Articles 96 of the Charter of the United Nations and 65 of the Statute of the International Court of Justice.

4. This Request for advisory opinion provides a vital opportunity to clarify States' obligations under international law. This Court has a unique position to clarify these obligations, enhancing coherence and accountability of global climate governance.

5. As we will underscore in this presentation, we stand at a critical historical juncture where international law must illuminate the path for global action against the far-reaching struggle of

climate change. This crisis transcends borders and generations, requiring international law to serve as both a guide and a catalyst for action.

6. Mexico reiterates that its written submissions remain in full, and we kindly ask the Court to take them into consideration. In this oral statement, Mexico will therefore delve into specific issues to provide further clarification in the questions posed to the Court by the General Assembly.

7. Mexico's statement will focus on three issues: (i) harmonizing climate régimes and general international law; (ii) obligations of States under international law concerning climate change; and (iii) State responsibility, legal consequences and the human rights perspective.

8. With the permission of the Court, I would ask you now, Mr President, to invite Ms Patricia Pérez to the podium to present the first section of the intervention.

The PRESIDENT: I thank Her Excellency Ms Carmen Moreno Toscano. I now give the floor to Ms Patricia Pérez.

Ms PÉREZ GALEANA:

II. HARMONIZING CLIMATE RÉGIMES AND GENERAL INTERNATIONAL LAW

1. Honourable Members of the Court, it is a privilege to stand before you to address Mexico's approach to the interaction between the climate change treaty and general principles of international law.

2. At the heart of this discussion is Mexico's argument against the application of the *lex specialis* principle and its advocacy for harmonization in addressing climate change obligations.

Lex specialis

3. First, let me address *lex specialis*. Some countries argue that climate change treaties, including the Paris Agreement, constitute a *lex specialis*, overriding broader principles of international law. Mexico respectfully disagrees.

4. As noted by the International Law Commission (ILC), for *lex specialis* to apply, there must be clear conflicts or explicit intent to exclude other norms. However, in the context of climate treaties, no such conflict exists. These instruments, while pivotal, lack mechanisms for assigning specific

targets or enforcing sanctions. They do not override foundational principles like the no-harm rule, due diligence, and the precautionary principle.

5. In its recent advisory opinion regarding climate change, the International Tribunal for the Law of the Sea (ITLOS) affirmed that compliance with the Paris Agreement alone does not fulfil obligations under Article 194 of the United Nations Convention on the Law of the Sea (UNCLOS).

6. To be clear, the Paris Agreement encourages co-operation but does not derogate from general obligations, also rendering moot the *lex posteriori* argument submitted by a few delegations. In this vein, it is Mexico's position that climate treaties must coexist with broader principles to create a unified and holistic legal framework that ensures comprehensive accountability.

Harmonization

7. This leads us to the principle of harmonization. As stated by the ILC in its report of the Study Group on Fragmentation of International Law, when multiple norms address a single issue, they should be interpreted to produce compatible obligations. In this sense, climate change treaties should be harmonized with general international principles to address the multifaceted nature of climate change. For instance, the precautionary principle complements treaty-based obligations by emphasizing proactive measures to prevent harm.

8. The Court embraced harmonization in the *Pulp Mills on the River Uruguay* case, where it interpreted the 1975 Uruguay River Treaty alongside the principle of environmental impact assessment. The same approach must be applied here. By aligning the Paris Agreement with the no-harm and due diligence principles, the Court can ensure that States adopt robust measures to combat climate change while fulfilling their broader international obligations.

9. The recent ITLOS Advisory Opinion reinforces this approach, emphasizing that climate treaties are primary but not of isolated interpretation and application. They must be interpreted alongside other instruments, as UNCLOS, to address global challenges comprehensively. This underscores the need for a collaborative framework that integrates various legal régimes to tackle the complex and transboundary nature of climate change.

10. Harmonization ensures that States are held accountable not only within the climate treaty framework but also under general international law. It provides a basis for addressing gaps in the

climate régime, including the alleged lack of secondary rules for legal consequences. We will also refer to this issue in the third part of our statement. Complementing climate treaties with broader principles can guarantee more effective solutions to mitigate the impacts of climate change.

11. In conclusion, Mexico respectfully urges the Court to adopt a harmonization approach in its advisory opinion. This will enable a comprehensive interpretation of States' obligations, ensuring accountability and reinforcing the global legal framework for addressing climate change.

12. By embracing harmonization, the Court can advance not only the objectives of climate treaties but also the broader principles of international law, that it has already upheld, safeguarding our planet for present and future generations.

13. With the permission of the Court, I would ask you now, Mr President, to give the floor to Mr Alfonso Ascencio. Thank you.

The PRESIDENT: I thank Ms Patricia Pérez. I now give the floor to Mr Alfonso Ascencio.

Mr ASCENCIO:

III. OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW CONCERNING CLIMATE CHANGE

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is a great honour for me to appear today before you on behalf of Mexico.

2. I will deliver Mexico's observations regarding obligations of States under international law concerning climate change.

3. To that end, I will address Mexico's position on core obligations and principles under international law, emphasizing, firstly, due diligence and the duty of prevention, and secondly, common but differentiated responsibilities and respective capabilities (CBDR-RC).

Due diligence and the duty of prevention

4. I now turn to my first main point, namely due diligence and the duty of prevention. The principle of due diligence is a cornerstone of climate action under the UNFCCC and the Paris Agreement. This principle requires States to take proactive measures based on their capabilities,

guided by the best available science as reflected in the findings of the International Panel on Climate Change (IPCC), as acknowledged in the recent ITLOS Advisory Opinion.

5. Compliance with due diligence can be assessed through four interdependent factors: (1) first, the preparation and implementation of nationally determined contributions (NDCs); (2) second, addressing loss and damage; (3) third, providing financial resources; (4) and fourth, facilitating technology transfer and capacity-building.

6. First, regarding NDCs under Article 4 of the Paris Agreement. While States retain discretion in their design, this discretion is not absolute. NDCs must reflect the "highest possible ambition", consistent with the principle of common but differentiated responsibilities.

7. Second, loss and damage associated with the adverse effects of climate change under Article 8 of the Paris Agreement, is yet another key element to assess due diligence. Mexico recognizes that vulnerable developing countries, particularly small island developing States and marginalized communities, bear the brunt of climate impacts. To mitigate this, the UNFCCC Santiago Network and the Paris Agreement Fund for Loss and Damage must be fully implemented.

8. Third, in conformity with Article 9 of the Paris Agreement and the relevant provisions of the UNFCCC providing accessible and predictable financial resources is an obligation of developed countries, enabling developing nations to address both mitigation and adaptation challenges effectively. This is a central feature in the global response to climate change.

9. And fourth, technology transfer and capacity-building are equally critical for achieving the Paris Agreement objectives under Articles 10 and 11, requiring fair and inclusive mechanisms that integrate cultural and gender perspectives.

10. However, taking into consideration these arguments and after a close examination of both the text of the cited provisions and the overall circumstances envisaged in them, Mexico respectfully requests the Court to determine that the obligations under the Paris Agreement and the climate change framework are obligations of "result". By applying the test outlined by ITLOS in paragraph 238 of its Advisory Opinion, the Court would ensure that States must achieve specific results or objectives in line with their obligations.

11. Additionally, Mexico highlights the importance of the principle of prevention as part of the due diligence obligations.

12. As established by the Court in the *Pulp Mills on the River Uruguay* case, the duty of prevention obligates States to avoid causing significant environmental harm by implementing robust regulations, conducting environmental impact assessments, and monitoring activities. Therefore, the duty of prevention is critical for protecting natural resources and ecosystems.

13. Furthermore, the precautionary principle, included in the Rio Declaration and the Paris Agreement, is also a relevant tool for addressing uncertainties inherent to potential or yet unknown impacts of climate change.

Principle of CBDR-RC

14. Moving now on to the second section of my intervention, Mexico strongly advocates for the principle of CBDR-RC. This principle recognizes the historical inequities in greenhouse gas emissions (GHG) and the varying capacities of States to address climate change.

15. This principle emphasizes that developed nations bear a greater responsibility to lead mitigation efforts, to address loss and damage, provide financial support, and facilitate technology transfer.

16. One delegation has suggested that CBDR was an "evolving notion" to dilute its normative character. With all due respect, Mexico firmly believes that this not the case. CBDR is a well-established cross-cutting principle which informs the application and interpretation of the entire climate change régime. This principle is therefore central to global justice in climate action.

17. Mr President, Members of the Court, this concludes my presentation. I kindly ask you to give the floor to Mr Pablo Arrocha, Legal Adviser of the Ministry of Foreign Affairs of Mexico for the final part of our oral submission. I thank you for your kind attention.

The PRESIDENT: I thank Mr Alfonso Ascencio. I now give the floor to Mr Pablo Arrocha. You have the floor.

Mr ARROCHA:

IV. STATE RESPONSIBILITY AND LEGAL CONSEQUENCES

1. Mr President, Madam Vice-President, Your Excellencies, it is truly an honour for me to address this honourable Court today on such a timely and critical issue.

2. I will present Mexico's position regarding State responsibility, legal consequences and the human rights perspective.

3. At a time in which we are facing the greatest climate and environmental crisis of our collective history, the advisory opinion to be rendered by this Court will define the present and shape the future for global climate justice. It calls upon the international community to act not only with urgency but with foresight, and accountability.

4. I will focus on four key areas: first, the gaps in specific rules within the climate change régime and the necessity to resort to general international law; second, the preconditions for State responsibility in this context; third, the legal consequences for breaches of climate-related obligations; and fourth, the human rights dimension in the context of climate change.

5. I will turn now on to my first topic.

6. Instruments such as the UNFCCC, the Kyoto Protocol, and the Paris Agreement embody the will of States to combat this global crisis. Yet, some argue that there is an absence of secondary rules within the climate régime.

7. As previously mentioned, the principle *lex specialis* has been invoked by some to suggest that general international law has little place alongside the specific rules of the climate régime. Mexico submits that the obligations under the climate treaties coexist harmoniously with the principles that underpin international law as a unified system, since there is no actual inconsistency or explicit derogation from them.

8. In other words, the general rules of State responsibility apply.

9. I will then address the preconditions for State responsibility.

10. Attribution of conduct to a State, by act or omission, is a foundational requirement of responsibility to arise. In many cases, this may appear straightforward, such as when harmful emissions result directly from State actions or when the State fails to adopt or implement legislative or administrative measures in accordance with its international obligations.

11. However, much of the harm to the environment and the climate arises from the activities of private entities operating within States' jurisdictions. Their conduct may be attributable to States under certain circumstances; nonetheless, international law imposes upon States, as an obligation of due diligence, the duty to regulate and oversee private actors to prevent harm. Consequently, State

responsibility may arise either because the conduct is attributable directly to them or indirectly, or for failure to act with due diligence.

12. Second, the invocation and allocation of State responsibility present unique challenges in the context of climate change. On the one hand, obligations in this régime are of a collective nature. The Paris Agreement and the UNFCCC acknowledge that climate change is of common concern for all humankind. Every State holds a legal interest in the compliance of these obligations. Thus, they must be recognized as *erga omnes partes* obligations, enabling all States to invoke the responsibility of those who fail to comply with them.

13. On the other hand, emissions and their effects are diffused, often involving multiple actors across different jurisdictions and different levels of environmental damage. Yet, this complexity cannot become a shield from accountability. International law allows for the invocation of State responsibility against a plurality of States, in accordance with the principle of proportionality.

14. In doing so, the principle of common but differentiated responsibilities, which offers a pathway to equitable burden-sharing, must be taken into consideration.

15. Third, the evidentiary challenges of linking specific emissions to harms demand innovative approaches. The Court's advisory opinion can be instrumental in the development and adoption of such tools, not only to strengthen claims for accountability but also to foster a shared understanding of the impacts of climate change. Information from civil society organizations can be particularly useful in this regard.

16. Your Excellencies, when States fail to fulfil their obligations under international law, consequences must follow. This is a cornerstone of the international legal order and, as such, it applies to international environmental law, which is not and cannot be the exception to the rule. Deciding otherwise would set a very dangerous precedent and one that could imply a denial of justice. In the context of climate change, the legal consequences of violations must address the unique nature of environmental harm.

17. The invocation of State responsibility leads to three basic legal consequences: States have the obligation to cease unlawful conduct, to guarantee non-repetition, and to provide adequate reparations.

18. Reparations are central to the régime of State responsibility, and they are essential in the climate framework, taking into consideration its possible catastrophic dimensions. As stated by the predecessor of this Court in the *Factory at Chorzów* case and the subsequent decisions by this Court in several cases, including on reparations in *Armed Activities on the Territory of the Congo*, "the breach of an engagement involves an obligation to make reparation in an adequate form", and "compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible".

19. Given the often irreversible nature of climate damage, compensation becomes a critical alternative, which must encompass direct economic losses and broader ecological harm, loss of ecosystem services, and the costs of adaptation measures.

20. While compensation is still an open question in the negotiations on climate change, it is a debt mainly towards severely affected countries. Even when the United Nations Climate Change Conference COP27 agreed on a fundamental measure and made progress in establishing a "loss and damage" fund for vulnerable countries that have been hit hard by climate disasters, contributions to this fund are of a voluntary nature and States parties do not have a differentiated obligation to make contributions in accordance with their responsibility in the emission of greenhouse gases.

21. In this context, the advisory opinion should establish the obligations arising from the rules of State responsibility for reparation purposes.

22. States must also develop scientific tools and methodologies to assess environmental harm and support claims, in accordance with their own capabilities, to ensure that reparations are fair, objective, and effective. Capacity-building and transfer of technology are key in this regard.

23. Having no reparations for a breach is contrary to international law and it is also morally and ethically inadmissible.

Human rights perspective

24. Regarding the human rights perspective, climate change is both an environmental and a significant human rights challenge, given its impacts on the rights to life, health and a healthy environment.

25. We must acknowledge that climate change is not gender-neutral. It amplifies existing inequalities and poses particular threats to women and girls.

26. The Court must recognize the disproportionate effects on vulnerable populations, as it has been done already by the United Nations General Assembly and the Inter-American Court of Human Rights.

27. There is an emerging right to healthy environment, as established by the Inter-American Court of Human Rights and the United Nations Human Rights Council, referring to the adverse effects of climate change. The Court therefore must integrate human rights obligations into the climate legal framework for the purpose of accountability, inclusivity and an effective application of the law, including the scope of the obligations of States and their responsibilities regarding non-State actors.

28. The Court should also underscore the principle of intergenerational equity, stressing the ethical and legal duty to safeguard natural resources for future generations. By protecting ecosystems and promoting sustainable development, States uphold justice and fairness in global governance.

V. CLOSING REMARKS

29. Mr President, Madam Vice-President, Your Excellencies, in conclusion, I wish to commend and celebrate the collective effort that these proceedings represent for the international community.

30. The adoption of General Assembly resolution 77/276, co-sponsored by Mexico, and the submission of 153 written statements and comments to the Registry in these proceedings — which is the highest number ever recorded in an advisory proceeding — speak volumes of the urgency and the need to address this crisis.

31. Mexico reiterates its unwavering commitment to combat climate change through robust legal, financial and co-operative frameworks. As a State party to the Paris Agreement and the UNFCCC, we are fully committed to aligning our national actions with the collective global endeavour to address this existential threat.

32. In our presentation we have emphasized the importance of harmonizing the climate régime with general international law; we have reaffirmed the validity and applicability of the principles of

no-harm, due diligence and the precautionary principle, and we have explained how these complement the obligations in climate treaties. Mexico has also highlighted the application of the principles of State responsibility under general international law to hold States accountable for wrongful acts with respect to climate and the global environment.

33. We recognize the Court's efforts to address this issue with a multidisciplinary perspective, integrating scientific and legal dimensions, as evidenced by the meeting held last November with authors of the reports issued by the IPCC.

34. Excellencies, we cannot stress enough the enormous significance of the advisory opinion to be issued by the Court. It provides a unique opportunity to state the law and, consequently, the ways in which States must conduct themselves in fulfilling their international obligations, fostering accountability, and ensuring that equity, justice, and sustainability are provided. It also offers the benefit of addressing this issue from a technical legal perspective, as only the Court can, leaving political discussions aside.

35. Moreover, we must keep in mind that, while conflict exacerbates the effects of climate change, climate change, at least indirectly, drives conflict. And, as the climate crisis intensifies in the coming years and decades, more and more people will be forced to leave their homes, as a result of everything from desertification to rising sea levels.

36. With all this in mind, the Court, as the principal judicial organ of the United Nations, has a truly historic opportunity to make a huge contribution to the fulfilment of the principles and purposes of the United Nations Charter, including the maintenance of international peace and security. As Secretary-General Guterres has said: "Climate action is not optional. It is an imperative."

37. Mexico will continue to do its part, both nationally and in the global sphere, to unite the international community under the principles of fairness and collective responsibility. We are also sure and confident that the Court is up for the challenge in its truly collective endeavour that has at its core the possibility, but most importantly, the hope to secure a sustainable climate future for all generations. Nothing more but nothing less.

38. Thank you.

The PRESIDENT: I thank the representatives of Mexico for their presentation. I now invite the delegation of the Federated States of Micronesia to address the Court and I call Mr Clement Yow Mulalap to the podium.

Mr MULALAP:

I. INTRODUCTION

1. Mr President, Madam Vice-President, honourable Members of the Court, it is an honour for me to present this oral statement on behalf of the Federated States of Micronesia.

2. Before I proceed with the rest of this statement, I wish to inform the Court that I will refer from now on to the Federated States of Micronesia as just "Micronesia". Please also be informed that Micronesia reaffirms all the substance of our written statement and written comments in these proceedings. For the sake of brevity, I will refrain from reciting what our written submissions say about the impacts of the climate crisis on the people, natural environments, practices and development aspirations of Micronesia. Those impacts are severe and very familiar.

3. This oral statement will be in two main parts. First, I will clarify the nature of the question before the Court, as requested by the United Nations General Assembly in its resolution 77/276.

4. Second, after clarifying the nature of the question, I will discuss key views of Micronesia with respect to the major elements of the question, particularly a select number of the relevant obligations, the relevant conduct that breaches those obligations and the legal consequences that arise as a result of those breaches.

5. In discussing these elements, I will repeatedly refer to the three main groups that the question identifies as being particularly harmed, namely (i) States, particularly small island developing States; (ii) peoples, including indigenous peoples; and (iii) individuals, including members of the present and future generations of humankind. The question before the Court clearly references all three groups. It is important that the Court does not lose sight of them.

II. NATURE OF THE QUESTION

6. Honourable Members, on the issue of the nature of the question in these proceedings, Micronesia strongly underscores that there is *one* question before this Court. In resolution 77/276,

the General Assembly requested the Court to "render an advisory opinion on the [. . .] question" — the General Assembly used the singular "question" rather than the plural "questions"[3]. Additionally, the resolution uses a semi-colon between paragraph *(a)* and paragraph *(b)* of the question[4]. And, the resolution contains the entirety of the question within one set of quotation marks[5]. So, notwithstanding the version of the resolution that was transmitted by the Secretary-General to the Court, it is clear that the question before the Court — that the General Assembly actually adopted — is a singular one and unified, with multiple parts that the Court must address, as requested by the General Assembly. Therefore, requests by some Participants in these proceedings for the Court to limit itself to just one element of the question must be rejected by the Court.

III. MAJOR ELEMENTS OF THE QUESTION

7. Honourable Members, I now turn to the major elements of the question before the Court. The question has three major elements, all of which the Court must address: (i) what are the relevant obligations; (ii) what is the relevant conduct of States that breaches those obligations; and (iii) what are the legal consequences arising from that relevant conduct?

A. Obligations

8. On the first major element of obligations in paragraph *(a)* of the question, Micronesia joins numerous other Participants in underscoring that the General Assembly intended for the Court to survey a wide swath of international law in answering the question. In the operative section of resolution 77/276, the General Assembly highlighted multiple sources of law to which it wishes the Court to pay "particular regard", including several core international human rights treaties, the United Nations Convention on the Law of the Sea (UNCLOS), the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, and key principles of international law and norms of customary international law[6].

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[3] 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, 29 March 2023, operative part.

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

9. "Particular regard", however, does not mean "exclusive regard". Indeed, the preamble of resolution 77/276 refers to other sources of international law and relevant instruments that are not referenced in the operative section of the resolution, including the Convention on the Rights of the Child, the Convention on Biological Diversity (CBD) and the Rio Declaration on Environment and Development[7]. Micronesia trusts that the Court will carry out its duties in a comprehensive manner that is faithful to resolution 77/276.

10. Participants in these proceedings have identified various human rights obligations of States as well as relevant principles and norms of customary international law in response to paragraph *(a)* of the question, including the prevention principle, the precautionary principle, the protection and preservation of the marine environment, equity and international co-operation. For this part of my statement, I will focus on the prevention principle, intergenerational equity and several human rights obligations, particularly in response to points raised by other Participants in these proceedings.

11. I will also advise the Court that for the rest of this statement, I will use the term "environment" as shorthand for the phrase "climate system and other parts of the environment", as referenced in the question. I will also use the phrase "GHG emissions" as shorthand for the phrase "anthropogenic emissions of greenhouse gases" from the question.

(i) Prevention principle

12. On the prevention principle, some Participants have argued that the principle applies only to recent GHG emissions because States were not aware of the harmful effects of such emissions until recently. Micronesia rejects this contention. As Vanuatu and others have demonstrated in these proceedings, international law has recognized since at least the nineteenth century that States are obligated to exercise due diligence to prevent harm from activities within their jurisdiction or control to other States; and by the middle of the twentieth century, the links between these GHG emissions and climate change were well established and understood by States[8]. Indeed, scientists knew as far

[7] *Ibid.*, preambular para. 5.

[8] Vanuatu Written Statement, para. 73; Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (dated 29 January 2024) (Exhibit D to Vanuatu's Written Statement). See Barbados Oral Statement, Verbatim Record, 2 December 2024, pp. 88-89, para. 13. See also *Alabama Claims of the United States of America against Great Britain*, Award rendered on 14 Sept. 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, XXIX *Reports of International Arbitral Awards*, pp. 129-130.

back as the early 1800s that the burning of fuel was increasing the concentration of carbon dioxide in the atmosphere[9].

13. Micronesia joins numerous other Participants in these proceedings who reject the contention that the UNFCCC, the Kyoto Protocol, and the Paris Agreement are *lex specialis* with respect to the climate crisis, including in terms of establishing legal consequences. Those instruments are important, but they are not exhaustive. References by Participants to the Implementation and Compliance Committee of the Paris Agreement and the Loss and Damage Fund under the UNFCCC as being sufficient are actually inappropriate — the Committee is non-punitive according to Article 15 of the Paris Agreement[10], and the Loss and Damage Fund is understood by UNFCCC parties to not involve compensation and liability[11].

14. Also, the General Assembly directed the Court to pay attention, as I mentioned, to a wide swath of international law rather than limit itself to the UNFCCC and its related instruments. This is critical because the UNFCCC and its related instruments do not address to any substantial degree the multiple aspects of international law highlighted in resolution 77/276.

15. Indeed, in its recent advisory opinion in case No. 31, the International Tribunal for the Law of the Sea (ITLOS), in finding that anthropogenic greenhouse gas emissions constitute pollution of the marine environment under the UNCLOS, stressed that the Paris Agreement is not *lex specialis* to the UNCLOS and does not modify or limit the obligations under the UNCLOS to protect and preserve the marine environment[12]. ITLOS further underscored that obligations under the UNCLOS would not be satisfied "simply by complying with the obligations and commitments under the Paris Agreement"[13]. Micronesia implores the Court to adopt a similar approach in these proceedings.

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[9] Charles Babbage, *On the Economy of Machines and Manufactures* (first published 1832, Cambridge University Press, 2009), p. 17.

[10] Paris Agreement, Art. 15 (2), 12 Dec. 2015, *UNTS*, Vol. 3156, p. 1.

[11] Decision 1/CP.28, preambular para. 5 as contained in the report of the Conference of the Parties on its twenty-eighth session, FCCC/CP/2023/11/Add.1, 30 Nov. 2023.

[12] *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, ITLOS, Advisory Opinion of 21 May 2024, para. 224.

[13] *Ibid.*, at para. 223.

(ii) Intergenerational equity

16. On intergenerational equity, contrary to the assertions of some Participants in these proceedings, this is a principle which the Court has already acknowledged in some form, including in connection with environmental harms. The Court did so by acknowledging in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the prospect of "damage to generations to come"[14], as well as by conceiving of the environment to include "the very health of human beings, including generations unborn"[15]. The Inter-American Court of Human Rights (IACtHR) also has a rich history of addressing intergenerational equity, especially for indigenous peoples[16]. And numerous treaties and other international instruments refer to the rights and interests of future as well as present generations of humankind, particularly with respect to ensuring the conservation and sustainable use of their natural resources for perpetuity — including the CBD[17], the UNFCCC[18], the Rio Declaration on Environment and Development[19] and the United Nations Declaration on the Rights of Indigenous Peoples[20].

17. Micronesia submits that the relevance of intergenerational equity to these proceedings is clear. States have an obligation to prevent the harmful impacts of GHG emissions on the ability of future generations of humankind — including indigenous peoples — to enjoy the natural resources of the planet for perpetuity.

(iii) Human rights obligations

18. Honourable Members of the Court, in addition to identifying principles and norms of customary international law, Participants have identified numerous core international human rights that States are obligated to respect, protect and fulfil — if those States are to ensure the protection of the environment from GHG emissions.

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[14] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 244, para. 36.

[15] *Ibid.*, p. 241, para. 29.

[16] See e.g. *The Mayagna (Sumo) Indigenous Community of Awas Tingni* v. *Nicaragua*, 2001 IACtHR Series C, No. 68, p. 149 (Aug. 16, 2000).

[17] Convention on Biological Diversity preambular para. 23, June 5, 1992, 1760 *UNTS* 79.

[18] United Nations Framework Convention on Climate Change, Art 3 (1), May 9, 1992, 1771 *UNTS* 107.

[19] United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14 (Rio Declaration on Environment and Development), UN doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), principle 3.

[20] United Nations Declaration on the Rights of Indigenous Peoples Art. 25, GA res. 61/295, UN doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013.

19. Micronesia echoes those Participants and rejects the contention of other Participants that human rights are irrelevant for these proceedings. Paragraph *(a)* and paragraph *(b)* of the question refer to present and future generations of humankind, inclusive of "peoples" and "individuals". The question therefore accommodates considerations of human rights, which are held by individuals as well as by certain collectives of peoples. I will spend a little bit of time on these considerations and the objections raised by other Participants.

20. There is a richness of rights that are relevant to paragraph *(a)* of the question, many of which are codified in core international human rights treaties. Those rights include, but are not limited to, the rights to life[21], adequate food[22], water[23], health[24], the productive use and enjoyment of property[25], cultural practices and traditions[26], and self-determination[27]. There is also the right to a clean, healthy and sustainable environment, which the General Assembly recognized in resolution 76/300 as a human right[28] that is "related to other rights and existing international law"[29].

21. Micronesia submits that there is a distinction under international law between the human rights of individuals, on the one hand, and the collective rights of groups like indigenous peoples, on the other hand. Indigenous peoples have collective rights to self-determination; to enjoy their own cultures; to practice their own religions; to speak their own languages; and to develop and transmit

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[21] See e.g. Universal Declaration of Human Rights Art. 3, GA res. 217A, UNGAOR, 3d Sess., 1st plen. mtg., UN doc. A/810 at 71 (Dec. 12, 1948); International Covenant on Civil and Political Rights Art. 6, Dec. 16, 1966, 999 *UNTS* 171 (hereinafter "ICCPR"); Convention on the Rights of the Child Art. 6, Nov. 20, 1989, 1577 *UNTS* 3 (hereinafter "CRC"); American Convention on Human Rights Art. 4, Nov. 21 1969, 1144 *UNTS* 143 (hereinafter "ACHR"); European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 3, Nov. 4 1950, 213 *UNTS* 221; African Charter on Human and Peoples' Rights Art. 4, June 27 1981, 1520 *UNTS* 217.

[22] See e.g. International Covenant on Economic, Social and Cultural Rights Art. 11, Dec. 11, 1966, 993 *UNTS* 3 (hereinafter "ICESCR"); CRC, *supra* note 21, at Art. 24 *(c)*; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities Art. 25 *(f)* and Art. 28 (1), UNGA res. 61/106, Annex I, UNGAOR, 61st Sess., Supp. No. 49, at 65, UN doc. A/61/49 (Dec. 13, 2006) (hereinafter "CRPD"); Convention on the Elimination of All Forms of Discrimination against Women Art. 14 (2) *(h)*, Dec. 18, 1979, 1249 *UNTS* 13 (hereinafter "CEDAW"); International Convention on the Elimination of All Forms of Racial Discrimination Art. 5 *(e)*, Mar. 7, 1966, 660 *UNTS* 195 (hereinafter "ICERD").

[23] See e.g. CEDAW, id.; CRPD, id., Art. 2 (2) *(a)*; CRC, *supra* note 21, Art. 24 (2) *(c)*.

[24] See e.g. ICESCR, *supra* note 22, Art. 12; CEDAW, *supra* note 22, Art. 12; ICERD, *supra* note 22, Art. 5 *(e)* (iv); CRC, *supra* note 21, Art. 24; CRPD, *supra* note 22, Art. 16 (4); European Social Charter Art. 11, Oct. 18, 1961, 529 *UNTS* 89.

[25] See e.g. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Art. 1, Mar. 20, 1952, E.T.S. 9; ACHR, *supra* note 21, Art. 21.

[26] See e.g. ICCPR, *supra* note 21, Art. 27.

[27] See e.g. UN Charter, Art. 1 (2); ICESCR, *supra* note 22, Art. 1; ICCPR, *supra* note 21, Art. 1.

[28] UNGA res. 76/300 para. 1, UN doc. A/RES/76/300 (July 28, 2022).

[29] *Ibid*., at para. 2.

to present and future generations their traditional, ancestral and indigenous knowledge about various elements of the natural environment, including seeds, flora and fauna. A number of treaty bodies for the core international human rights treaties have acknowledged these collective rights of indigenous peoples, including in connection with environmental harms[30].

22. The exercise of all of these individual and collective rights depends on an environment that is protected from GHG emissions. Micronesia submits that a State is obligated to ensure the protection of the environment from these emissions because that protection is necessary for the enjoyment of those core human rights. The failure to ensure that protection of the environment is a violation of those human rights.

23. Some Participants in these proceedings have insisted that human rights are irrelevant when answering the question before the Court, because human rights obligations cannot be applied extraterritorially with respect to the climate crisis.

24. Micronesia rejects this contention. Micronesia invites the Court to take an approach that is similar to what the Inter-American Court of Human Rights did in its 2017 Advisory Opinion on the environment and human rights[31], as well as what the Committee on the Rights of the Child did in the *Sacchi* case[32]. Specifically, in the context of adverse impacts of GHG emissions, what is dispositive is the effective control of a particular State over the sources of those emissions, rather than the State's effective control over the territories where the impacts of those emissions occurred or the State's power over the persons affected by those impacts.

25. The Court can additionally require that those adverse impacts were reasonably foreseeable by the accused State when those emissions occurred. However, in line with what I previously argued, Micronesia submits that such reasonable foreseeability must not be cabined to very recent times, as some have argued, but must stretch back to at least the middle of the twentieth century, if not further back in time.

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[30] See e.g. ICCPR, *supra* note 21, Art. 27; Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, Aug. 18, 1997, UN doc. A/52/18, annex V, paras. 2, 4 *(c)*, and 4 *(e)*; Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of everyone to take part in cultural life (Art. 15, para. 1 *(a)*), UN doc. E/C.12/GC/21 (2009), paras. 7 and 37.

[31] IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/18 Ser A No 23 (15 November 2017).

[32] Communication *Chiara Sacchi et al.* v. *Argentina et al.*, crc/c/88/d/105/2019; crc/c/88/d/106/2019 crc/c/88/d/107/2019; crc/c/88/d/108/2019, UN CRC, 22 September 2021.

26. Even if, assuming *arguendo*, there is no extraterritorial application of obligations with respect to various core human rights held by individuals, Micronesia submits that international law allows for the extraterritorial application of at least the obligation of States with respect to the right of all peoples to self-determination. This is a right held by collectives — by peoples. The Court has recognized that the right of all peoples to self-determination is a peremptory norm of international law and gives rise to *erga omnes* obligations for all States. State obligations to respect, protect and fulfil this right can therefore be — and indeed are by definition — extraterritorial.

27. Micronesia further submits that the right of all peoples to self-determination has multiple components, including permanent sovereignty of peoples over their natural resources; the right of peoples to territorial integrity; and the right of peoples to freely pursue their cultural, economic and social development. States are therefore obligated to ensure the protection of the environment from GHG emissions in order to avoid undermining the right of all peoples to self-determination, inclusive of any of the aforementioned components of that right.

B. Relevant conduct

28. Honourable Members of the Court, having discussed several relevant obligations in response to paragraph *(a)* of the question, I now turn to the second major element of the question. Specifically, what are the acts and/or omissions of States that breach the obligations under paragraph *(a)* of the question in a manner that causes significant harm to the environment, thereby triggering legal consequences under paragraph *(b)* of the question? This connective tissue between paragraph *(a)* and paragraph *(b)* is what Vanuatu and the Melanesian Spearhead Group have called the “relevant conduct”. Micronesia endorses that framing.

29. Specifically, the relevant conduct for these proceedings are the individual and cumulative releases of GHG emissions over an extended period of time, from activities under the jurisdiction or control of particular States that result in significant harm to the environment. Such significant harm is suffered by States, particularly small island developing States; by peoples, including indigenous peoples; and by individuals of present and future generations of humankind, including rights holders. Such significant harm gives rise to legal consequences under international law for those States that cause such harm.

30. The wording of paragraph *(b)* of the question is critical. Paragraph *(b)* speaks to "significant harm". While all States have obligations under international law to ensure that activities under their jurisdictions and control do not harm the environment as a result of GHG emissions, the Court must focus, in these proceedings, on those acts or omissions which have led to "significant harm" to the environment, in accordance with paragraph *(e)* of the question. It is well established — including by the Intergovernmental Panel on Climate Change — that certain States have outsized historical responsibility for a significant majority of GHG emissions over time[33].

31. The States responsible for the relevant conduct have breached multiple obligations relevant to paragraph *(a)* of the question, including obligations pertaining to the prevention principle that I discussed; the protection and preservation of the marine environment; and the respect, protection and fulfilment of core individual and collective human rights, including the rights of indigenous peoples as well as the right of all peoples to self-determination.

32. For example, that relevant conduct has caused significant transboundary harm to other States as well as the peoples and individuals living therein. It also constitutes pollution of the marine environment, in violation of core obligations to protect and preserve the marine environment from significant harm, as identified by ITLOS in its Advisory Opinion in case No. 31. And, it undermines the enjoyment of multiple core international human rights held by individuals and collectives, including the right of all peoples to self-determination, as Vanuatu, the Melanesian Spearhead Group and other Participants in these proceedings have convincingly explained.

33. It has been argued by some Participants in these proceedings that the Court cannot address legal consequences because it is impermissible if not impossible for the Court to establish a causal connection between GHG emissions under the jurisdiction and control of one State on the one hand and the particular harms to the environment on the other hand.

34. Micronesia rejects this contention because it applies the wrong analytical standard in the context of the question. The Court can understand paragraph *(b)* of the question to refer to the composite acts or omissions of a handful of States that have, collectively and over time, caused significant harm to the environment. It is already established that the historic GHG emissions under

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[33] See e.g. Vanuatu Written Statement, paras. 73, 152-153 and 162-170; Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023) (Vanuatu Written Statement, Exhibit B).

the jurisdiction or control of certain States have over time already caused and will continue to cause significant harm to the environment. This collective assessment is enough to establish the relevant conduct that leads to legal consequences for the question.

C. Legal consequences

35. Honourable Members, having identified the major elements of obligations and relevant conduct for the question, I now turn to the third and final major element of legal consequences.

36. Micronesia endorses the views expressed by numerous Participants in these proceedings that the general international law of State responsibility governs the issue of legal consequences, particularly as enshrined in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts[34] and particularly in connection with acts or omissions under a State's jurisdiction or control.

37. When applying this framing to paragraph *(b)* of the question, the Court must consider legal consequences with respect to particularly affected States, such as small island developing States; to peoples, including indigenous peoples; as well as to individuals from present and future generations of humankind, including individuals as rights holders.

38. With this framing, the legal consequences are clear. The foremost consequences are cessation and non-repetition — namely, the responsible States must cease and not repeat the acts or omissions under their jurisdiction or control that have resulted in GHG emissions that have caused significant harm to the environment. Cessation and non-repetition can include the halting of government subsidies for fossil fuels as well as the adoption of binding legislative and regulatory measures to drastically cut emissions in the near term and eventually phase out the use of fossil fuels.

39. Additional legal consequences include reparations, which can come in the forms of restitution, compensation and satisfaction. Restitution can include the rehabilitation and restoration of areas harmed by GHG emissions. Compensation can involve the provision of monetary payments by the responsible State to those who suffer such harms, including compensation for financial

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

damage as a result of GHG emissions. Satisfaction can include the enforcement of disciplinary actions against individuals and entities by the responsible State.

40. In applying the various forms of legal consequences under paragraph *(b)* of the question, the Court must differentiate, to the extent possible, between the reparations owed to States, particularly small island developing States; the reparations owed to peoples, including indigenous peoples and those exercising the right to self-determination; and the reparations owed to individuals, including rights holders of the present and future generations of humankind.

41. For example, small island developing States, being specially affected and disproportionately impacted by and among the least responsible for the climate crisis, are entitled to special consideration for funding for climate mitigation, adaptation, and loss and damage. Indigenous peoples are entitled to compensation for harms that they suffer from the climate crisis that is separate from compensation owed to other groups, individuals and government entities. And, individual rights holders are entitled to compensation as well as satisfaction in the form of disciplinary actions against actors whose emissions have undermined their enjoyment of their individual human rights. These are just some examples.

IV. CONCLUSION

42. Honourable Members of the Court, to conclude and echoing Mexico's eloquent concluding remarks earlier today, I underscore that the Court has a tremendous opportunity to authoritatively clarify international law in a manner that will benefit all of humankind, including future generations. I also stress that this is the first time that Micronesia has delivered an oral statement in any advisory proceeding before the Court. We do so because we view the Court as an instrument of justice. Justice is in your foundational documents, it is on the lips of countless advocates who have spoken within these walls, it is in your very name. As the Cook Islands articulated to you last week, international law has numerous systemic gaps, challenges and blind spots, especially when addressing the concerns of formerly colonized small island developing States like Micronesia who were not recognized as States or whose peoples were not recognized as free when the ramparts of international law were constructed. Nevertheless, we all persist in trying to bend the arc of history toward fairness, equity, truth and justice, using systems that were not created by us but which nevertheless promise

us relief. It is an exercise in trust and hope. That is why Micronesia is here. That is why the Court is here. That is why this case is here.

43. Mr President, Madam Vice-President, honourable Members of the Court, this concludes Micronesia's oral statement in these proceedings. Thank you very much for your attention.

The PRESIDENT: I thank the representative of the Federated States of Micronesia for his presentation. I now invite the delegation of Myanmar to make its oral statement and I call upon His Excellency Mr Soe Lynn Han to take the floor.

Mr HAN:

I. INTRODUCTION

1. Mr President, Madam Vice President, distinguished Members of the Court, it is a great honour for me to appear before you to present Myanmar's position on a matter of utmost importance for all States, especially to the countries being on the frontlines of global climate crisis.

2. The Request for an advisory opinion offers a crucial opportunity to reaffirm and clarify States' obligations under international law to protect the climate system and environment from greenhouse gas emissions for current and future generations. A clear legal assessment would assist the General Assembly and the international community in understanding the consequences of States' actions or inactions, particularly regarding significant environmental harm, with a focus on the vulnerabilities and the rights of developing nations. Myanmar strongly believes that the advisory opinion will carry legal weight and moral authority to address the climate crisis and further bolster multilateral co-operation and State conduct in addressing the issues of climate change.

II. MYANMAR'S GEOGRAPHY AND ENVIRONMENTAL DIVERSITY

3. Honourable judges, Myanmar is located in South-East Asia. In fact, Myanmar is the largest country in the mainland South-East Asia, with an area of 676,575 km^2. The total population of the country is 54.8 million and Myanmar shares adjacent borders with Thailand, Laos, China, India and Bangladesh. Its geographical position is also in the Indo-Pacific region, strategically located between the Andaman Sea and the Bay of Bengal, featuring an approximate length of nearly 3,000 km

(2,851 km) long coastline. Myanmar has various ecological zones and physiographic regions such as a dry zone, a delta region, hilly regions, low-lying plains and coastal areas.

4. Because of its geographic location and characteristics, Myanmar is exposed to severe natural weather events, which have increased in intensity and frequency since several decades. Crossed by large river systems ending in a vast delta, many parts of Myanmar are experiencing heavy-rain-induced floods. The nation's coast makes up more than half of the eastern side of the Bay of Bengal and the Andaman Sea, which are prone to cyclones and associated strong winds, heavy rains and storm surges. Droughts are also frequent, particularly in the central part of Myanmar. The largest portion of Myanmar's population is concentrated in two main areas: the Delta region (around 50,400 km^2) which is most exposed to recurring tropical storms, cyclones and floods and potential storm-surge effects, and the Dry Zone, which is exposed to chronic drought and other risks. Approximately 70 per cent of the total population of Myanmar depend on rain-fed agriculture, livestock and fishery and forest resources. The livelihoods and well-being of a large part of the population of Myanmar are highly sensitive and vulnerable to climate change, climate variability and natural disasters.

III. CLIMATE VULNERABILITY AND IMPACTS

5. Since several decades, climate change has significantly increased Myanmar's vulnerability to natural disasters. Observed and projected climate changes include rising temperatures, altered rainfall patterns, and a higher frequency and intensity of extreme weather events such as cyclones, floods, droughts, intense rainfall and extreme heat. The south-west monsoon season has shortened due to delayed onset and early retreat, exacerbating these impacts. Coastal areas are particularly at risk from sea level rise and salinity intrusion, threatening around 5 million people living in these regions and low-lying plains. Communities in the Central Dry Zone, Delta region and hilly areas are also being adversely affected by exposure to severe climatic events.

6. Myanmar faces a significant rise in the frequency and intensity of such natural disasters in densely populated areas, which resulted severely impacting agriculture in dry regions, worsening

socio-economic conditions. Therefore, Myanmar is mentioned as one of the world's most vulnerable countries to climate change impacts, with 7.2 score of natural hazard indicator[35].

7. Due to several devastating natural disasters in recent years, Myanmar faces severe socio-economic and human impacts. In May 2008, Cyclone Nargis, the worst natural disaster in the country's history, claimed 138,000 lives and caused over US$4 billion in damages. In 2010, Cyclone Giri struck Rakhine State on the west coast, rendering 70,000 people homeless. Recently, in May 2023, Cyclone Mocha, an extremely severe cyclonic storm with wind speeds of 257 km/h (160 mph), devastated large parts of the Rakhine state and other states and regions. The cyclone caused nearly 300 casualties (killed 148 people, injured 132 people) and damaged over 270,000 buildings (271,335 buildings), affecting 3.2 million people. In September 2024, Typhoon Yagi struck 110 townships, including the capital Nay Pyi Taw, causing flash floods and landslides that killed more than 400 people (433 people, left 79 missing) and damaged over 115,000 houses, 333 schools and numerous public infrastructure elements.

8. The impacts of climate change have already undermined the development of Myanmar and will continue to undermine further development of the country. In fact, climate change is a serious threat and a major challenge to Myanmar's economic growth and socio-economic stability. Current patterns of Myanmar's socio-economic development rely on climate-sensitive industries located in climate-sensitive areas. For example, agriculture is the largest and the most important economic sector, contributing to approximately 30 per cent of GDP and creating employment for nearly 60 per cent of the labour force in Myanmar. An increase in the frequency and severity of extreme weather events has caused a decline in agricultural productivity, which has resulted in a decrease in GDP and household income and rising food insecurity. Myanmar's population and economic activities are concentrated in disaster risk-prone areas such as the Delta, Coastal and Central Dry Zones, which are highly exposed to hazards and have both high poverty levels and low response capacity. Coastal regions are particularly at risk from sea level rise and cyclones, while the lowlands and Central Dry Zone are vulnerable to the impacts of floods and droughts, respectively.

[35] Myanmar, Natural Hazard Indicator, INFORM Climate Change Risk Index, European Commission.

Communities and businesses located in at-risk regions and reliant on climate-sensitive economic activities are particularly vulnerable to the impacts of climate change[36].

9. Despite struggling with the serious consequences of climate change, which to a substantial extent has resulted from Myanmar's contribution to global greenhouse gas emissions is considerably low. In fact, based on emission database for global atmospheric research by the European Commission, Myanmar's CO_2 emissions per capita stand at 0.59 metric tons in 2023, compared to the global average of approximately 4.7 metric tons per capita. Thus, Myanmar is considered to be one of the least greenhouse gas-emitting countries in the world, contributing only 0.22 per cent of global emissions in 2023[37].

IV. INTERNATIONAL LEGAL OBLIGATIONS AND CLIMATE JUSTICE

10. Honourable judges, Myanmar understands that the legal obligation of States to protect the climate system is beyond the direct terms of international conventions. The Paris Convention, with its almost universal participation, constitutes the primary instrument prescribing the current and specific obligations of States in relation to climate change. The obligations under Article 4 of the Paris Agreement are applicable to international rules. However, the Paris Agreement does not specify the modality of meeting these obligations and therefore gives latitude to States to determine, in line with their domestic legal régimes, whether the promulgation of laws and regulations is necessary or whether non-legislative measures will suffice.

11. According to the International Law Commission, an internationally wrongful act of a State occurs when: *(a)* conduct consisting of an act or omission is attributable to the State under international law; and *(b)* that conduct constitutes a breach of an international obligation of the State[38]. This principle applies to breaches by a State of its international obligations relating to the environment, just as much as it does to breaches of other international obligations.

12. After introducing national laws relating to environmental issues, many industrialized States have made legal claims for environmental damage caused to its own territory or interests of their

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[36] MyanmarClimateChangeStrategy_2019.pdf.

[37] EDGAR — Emissions Database for Global Atmospheric Research by the European Commission, https://edgar.jrc.ec.europa.eu/.

[38] International Law Commission (ILC), Draft Articles on State Responsibility, Part I, Art. 3.

domestic courts. However, the issue of international legal claims arising out of environmental damage is still unclear under international law. The 1992 Rio Declaration, adopted in a non-binding form by the United Nations Conference on Environment and Development, provides in Principle 2 that States shall prevent transboundary damage:

> "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 and the health of human beings, including generations unborn."

13. Let us now recall the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the International Court of Justice recognizes:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."

14. Myanmar recognizes that the United Nations Convention on the Law of the Sea, as the constitution of the oceans, provides obligations on States to protect and preserve the marine environment as per Article 192 of the Convention. Furthermore, Article 194 of UNCLOS specifies obligations of States to take measures to prevent, reduce and control pollution of the marine environment.

15. In *Costa Rica* v. *Nicaragua*, the International Court of Justice observed that

> "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment"[39].

16. In the face of the planetary environmental crisis, recognition and implementation of the right to a clean, healthy and sustainable environment is essential to protecting human life, well-being and dignity. While many human rights are linked to the quality of the environment (e.g. life, health and water), the right to a healthy environment should be accompanied by corresponding State obligations. The jurisprudence of international courts and tribunals highlights the obligations of

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[39] *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 (II),* pp. 706-707, para. 104.

States to limit activities that cause greenhouse gas emissions and that harm the rights of people both within and outside its territory.

17. In its 2017 advisory opinion on the Environment and Human Rights, the Inter-American Court of Human Rights noted that "States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory"[40].

18. Honourable judges, in our point of view, responsibility for climate change should not be evenly shared among States. Instead, these responsibilities should be shared based on historical contributions, climate vulnerability and the capacity of different nations to address climate change in line with "the principle of common but differentiated responsibilities".

19. Developed countries, particularly G20 nations, are responsible for 76 per cent of current global greenhouse gas emissions, with a 1.2 per cent increase in 2022[41]. Nearly 80 per cent of historical cumulative fossil and land use, land-use change and forestry (LULUCF) CO_2 emissions have come from G20 countries, with the largest contributions, while least developed countries contributed only 4 per cent[42]. Although Myanmar's emissions are minimal compared to industrialized nations, it disproportionately suffers significant harm from climate change. Myanmar emphasizes that industrialized nations, as historical emitters and major energy consumers, are responsible and accountable to have an obligation to support developing countries with insufficient resources to mitigate and adapt to climate change. This includes providing financial assistance, technology transfer and support for adaptation efforts, consistent with the principle of common but differentiated responsibilities and international human rights law.

20. The protection of the environment is a legal obligation. Everyone in this hall today knows that the common goal of protection of the climate system can only be achieved through a co-operative approach among nations. States are obliged to co-operate for achieving climate change mitigation.

21. In its recent advisory opinion on climate change and international law, the International Tribunal for the Law of the Sea identifies the obligations of States also extends to co-operating with

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[40] IACtHR, Advisory Opinion OC-23/17, 15 November 2017, P-101.

[41] Figure ES.1, Emissions Gap Report 2023 by the United Nations Environment Programme.

[42] *Ibid.*

a view to adopting effective measures necessary to co-ordinate and ensure the conservation and development of shared stocks[43].

V. MYANMAR'S COMMITMENTS ON CLIMATE ACTIONS

22. Myanmar has demonstrated a strong commitment to manage and address the impacts of climate change within its capacity and with limited resources. Myanmar, as a party to the Paris Agreement, has developed policy instruments and action plans and set up sectoral co-ordination mechanisms to play its role in the global efforts on climate change. Myanmar has established an institutional framework to mainstream climate change into all relevant short-, medium- and long-term national development plans and policies. The Myanmar Climate Change Policy (MCCP) (2019), the Myanmar Climate Change Strategy (MCCS) (2018-2030), and the Myanmar Climate Change Master Plan (MCCMP) (2018-2030) were endorsed and launched on 5 June 2019.

23. For our own people and all the world's citizens, we have regularly submitted intended nationally determined contributions (INDCs) to achieve the long-term goal of the Paris Agreement.

VI. CALL FOR INCLUSIVITY ON CO-OPERATIVE CLIMATE ACTION ON SHARED GLOBAL CRISIS OF CLIMATE CHANGE

24. The United Nations General Assembly Credentials Committee has deferred a decision on Myanmar's representation to attend United Nations meetings. Deferring Myanmar's representation at United Nations meetings, including Myanmar's participation in practical and functional matters such as climate change conferences, has significantly impacted the country's ability to address climate challenges effectively and implement necessary measures. Furthermore, this situation has broader regional implications, as limitation on Myanmar's engagement in climate activities can also impact the climate resilience and environmental stability of our neighbouring countries. We believe that it is also vital to view environmental impacts through the lens of human rights. Excluding Myanmar is not only limiting Myanmar peoples' right to address and combat climate change but also directly infringes upon their fundamental human rights, including the right to a safe, clean and sustainable environment. It will also undermine their capacity to secure livelihoods from climate-induced challenges which leads to hamper collective global actions to fight against climate

[43] Advisory Opinion on Climate Change and International Law, International Tribunal for Law of the Sea, p. 152.

change. On addressing this shared global crisis of climate change, all nations shall be inclusive in collaboration and co-operation, to ensure common but differentiated responsibilities on climate action and justice.

25. Mr President, Madam Vice-President, distinguished Members of the Court, this brings to a conclusion the oral submission of Myanmar. I wish to thank the Court for your attention. Thank you.

The PRESIDENT: I thank the representative of Myanmar for his presentation. Before I invite the next delegation to take the floor, the Court will observe a short break of 15 minutes. The hearing is suspended.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, Namibia, to address the Court and I give the floor to Her Excellency Ms Mekondjo Kaapanda-Girnus.

Ms KAAPANDA-GIRNUS:

1. Mr President, distinguished Members of the Court, I have the honour to appear before you on behalf of the Republic of Namibia in these historic proceedings.

2. Namibia stands before you in fulfilment of our constitutional duty and to advance a core principle of State policy. Article 95 of our Constitution requires positive State action for the maintenance of ecosystems, ecological processes and biodiversity for the benefit of present and future generations of Namibians.

3. Namibia stands before you to stop the significant harm that climate change has brought to our environment and, in particular, our *water* resources. The science is undeniable: greenhouse gases cause rising temperatures and greater evaporation, stretching water resources to their limits, while intensifying droughts[44]. With each one degree of global warming, water resources could decrease by 20 per cent[45].

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[44] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), p. 1328.

[45] *Ibid.*, p. 559.

4. For Namibia, keeping the global temperature to 1.5°C[46] rather than 2°C above pre-industrial levels is a matter of survival. Even if global warming is maintained at 2°C, the mean annual temperature in Africa is projected to be 2.3°C warmer than in the decade before 2005[47]. The IPCC has highlighted the impact of rising temperatures on water scarcity in southern Africa, including Namibia[48]. Namibia is already the driest country in sub-Saharan Africa[49] and is getting drier still. Currently, 92 per cent of our landmass is classified as semi-arid, arid or even hyper-arid[50].

5. Since 2016, extreme droughts have forced the Namibian Government to declare a state of emergency three times, including as recently as May this year[51]. In fact, we are currently in the midst of the worst drought in a century. Unless we act now, Namibia will become completely arid and enter into a permanent climatological state in which devastating droughts will become a regular feature of life in our country.

6. Mr President, distinguished Members of the Court, Namibia also stands before you to protect the *human rights* of the Namibian people, present and future. As this very Court said in 1996, "[t]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"[52]. Because of the ongoing drought in our country, over 1.2 million Namibians — nearly half of our total population — are currently in a state of emergency[53] and face high levels of acute food insecurity[54]. The loss of water resources is

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[46] Paris Agreement (12 December 2015) (Dossier No. 16), Art. 2 (1) *(a)*.

[47] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), p. 1328.

[48] *Ibid.*, p. 1346; *see also* African Union, *African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)*, p. 10.

[49] Republic of Namibia, Namibia's Second Voluntary National Review Report on the Implementation of the Sustainable Development Goals Towards Agenda 2030 (2021), p. 26.

[50] "Desertification in Namibia", https://dataspace.copernicus.eu/gallery/2024-10-20-desertification-namibia.

[51] See Republic of Namibia, Government Gazette, Proclamation by the President of the Republic of Namibia: Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution, No. 6056 (28 June 2016); Republic of Namibia, Government Gazette, Proclamation by the President of the Republic of Namibia: Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution, No. 6900 (6 May 2019); Republic of Namibia, Government Gazette, Proclamation by the President of the Republic of Namibia: Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution, No. 8370 (22 May 2024).

[52] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

[53] Republic of Namibia, Dr Saara Kuugongelwa-Amadhila, Prime Minister of Namibia, *Opening Statement at the National Platform on the Implementation of the Nationwide Drought Relief Programme, 2024/25* (25 September 2024).

[54] Integrated Food Security Phase Classification, "Namibia: Acute Food Insecurity Analysis April-September 2024", 8 July 2024; World Food Programme, "Namibia", https://www.wfp.org/countries/namibia.

therefore not just an environmental issue; it is a *human rights* issue that threatens Namibia's very existence and, in particular, the lives and livelihoods of our people.

7. Finally, Namibia stands before you in solidarity with other African States and small island developing States. Collectively, we are among the lowest emitters of greenhouse gases. Yet, climate change brings disproportionate harm to our environments, human rights, development and future generations. In the words of the late President of Namibia, Dr Hage Geingob, "developed nations must provide financial . . . support to enable developing countries to shift to cleaner energy sources without hampering development". Namibia respectfully asks the Court to determine that the obligations of those most responsible for the climate crisis, historically and currently, are not merely aspirational but legally binding, both as (i) primary obligations, as well as a (ii) legal consequence of violating those obligations.

8. Namibia concurs with the majority of Participants that, under both questions posed by the United Nations General Assembly, the Court must interpret climate change treaties by reference to international law as a whole. As the Court stated in its 1971 Advisory Opinion on Namibia, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[55].

9. In the context of the present advisory proceedings, Namibia invites the Court to interpret the climate change treaties in a way that is compatible with States' pre-existing obligations, not only under the law of the sea as confirmed by ITLOS, but also under (i) international environmental law, (ii) international human rights law, and (iii) the law on State responsibility.

10. Mr President, distinguished Members of the Court, the Republic of Namibia always appears before the Court with gratitude and confidence, appreciating the role that this august institution has played in our journey to self-determination and national independence. Today, we appear before you as our self-determination and that of so many States and peoples is threatened by climate change. More than ever, the most vulnerable States, peoples and individuals need the protection of international law. More than ever, the international community is in need of the Court's guidance.

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[55] *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.

11. I thank you for your attention and respectfully ask that you invite Dr Ndjodi Ndeunyema to the podium.

The PRESIDENT: I thank Her Excellency Ms Mekondjo Kaapanda-Girnus. I now give the floor to Mr Ndjodi Ndeunyema. You have the floor, Sir.

Mr NDEUNYEMA:

1. Mr President, Members of the Court, it is a special honour to appear before you for the first time and on behalf of the Republic of Namibia.

2. Namibia's submissions on the two questions put before the Court will focus on *one* issue, a resource that is essential to our very survival: *water*.

3. On question *(a)*, Namibia concurs with the majority of Participants in these proceedings that States have legal obligations of mitigation, adaptation and co-operation in respect of climate change. This is particularly because greenhouse gas emissions (i) cause *significant harm* to the *environment*, specifically the *hydrosphere* within the climate system, and thereby (ii) has adverse consequences for *human rights*, particularly the *right to water*.

4. On question *(b)*, Namibia submits that States violating these obligations incur responsibility, including reparations for the significant harm they caused to the hydrosphere and the violation of the right to water.

I. OBLIGATION OF STATES UNDER CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW: GREENHOUSE GAS EMISSIONS CAUSE SIGNIFICANT HARM TO THE HYDROSPHERE

5. Mr President, Members of the Court, turning to the first basis of the legal obligation in response to question (*a*) — customary international environmental law. As you heard last week, a minority of Participants continue to cast doubt on whether the long-established customary rules, such as the obligation to prevent significant harm to the environment, apply to greenhouse gas emissions.

6. Both ITLOS and a significant number of Participants here have already dispelled any such doubt. Namibia adds that these customary obligations apply equally to greenhouse gas emissions, given their well-documented significant *harm* to the hydrosphere[56].

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[56] IPCC, *Climate Change 2021: The Physical Science Basis* (2021), available at https://www.ipcc.ch/report/ar6/wg1/, Glossary, p. 2234. See Article 2 of the UNFCCC (9 May 1992), *UNTS*, Vol. 1771, p. 107 (Dossier No. 4).

A. Significant harm and pollution caused by greenhouse gas emissions to the hydrosphere, especially in Namibia

7. In *Silala*, and citing your earlier jurisprudence in *Pulp Mills*, you observed that "under customary international law" States are "obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party"[57].

8. Furthermore, in *Pulp Mills* you also stated that "[t]his vigilance and prevention is all the more important in the preservation of the ecological balance, since *the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse*"[58].

9. In the same way, the "best available science" found in the IPCC's works[59] has incontrovertibly demonstrated that the negative impact of greenhouse gas emissions also affects other components of the climate system, particularly the hydrosphere and the global water cycle[60].

10. As Ambassador Kaapanda-Girnus just laid bare, the catastrophic consequences of climate change in Namibia, if no steps are taken, will soon result in a permanent state of climatological aridity.

11. We therefore ask: how can this *not* be significant harm to the environment?

B. Legal obligation to prevent significant harm to the hydrosphere in the context of climate change by mitigation, adaptation and co-operation

12. Namibia argues that the due diligence obligations of prevention must of necessity anticipate and take into account the impact on the global hydrological system. The customary obligation on States to prevent the significant harm to the hydrosphere due to greenhouse gas emission is threefold.

13. *First*, the obligation of mitigation, which means reduction in greenhouse gas emissions, as already mentioned by other Participants. In particular, this entails the obligation of States to regulate the conduct of private persons and corporations, and their emissions.

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[57] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II),* p. 648, para. 97.

[58] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* p. 77, para. 188.

[59] International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS Case No. 31), Advisory Opinion of 21 May 2024, para. 208.

[60] See IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019), available at https://www.ipcc.ch/srocc/download/#pub-full, Glossary, p. 688.

14. *Second*, the obligation of adaptation. In the context of the hydrosphere, this means increasing the resilience of the water system to the impact of climate change.

15. *Finally*, the obligation of co-operation. This is a cornerstone for ensuring that activities of other States are appropriately sensitive to their impacts on the hydrological system.

16. The obligation to prevent harm to the hydrosphere is a global responsibility because the hydrosphere itself knows no national boundaries. For example, because Namibia receives almost a third of its water from transboundary rivers, reductions in rainfall in upstream countries like Angola and Zambia will catastrophically reduce water availability in Namibia[61].

17. As per *Pulp Mills*, the obligation of co-operation applies to upstream and downstream States of a particular watercourse. It follows that the obligation must also extend to every State in the global water cycle. Therefore, it is only through co-operation and due diligence in reducing greenhouse gas emissions that the hydrosphere can be protected.

II. OBLIGATION OF STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW: THE HARM TO THE HYDROSPHERE ENGAGES THE RIGHT TO WATER

18. Mr President, Members of the Court, turning now to the second basis in response to question *(a)* — international human rights law: you have already heard about the relevance of the right to life, the right to self-determination, and the right to a clean, healthy, and sustainable environment. Namibia wishes to emphasize that the *right to water should not* be overlooked by the Court's opinion. Water is an essential right to everyone, and this is especially so for the Namibian people and others living in arid areas.

A. Bases of the right to water under conventional and customary international law

19. We ask the Court to confirm that there exists a right to water under both customary international law and human rights treaties and customary international law as evidenced by state practice and *opinio juris*[62]. And this is on three grounds.

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[61] Luckson Zvobgo, *Evidence of Observed Impacts from Human-Induced Climate Change, and Projected Future Impacts on Namibia* (23 September 2024), para. 23.

[62] UNGA res. 68/157: 'The Human Right to Water and Sanitation' (18 Dec. 2013) UN doc A/RES/68/157; UNGA res. 70/169: 'The Human Right to Water and Sanitation' (17 Dec. 2015) UN doc A/RES/70/169; UNGA res. 64/292: 'The human right to water and sanitation' (3 Aug. 2010) UN doc A/ RES/64/292.

20. *First*, the right to water is a crucial component of (i) the right to an adequate standard of living and (ii) the right to the highest attainable standard of health as enshrined in Articles 11[63] and 12[64] of the International Covenant on Economic, Social and Cultural Rights.

21. *Secondly*, the right to water is an integral component of the right to life. This is reflected in Article 6 of the International Covenant on Civil and Political Rights[65], and the Universal Declaration, Article 3[66], amongst others[67].

22. *Finally*, we submit that the right to water is a corollary and an irreducible core of the right to self-determination. This is particularly relevant to States where water resources are crucial to a people's very survival.

23. As a rule of customary international law, the right to water binds each State regardless of its ratification of human rights treaties. This is even more so where the right to water engages *erga omnes* obligations, such as the right to self-determination.

B. Legal obligation to respect, protect and fulfil the right to water in the context of climate change

24. As stated in General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights[68] the right to water imposes three distinct obligations.

25. *First*, the obligation to *respect*, which requires States to refrain from interfering — directly or indirectly — with the enjoyment of the right to water[69].

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[63] United Nations Committee on Economic, Social and Cultural Rights (UN CESCR), General Comment No. 15: The right to water (arts. 11 and 12 of the ICCPR), UN doc. E/C.12/2002/11 (20 Jan. 2003). See also Art. 25, para. 1, of the Universal Declaration of Human Rights.

[64] See also Article 16 of the African Charter on Human and People's Rights. African Commission on Human and Peoples' Rights (CmHPR), *Free Legal Assistance Group and Others* v. *Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, Decision (October 1995), para. 47; ACmHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE)* v. *Sudan*, Communications Nos. 279/03-296/05, Decision (May 2009), paras. 208-212; UN CESCR, General Comment No. 14 (2000), para. 11; UN CESCR, General Comment No. 15: The right to water (arts. 11 and 12 of the ICCPR), UN doc. E/C.12/2002/11 (20 Jan. 2003), paras. 3-4.

[65] United Nations Human Rights Committee (UN HRC), General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018), UN doc. CCPR/C/GC/36 (3 Sept. 2019), para 26.

[66] ACmHPR, *General Comment No. 3* (2015), para. 36; UN HRC, General Comment No. 36 (2019), para. 26.

[67] See for instance UNGA res. 64/292, "The human right to water and sanitation" (3 August 2010); UN HRC, res. 15/9, "Human rights and access to safe drinking water and sanitation", UN doc. A/HRC/RES/15/9 (6 Oct. 2010).

[68] UN CESCR, General Comment No. 15: The right to water (arts. 11 and 12 of the ICCPR), UN doc. E/C.12/2002/11 (20 Jan. 2003), para. 20.

[69] *Ibid.*, para. 21.

26. *Second*, the obligation to *protect*, which requires States to prevent third parties from interfering with the enjoyment of the right to water[70].

27. And *finally*, and very importantly, the obligation to *fulfil*, which requires States to facilitate the enjoyment of the right to water[71].

28. In the context of climate change, this entails measures similar to those under the customary obligation of prevention. For example, States have the obligation to take *adaptation* measures, of which Namibia has adopted many[72].

29. States also have the obligation of *mitigation* in respect of third parties such as domestic and transnational corporations within their jurisdiction or control. States must ensure that due diligence throughout the value chains of these business entities, particularly in identifying, mitigating and addressing the adverse environmental impacts of their business activities.

30. There is only so much that States with low emissions can do, especially with regard to mitigation. Thus, the obligation of high-emitting States — whether or not they are "developed" or self-proclaimed "developing" States — is crucial.

31. This brings me to the applicability of the right to water.

C. Applicability of the right to water in the context of climate change

32. Mr President, Members of the Court, last week, a small number of Participants questioned the relevance and applicability of human rights law (1) *ratione loci*, (2) *ratione materiae* and (3) *ratione personae*. We will illustrate in turn that none of these hold water.

1. Applicability *ratione loci*

33. With respect to the application *ratione loci*, States such as Germany have for instance questioned the extraterritorial applicability of human rights[73].

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[70] *Ibid.*, para. 23.

[71] *Ibid.*, para. 25.

[72] See e.g. Republic of Namibia, *National Climate Change Policy* (2011); Republic of Namibia, *National Climate Change Strategy and Action Plan* (2015); Republic of Namibia, *Intended NDC* (2015); Republic of Namibia, *NDC Update* (2021); Republic of Namibia, *First Adaptation Communication to the UNFCCC* (2021).

[73] CR 2024/35, p. 150, para. 18 (Zimmermann).

34. Namibia disagrees because, in our view, even though the *application* of the right to water may differ depending on whether the rights holder is within the territory of the State in question, the right to water itself is *applicable* extraterritorially. This is for three reasons.

35. *First*, the International Covenant on Economic, Social and Cultural Rights contains no limit as to "jurisdiction" or "control". Article 2, paragraph 1, of that Covenant requires each State Party to "take steps, individually and through international assistance and co-operation, especially economic and technical assistance, to the *maximum* of its available resources, with a view to achieving *progressively* the full realization of the rights".

36. This also applies to the right to water under Articles 11 and 12 of the Covenant. In General Comment No. 15, the Committee explained that this requires States parties to respect the enjoyment of the right to water in other countries. Compliance includes co-operation that requires States to refrain from interference. And this includes "activities undertaken within the State party's jurisdiction" that "deprive *another* country of the ability to realize the right to water for persons in its jurisdiction"[74].

37. *Secondly*, to argue that the right to life and other human rights of Namibians and other peoples are *inapplicable* because they are outside the "jurisdiction or control" of emitting States is grossly insensitive and self-serving. It is also simply incorrect as a matter of fact and law, as Micronesia this morning, and several other Participants have already addressed.

38. *Finally*, in so far as the right to water engages the right to self-determination, the obligation under the right is necessarily owed *erga omnes*.

39. For these reasons, human rights obligations, specifically the right to water, apply extraterritorially. In any case, the right to water informs the *content* of legal obligations of States under international law, including international environmental law and the climate change treaties régime[75].

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[74] UN CESCR, General Comment No. 15: The right to water (arts. 11 and 12 of the ICCPR), UN doc. E/C.12/2002/11 (20 Jan. 2003), para. 31.

[75] CR 2024/35, pp. 147-148, paras. 2-4, 9-10 (Zimmermann).

2. Applicability *ratione materiae*

40. This brings me to the second objection: *ratione materiae.* In this regard, a handful of Participants have also argued that international human rights law does not impose obligations in respect of greenhouse gas emissions, or if it did, compliance with the climate change treaties would be in compliance with human rights obligations. This is also inaccurate for three principal reasons.

41. *First*, the obligation to respect, protect and fulfil human rights applies *regardless* of the source of infringement. Nothing suggests that the protected rights, including the right to water, are to be interpreted restrictively to exclude their infringement due to environmental harm caused by greenhouse gases.

42. In this regard, various courts and treaty bodies have recognized that human rights law requires States to take measures to prevent such infringements[76]. For example, this year, the European Court of Human Rights found Switzerland in breach of its obligations under the European Convention because it had failed to properly implement a regulatory framework for limiting greenhouse gas emissions[77].

43. *Secondly*, climate change treaties represent only one piece of a larger puzzle, whereby compliance with climate change treaties alone does not ensure compliance with human rights obligations under the right to water.

44. *Finally*, some human rights, such as the right to self-determination, enjoy peremptory status[78]. As a result, in cases of conflict, obligations flowing from climate change treaties must be interpreted and applied consistently with these peremptory human rights norms.

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[76] UN HRC, General Comment No. 36: Article 6: right to life, UN doc. CCPR/C/GC/36 (3 Sept. 2019) (Dossier No. 299), paras. 3, 62; Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, Understanding Human Rights and Climate Change (2015), available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf, p. 13; IACtHR, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity — interpretation and scope of Articles 4 (1) and 5 (1) of the American Convention on Human Rights), Advisory Opinion OC-23/17 (15 November 2017), Series A No. 23, para. 180.

[77] ECtHR, Grand Chamber, *VereinKlima Seniorinnen Schweiz and Ors* v. *Switzerland*, Application No. 53600/20, Judgment (9 April 2024), paras. 573-574.

[78] See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 233 ("in cases of foreign occupation").

3. Applicability ratione personae

45. Turning to the final objection: *ratione personae*. Some States have questioned whether human rights law is applicable to future generations, as they regard this to be merely the protection of "abstract persons from abstract risks"[79].

46. There is no basis for this argument. The Committee on Economic, Social and Cultural Rights has noted that compliance with water obligations requires States parties to take measures "to ensure that there is sufficient and safe water for present and future generations"[80]. This explicitly includes guarding against impinging water in the context of climate changes[81]. Moreover, as already noted by our representative, in your 1996 *Nuclear Weapons* Advisory Opinion, you recognized the importance of obligations to "generations unborn"[82].

47. Namibia submits that States are under legal and fiduciary obligations as trustees for water resources of future generations.

III. STATE RESPONSIBILITY FOR VIOLATION OF THEIR OBLIGATIONS

48. Mr President, this brings me to our final point in response to question (*b*).

A. The *lex specialis* principle has no application

49. As a preliminary issue, Namibia adds its voice to the great majority of Participants who concur that the ILC Articles on State Responsibility must be followed when determining the relevant legal consequences, including the principle of compensation.

50. Namibia also notes the small minority of participants who have sought to *dilute* the legal consequences applicable by arguing that the relevant rules and consequences are found *exclusively* within the climate change treaties régime.

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[79] CR 2024/35, p. 151, para. 26 (Zimmermann).

[80] UN CESCR, General Comment No. 15: The right to water (Arts. 11 and 12 of the ICCPR), UN doc. E/C.12/2002/11 (20 Jan. 2003), para. 28; see also *ibid*., para. 11.

[81] UN CESCR, General Comment No. 15: The right to water (Arts. 11 and 12 of the ICCPR), UN doc. E/C.12/2002/11 (20 Jan. 2003), paras. 8, 10, 28.

[82] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

51. In concurrence with most Participants, the *lex specialis* principle finds no application. There is *neither* "*actual inconsistency*" nor a "*discernible intention to exclude*" the applicability of the law of State responsibility[83]. This is for three reasons.

52. *One*, mechanisms such as the Loss and Damage Fund in Article 8 of the Paris Agreement can operate while States seek compensation for the harm incurred as a result of non-compliance by other States with their climate change mitigation obligations[84].

53. *Two*, if we consider the *travaux préparatoires* of the Conference of the Parties, when adopting the Paris Agreement, they expressly stated that "Article 8 of the Agreement *does not* involve or provide a basis for any liability or compensation"[85].

54. *Three*, far from exhibiting a "discernible intention" for climate change treaties to exclude rules on reparations contained in the Articles on State Responsibility, some States have expressly declared that their signing or ratification of the UNFCCC "shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change"[86].

B. Compensation

55. Having dispensed with the *lex specialis* fallacy, Namibia invites the Court to affirm that compensation is an appropriate remedy as recognized in Article 36, paragraph 1, of the Articles on State Responsibility. The science of climate change provides ample evidence that anthropogenic greenhouse gas emissions have resulted in the prevailing disastrous climate change events that we are seeing. This has caused huge financial losses and impaired the developmental initiatives of many developing countries, including Namibia.

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[83] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 140 (emphasis added).

[84] The Warsaw Mechanism under Article 8 of the Paris Agreement is of the same nature.

[85] Conference of the Parties, Decision 1/CP.21, "Adoption of the Paris Agreement", para. 51, reproduced in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015: Addendum: Part two: Action taken by the Conference of the Parties at its twenty-first session, UN doc. FCCC/CP/2015/10/Add.1 (29 January 2016), p. 8 (emphasis added).

[86] UN Climate Change, *Declarations by Parties*, available at https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties.

56. Compensation is of particular importance to developing States that face the prohibitively high costs that are associated with addressing the impacts of climate change, and with implementing the projects for adaptation and building climate resilience[87].

IV. CONCLUSION

57. Mr President, Members of the Court, to conclude, anthropogenic climate change has and will continue to threaten our shared water resources. Namibia has stressed the centrality of the hydrosphere to the lives and livelihoods of Namibian peoples, and all around the world.

58. States have obligations under international law to protect the environment by mitigation, adaptation and co-operation in respect of greenhouse gas emissions that significantly harm the hydrological system.

59. The realization of the human right to water will depend on our collective response to the climate crisis. We urge the Court to take this into account in your advisory opinion.

60. I thank you for your attention.

The PRESIDENT: I thank the representatives of Namibia for their presentation. I now invite the delegation of Japan to address the Court and I call upon Mr Nakamura Kazuhiko to take the floor.

Mr NAKAMURA:

1. Mr President, Members of the Court, it is an honour to appear before you on behalf of the Government of Japan.

2. Before addressing the legal questions put to the Court by the General Assembly, please allow me to briefly reiterate Japan's political stance on climate change, which aligns with its international obligations. Climate change is a challenge, indeed a crisis, that needs to be tackled urgently by all of humanity. In order to limit the global temperature increase to 1.5°C, all countries, in particular major emitters, must be united to address the problem.

3. Japan aims to reduce its greenhouse gas emissions by 46 per cent in 2030 compared to its 2013 levels. This is an ambitious target which is aligned with the long-term goal of achieving net zero by 2050. Japan wishes to stress that only a common effort by all countries to reach the peak

[87] Namibia Written Statement, para. V.A.2.

global greenhouse gas emissions by 2025 and to achieve net zero emissions in 2050, may allow to implement the 1.5°C goal. This was clearly underlined by the IPCC in its Sixth Assessment Report on Climate Change[88].

4. My country also acknowledges that support is needed for countries that are particularly vulnerable to the adverse effects of climate change, such as island nations where climate change poses an imminent threat. In this respect, Japan provides assistance for developing countries, to support them building sustainable and resilient economies and societies. Japan has been steadily implementing its commitment to provide up to a total of US$70 billion during the period from 2021 to 2025, and a part of it contributed to the Green Climate Fund as well as the Fund for responding to Loss and Damage. Japan is actually the first contributor to the latter fund.

5. Beyond these financial commitments, Japanese companies and the Japanese Government collaborate with developing and emerging countries under the Joint Crediting Mechanism (JCM). The JCM aims to facilitate diffusion of leading decarbonizing technologies and infrastructure through investment by Japanese entities, thereby contributing to GHG emission reductions or removals and sustainable development in developing countries.

6. Mr President, I now turn briefly to the applicable law. In my country's view, the climate change treaty régime is the most relevant law applicable to the questions addressed to the Court by the General Assembly. International agreements, such as the UNFCCC, the Paris Agreement which stipulate specific obligations on climate action, are apt to provide answers to both questions. Our written submissions and observations address the issue of the applicable law at some length, and I respectfully refer to them[89].

7. In our oral submissions, we insist upon the interaction between the climate change treaties and general international law. Japan's basic position is that climate change treaties, whose development was inspired by customary principles concerning the protection of the environment, have in turn been contributing greatly to their concretization in the field of climate change. We

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[88] Climate Change 2023 Synthesis Report, Summary for Policymakers, A Report of the Intergovernmental Panel on Climate Change, p. 20, Mitigation Pathways B.6.1.

[89] International Court of Justice, *Obligations of States in Respect of Climate Change (Request for Advisory Opinion)*, Written Statement of the Government of Japan, 22 March 2024, p. 3, para. 4., p. 7 para. 18. and International Court of Justice, *Obligations of States in Respect of Climate Change (Request for Advisory Opinion)*, Written Statement of the Government of Japan, 15 August 2024, p. 3, para. 4, p. 22, para. 48.

therefore underline in our oral submissions this phenomenon of cross-fertilization or systemic integration. I will thus address, how the general principle of *due diligence* in the international environmental law should be defined in relation to the climate change treaty régime (I). In the second part, Professor Takamura Yukari will speak about the interaction between climate change treaties and customary principles (II). In the third part, Professor Alina Miron will examine the legal framework relevant to question *(b)* (III).

I. INTRODUCTION

1. La définition et la portée de la diligence due dans le domaine du changement climatique

8. Monsieur le président, la diligence due a été mentionnée par beaucoup d'États dans leurs exposés ou observations écrites dans cette procédure. Le TIDM en a également traité dans son avis consultatif du 21 mai dernier[90]. Elle mérite donc d'être examinée ici.

9. Comme l'a souligné la professeure Penelope Ridings dans son étude préliminaire présentée à la Commission du droit international en 2024, « [l]a nature juridique, la portée et le contenu de l'obligation de diligence ne sont … pas bien définis en droit international »[91]. Qu'elle soit un « standard de conduite » ou un « principe général du droit », la diligence due a un contenu variable. Le TIDM insiste d'ailleurs sur ce caractère variable dans son avis consultatif[92]. Il dépend des normes primaires qui lui donnent naissance et auxquelles elle est rattachée, ainsi que des circonstances et de la situation spécifique des États concernés. Ainsi, les conduites concrètes requises par cette notion ne sont pas censées être identiques, mais varient selon l'obligation primaire et le domaine en question.

10. C'est sur la base de cette compréhension de la notion que le Japon considère que la diligence due dans le contexte spécifique du changement climatique évolue, en fonction des obligations primaires inscrites dans les traités relatifs aux changements climatiques. Celles-ci sont elles-mêmes évolutives — peu de traités ont connu une telle dynamique normative comme c'est le

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[90] TIDM, demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, avis consultatif, 21 mai 2024, par. 234-237, 239-243, 254-258, 309, 353, 395-400.

[91] Nations Unies, rapport de la Commission du droit international, soixante-quinzième session (29 avril-31 mai et 1er juillet-2 août 2024), doc. A/79/10, p. 162, par. 6.

[92] TIDM, demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, avis consultatif, 21 mai 2024, par. 239.

cas de ceux adoptés afin de contribuer à l'objectif ultime de la UNFCCC. Ainsi, à l'accord de Paris viennent s'ajouter les décisions adoptées lors des différentes COP, qui marquent une progression des objectifs et un renforcement des méthodes de mise en œuvre. L'effort des parties prenantes a été d'adapter le droit aux « meilleures données scientifiques disponibles », pour reprendre la formule de l'accord de Paris[93].

2. Le régime des traités sur le changement climatique comme vecteur d'incarnation de la diligence due

11. Le droit du changement climatique incorpore également la dimension procédurale de l'obligation de diligence due, notamment en matière d'échange d'informations, de consultation, d'évaluation et de contrôle. La Cour a eu l'occasion d'insister par le passé sur la dimension procédurale de l'obligation de diligence due[94]. Ces obligations procédurales accompagnent et garantissent la mise en œuvre des obligations substantielles. Ainsi l'article 4 de la UNFCCC contient un vaste inventaire d'obligations procédurales telles que la notification à la Conférence des Parties[95], l'évaluation des impacts sous forme d'établissement et de mise à jour de l'inventaire national[96], et la coopération pour lutter contre le changement climatique. On peut sans difficulté qualifier cette disposition de clé de voûte du principe de diligence due dans le domaine du changement climatique.

12. L'accord de Paris va encore plus loin en établissant des obligations procédurales pour promouvoir la surveillance et la mise en œuvre des obligations climatiques. L'article 13 établit un cadre de transparence à travers l'examen des progrès réalisés. S'appliquant à tous les pays, il vise à fournir des informations claires sur la mise en œuvre des obligations, ainsi que sur le soutien reçu et fourni. À cette fin, les États préparent et transmettent un rapport biennal, contenant des informations sur les émissions par source et les absorptions par les réservoirs, sur les progrès réalisés dans la mise en œuvre de leurs contributions déterminées au niveau national, ainsi que sur le soutien financier et

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[93] Accord de Paris, par exemple art. 4, par. 1, art. 7, par. 5, art. 14.

[94] Voir *inter alia, Différend concernant le statut et l'utilisation des eaux du Silala (Chili c. Bolivie), arrêt, C.I.J. Recueil 2022 (II)*, p. 651-652, par. 114 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 707, par. 104.

[95] UNFCCC, art. 4, par. 1, al. *a)* et *j)*. Voir aussi UNFCCC, art. 12.

[96] UNFCCC, art. 4, par. 1, al. *a)*.

technologique apporté aux pays en développement. Toutes ces informations sont examinées à deux reprises, d'abord au niveau des experts techniques, ensuite au niveau politique.

13. Permettez-moi également d'introduire le point de vue du Japon sur les responsabilités communes mais différenciées (CBDR). Les CBDR font partie de l'architecture normative de la UNFCCC et de l'accord de Paris. À l'instar de la diligence due, les CBDR doivent être comprises comme un concept évolutif, qui n'impose pas de responsabilités fixes à des groupes spécifiques, mais prend plutôt en compte les différentes circonstances et capacités de chaque pays à coopérer pour atteindre les objectifs de la UNFCCC et de l'accord de Paris.

14. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention. Je voudrais maintenant passer la parole à la professeure Takamura.

The PRESIDENT: I thank Mr Nakamura Kazuhiko. I now give the floor to Professor Takamura Yukari.

Ms TAKAMURA:

II. INTERACTION BETWEEN CLIMATE CHANGE TREATIES AND CUSTOMARY PRINCIPLES

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is a great honour and privilege for me to deliver a statement on behalf of the Government of Japan.

The principle of prevention of significant harm to the environment in the context of climate change

2. Under international law, States have the obligation to "ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control". This obligation of States to prevent transboundary damage to the environment is well-established as a customary rule, as the Court's Advisory Opinion of *Legality of the Threat or Use of Nuclear Weapons* and subsequent judgments have confirmed.

3. In the *Pulp Mills* case, the Court stated interconnection between this obligation and duty of due diligence when they are applied to the protection of the environment:

> "[T]he 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."[97]

The obligation is thus an obligation of conduct rather than of result, subject to exercise of due diligence.

4. On the other hand, the UNFCCC, in its preamble, recalls the obligation to prevent transboundary damage to the environment as stipulated in Principle 2 of the Rio Declaration, which has inspired the elaboration of the UNFCCC and its subsequent development of the treaty régime.

The standard of due diligence

5. The International Tribunal for the Law of the Sea (ITLOS) stated in its advisory opinion on climate change and international law that due diligence is a "variable concept"[98]. ITLOS also stated that the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies[99]. ITLOS indicated several factors to be considered in this regard, which include scientific and technological information, the risk of harm and the urgency involved, as well as relevant international rules and standards. Implementing the duty of due diligence may also vary according to States' capabilities and available resources: it requires each State to do whatever it can in accordance with its capabilities and available resources.

Obligations of States under the Paris Agreement inform the standard of due diligence in the context of climate change

6. In the context of climate change, no specific standard of due diligence is stipulated under customary international law. The Paris Agreement as "relevant international rules and standards" should be considered, may inform the standard of due diligence in the context of climate change.

7. Under the Paris Agreement, every five years, each party shall prepare, communicate and maintain nationally determined contributions (NDCs) that it intends to achieve[100]. Parties shall

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

[98] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* Advisory Opinion of 21 May 2024, ITLOS, paras. 239, 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.

[99] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, ITLOS, paras. 239.

[100] Articles 4.2 and 4.9 of the Paris Agreement.

pursue domestic mitigation measures, with the aim of achieving NDC[101] (Article 4.2 and 4.9). These obligations are considered as obligations of conduct but not obligations of result.

8. Each Party's NDC will represent a progression beyond the party's current NDC and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, according to Article 4.3 of the Paris Agreement[102].

9. Each Party's NDC shall also be informed by the outcome of the global stocktake under Article 14, the process to assess the collective progress toward achieving the purpose of the Paris Agreement and its long-term goals as expressed in its Article 2 (1) *(a)*[103], which are to hold the increase in the global average temperature to well below 2°C and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, in the light of equity and the best available science (Article 4.9)[104]. It should also be noted that, in 2021 at COP26, parties to the Paris Agreement resolved to pursue efforts to limit the temperature increase to 1.5°C rather than well below 2°C.

10. These obligations including the one concerning progression over time and reflecting its highest possible ambition towards achieving the purpose of the Paris Agreement — its long-term goals — may inform the standard of due diligence in the context of climate change.

Standard of due diligence and differentiation

11. The standard of due diligence may also change over time given that these factors to be considered evolve, such as scientific and technological information as well as relevant international rules and standards.

12. In this regard, it should also be noted that implications of "common but differentiated responsibilities and respective capabilities and respective capabilities" (CBDR-RC) have evolved from annex-based bifurcated approach to differentiation under the UNFCCC and its Kyoto Protocol, towards multi-factored differentiation approach under the Paris Agreement. Introducing the wording of "in the light of different national circumstances" made such evolution even clearer.

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[101] Article 4.2 of the Paris Agreement.

[102] Article 4.3 of the Paris Agreement.

[103] Articles 14.1 and 14.3 of the Paris Agreement.

[104] Article 4.9 of the Paris Agreement.

13. CBDR-RC does not create an autonomous obligation, rather it provides guidance on how relevant provisions of climate treaties should be interpreted and applied. Japan acknowledges the importance of developed countries' leadership role, which entails more ambitious mitigation actions, as reflected in their NDCs. At the same time, in light of relevant rules of the Paris Agreement, the obligation to prevent significant damage to the environment requires each party — meaning all States — to take all appropriate climate change mitigation measures in order to achieve the long-term goals of the Paris Agreement, according to its best capabilities. The application of the CBDR-RC should not lead to undermine the fulfilment of this obligation towards achieving objectives of the Paris Agreement, especially its long-term goal.

Importance of the obligation to co-operate in good faith

14. Mr President and distinguished Members of the Court, finally, the Government of Japan highlights that "given the diffused and cumulative causes and global effects of climate change", the general obligation of States to co-operate in good faith gains far more importance than ever for States to effectively address climate change and its adverse impacts. The Government of Japan has implemented this obligation to co-operate and will continue to do so.

15. This concludes the statement on my part. With the permission of the Court, I now invite Professor Miron to the podium. I thank you very much for your attention.

The PRESIDENT: I thank Professor Takamura Yukari. Je donne maintenant la parole à la professeure Alina Miron.

M[me] MIRON :

III. LE CADRE JURIDIQUE PERTINENT POUR LA QUESTION *B)*

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un grand honneur de paraître devant vous au nom du Japon. Comme annoncé par M. Nakamura, j'aborderai la question *b)*. Il nous semble que, telle qu'elle est formulée, elle ne désigne pas le droit de la responsabilité pour fait internationalement illicite comme étant nécessairement le droit juridique applicable. Selon le Japon, la question *b)* peut trouver une réponse utile dans les obligations primaires de l'accord de Paris.

1. L'inadaptation du droit de la responsabilité pour fait illicite

2. Je souhaiterais, pour commencer, écarter un faux dilemme : il ne s'agit pas de savoir si, dans l'abstrait, les principes coutumiers de la responsabilité pour fait illicite peuvent être applicables aux émissions anthropiques de gaz à effet de serre. Il n'y a aucune raison de les écarter en cas de violation des obligations nées des traités relatifs au changement climatique ou encore des obligations coutumières correspondantes.

3. Cela étant, la question *b)* suppose d'identifier les « conséquences juridiques » de certains actes et omissions. Or, dans votre jurisprudence, cette expression — « conséquences juridiques » — n'est pas synonyme d'« obligations secondaires de réparation ». Que ce soit dans l'avis consultatif sur la *Namibie*[105], dans celui sur l'*Archipel des Chagos*[106] ou bien dans *Conséquences juridiques découlant des politiques et pratiques d'Israël dans le Territoire palestinien occupé*[107], votre Cour a englobé dans cette expression des « conséquences juridiques » à la fois les obligations secondaires de l'État responsable et les obligations primaires des États tiers, ces obligations primaires trouvant leur expression la plus concrète dans ces affaires dans des résolutions de l'Assemblée générale et du Conseil de sécurité. Mais, dans la présente procédure, la question *b)* ne permet pas d'examiner les obligations secondaires de l'État responsable, faute de pouvoir dégager l'élément objectif et l'élément subjectif de la responsabilité pour fait illicite. Cette impossibilité résulte, il me semble, d'au moins trois facteurs.

4. Premièrement, à la différence de ces précédents cités, la question *b)* ne désigne aucun État ou aucune catégorie d'États et rend ainsi abstrait l'exercice de l'attribution. Et la référence au dommage significatif n'est d'aucun secours. Elle permet, certes, d'identifier les sujets lésés — que ce soit des États ou d'autres — mais le dommage ne permet pas d'identifier le sujet responsable.

5. Deuxièmement, le comportement incriminé n'est pas non plus identifié. Et cette absence ne peut être compensée par une référence générique aux émissions anthropiques de gaz à effet de serre ou à des activités plus spécifiques comme l'extraction, la vente ou les subventions aux produits

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[105] *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 54-56, par. 117-127.

[106] *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif, C.I.J. Recueil 2019 (I)*, p. 129, par. 136, et p. 139, par. 178-182.

[107] *Conséquences juridiques découlant des politiques et pratiques d'Israël dans le Territoire palestinien occupé, y compris Jérusalem-Est, avis consultatif, C.I.J. Recueil 2024*, par. 273-279.

fossiles, quand bien même il y aurait un consensus scientifique sur leurs effets néfastes. En effet, ces activités ne sont pas interdites par le droit international, mais seulement réglementées, et en des termes qui ont été soigneusement choisis par les rédacteurs des traités et les décisions des COP.

6. Ainsi, l'adoption par la COP 28 de l'objectif d'« [o]pérer une transition juste, ordonnée et équitable vers une sortie des combustibles fossiles »[108] a été saluée, à juste titre, comme une victoire.

7. La mise en œuvre cependant de cette décision nécessite une nouvelle révolution industrielle dans la plupart des pays. Or, on ne transforme pas des économies à coups d'obligations secondaires.

8. Troisièmement, le droit intertemporel s'oppose à l'application des normes du présent aux faits du passé. Le rappeler n'est pas nier une responsabilité historique. À l'inverse, accepter — comme le Japon vient de le faire devant vous — qu'un leadership particulier incombe aux pays développés ne vaut pas acquiescement à une prétention de rétroactivité des normes, encore moins un acquiescement à l'existence d'une obligation secondaire de réparation pour des faits qui étaient licites au moment où ils se sont produits[109].

9. Comme l'a montré M. Nakamura, la dynamique normative — c'est-à-dire la progression des obligations dans le temps — est consubstantielle au régime climatique. La recherche d'une projection rétroactive des obligations heurte de front cette ambition de progression qui va vers le futur. Dès lors, responsabilité historique et responsabilité pour fait illicite sont des notions de nature différente. Comme les meilleures données scientifiques disponibles, les contributions historiques viennent alimenter le droit positif. Elles représentent le fait social à l'origine des règles, autrement dit les sources matérielles du droit[110] ; mais les sources matérielles ne se substituent pas à la *lex lata*.

2. Les obligations en matière de pertes et préjudices

10. Monsieur le président, de l'avis du Japon, la question *b)* peut trouver une réponse utile dans les obligations primaires issues de l'accord de Paris[111]. Et le Japon souhaiterait revenir sur les

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[108] Conférence des Parties agissant comme réunion des parties à l'accord de Paris, décision 1/CMA.5, « Premier bilan mondial », 30 novembre 2023, doc. FCCC/PA/CMA/2023/16/Add.1, par. 28 *d)*.

[109] Articles sur la responsabilité pour fait internationalement illicite, art. 13.

[110] Pour rappeler la formule de G. Scelle, « D'où viennent les règles de droit ? Du fait social lui-même et de la conjonction de l'éthique et du pouvoir, produits de la solidarité sociale », *Manuel de droit international public*, Montchrestien, Domat, p. 6.

[111] Written Statement of Japan, 22 mars 2024, par. 39-45; Written Comments of Japan, 15 August 2024, par. 71-84.

articles 8 et 9, deux dispositions clés, adoptés en réponse aux revendications légitimes des États les plus vulnérables tendant vers plus de justice climatique. Ces dispositions conventionnelles ont un effet utile et une portée concrète.

11. L'article 8 d'abord. Certains participants s'en servent pour démontrer que le droit de la responsabilité serait inapplicable en matière d'émissions historiques de GES ; d'autres y attribuent une finalité complètement contraire. Mais tous conviennent que cette disposition ne saurait — et je recite les phrases de la décision de la COP portant adoption de l'accord de Paris — « donner lieu [ou] servir de fondement à aucune responsabilité ni indemnisation »[112].

12. L'article 8 a cependant une portée normative au-delà de ce qu'il ne dit pas. Selon son paragraphe premier, « [l]es Parties *reconnaissent* la nécessité d'éviter les pertes et préjudices liés aux effets néfastes des changements climatiques, … de les réduire au minimum et d'y remédier » *[les italiques sont de nous]*. Comme vous l'avez souligné dans un autre contexte, « reconnaître », c'est avant tout accepter une situation juridique, « c'est-à-dire tirer les conséquences juridiques de son existence, la respecter et renoncer à la contester pour l'avenir »[113]. Ainsi, ce paragraphe premier de l'article 8 contient un triple engagement en matière de pertes et préjudices : un engagement préventif (« éviter/*avert* »), un engagement correctif (« réduire/*minimize* ») et un engagement curatif (« remédier/*address* »). Au surplus, il s'applique à tous les États. Et en tirant les conséquences de cette « reconnaissance », la suite de l'article 8 identifie les moyens de mise en œuvre (principalement le Mécanisme international de Varsovie) et des domaines de coopération et de facilitation.

13. L'article 9 va cependant plus loin et d'une manière plus ferme. Il prévoit que « [l]es pays développés *fournissent* des ressources financières » *[les italiques sont de nous]*, tandis que « [l]es autres Parties sont invitées à fournir » de telles ressources. Ces termes traduisent l'obligation collective des pays développés à fournir ces ressources, bien que leurs quotas respectifs et les modalités des contributions fassent l'objet de discussion. Et comme vous le savez, les parties ont établi en 2022 le « Fonds de réponse aux pertes et préjudices » et celui-ci est opérationnel depuis 2023. C'est là un exemple de mise en œuvre.

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[112] Décision 1/CP.21, « Adoption de l'Accord de Paris », FCCC/CP/2015/10/Add.1, par. 51.

[113] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 22, par. 42.

14. L'article 9 illustre par ailleurs l'application du principe de différenciation en matière de financement : même s'il distingue entre l'obligation des États développés et l'invitation aux autres parties, il signifie aussi que la solidarité climatique ne saurait être prisonnière de catégories datées ou figées dans des annexes. Monsieur le président, il me semble que, en ancrant votre réponse à la question *b)* dans ces obligations primaires, votre Cour pourrait pleinement contribuer à l'objectif poursuivi par l'Assemblée générale, qui est de voir l'avis consultatif contribuer à la réalisation des objectifs de l'accord de Paris.

15. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie pour votre attention. Ceci conclut la présentation du Japon.

Le PRÉSIDENT : Je remercie les représentants du Japon pour leur présentation, qui conclut l'audience de ce matin. La Cour se réunira à nouveau cet après-midi, à 15 heures, pour entendre Nauru, le Népal, la Nouvelle-Zélande, l'État de Palestine et le Pakistan sur les questions qui lui ont été soumises.

L'audience est levée.

The Court rose at 12.45 p.m.