

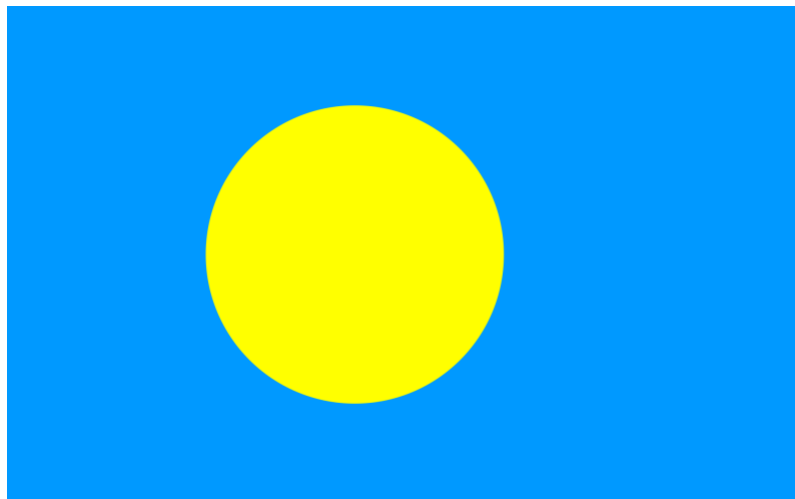
**INTERNATIONAL COURT OF JUSTICE**

**OBLIGATIONS OF STATES IN RESPECT OF  
CLIMATE CHANGE**

CASE No. 187

**RESPONSES BY THE REPUBLIC OF PALAU  
TO THE QUESTIONS PUT BY  
JUDGES CLEVELAND, TLADI, AURESCU, & CHARLESWORTH**

December 2024



The Republic of Palau respectfully submits the following responses to the questions put by Judges Cleveland, Tladi, Aurescu, and Charlesworth at the close of the oral submissions in this matter, as follows:

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## **QUESTION PUT BY JUDGE CLEVELAND**

*“During these proceedings, a number of participants have referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, if any?”*

## **RESPONSE TO QUESTION PUT BY JUDGE CLEVELAND**

The natural purpose of State subsidies to any industry is to enable that industry to produce more of its product, at lower prices, than the industry would otherwise produce. A State that subsidizes fossil fuel production naturally does so to encourage the production and ultimate use of more fossil fuels than would otherwise be produced and used.

The mere subsidization of a fossil fuel industry operating within a State’s territory or jurisdiction, without more, would not likely breach a State’s obligation, under the Transboundary Harm principle, “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”<sup>1</sup>, because those subsidies, by themselves, would not likely cause significant damage to the environment of another State. It is the ultimate burning of those fossil fuels, and the consequent emission of greenhouse gases, that can cause the harm that implicates the Transboundary Harm principle.

But States are prohibited from aiding or assisting another State in the commission of an internationally wrongful act by the latter—

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<sup>1</sup> *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, p. 706, para. 104, quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 56, para. 101.

including the latter's violation of the Transboundary Harm principle—as described in Article 16 of the International Law Commission's Articles on State Responsibility:

*Article 16. Aid or assistance in the commission of an internationally wrongful act*

*A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

*(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*

*(b) the act would be internationally wrongful if committed by that State.*

Under this rule, a State would bear responsibility under international law for subsidizing the production of fossil fuels that the State knows are being exported, at lower prices or higher volumes than would otherwise be possible without the subsidies, to another State that is breaching the Transboundary Harm principle. The International Law Commission gave as an example of conduct implicated by this rule “knowingly providing an essential facility or financing the activity in question.”<sup>2</sup> Providing subsidies to domestic fossil fuel production, so as to enable greater fossil fuel exports at lower prices, effectively provides an essential facility (fossil fuels) and financing (lower prices and greater volumes) of the wrongful activity in question (not preventing significant harm caused by burning those fossil fuels). A State that subsidizes fossil fuel production in this way is internationally responsible.

In sum: in addition to every State's obligation to use all the means at its disposal to prevent its territory or jurisdiction from being used for the emission of greenhouse gases that cause significant harm to the environment of another State (the Transboundary Harm principle), international law *also* prohibits every State from knowingly subsidizing fossil fuels that are then

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<sup>2</sup> *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 66, para. 1.*

used in another State that is in breach of the latter State's obligation under the Transboundary Harm principle.

## **QUESTION PUT BY JUDGE TLADI**

*“In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties.*

*I would like to know from the participants whether, according to them, “the object and purpose” of the Paris Agreement, and the object and purpose of the climate change treaty framework in general has any effect on this interpretation and if so, what effect does it have?”*

## **RESPONSE TO QUESTION PUT BY JUDGE TLADI**

According to the principle of *pacta sunt servanda*, as embodied in Article 26 of the Vienna Convention on the Law of Treaties, every treaty obligation, including “procedural” obligations, must be performed “in good faith.” “The principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized”—which sometimes may “prevail over [the treaty’s] literal application.”<sup>3</sup>

Suffice it to say that, in the context of Article 4 of the Paris Agreement, Paragraph 1 identifies the object and purpose of the obligations with respect to Nationally Determined Contributions as being “[i]n order to achieve the long-term temperature goal set out in Article 2”. Good-faith compliance with the obligations of Article 4 requires, among other things, the preparation, communication, maintenance, and progressive enhancement of Nationally Determined Contributions—all done in a reasonable way and in such

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<sup>3</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp. 78-79, para. 142.*

a manner to achieve the long-term temperature goal set out in Article 2.

### **QUESTION PUT BY JUDGE AURESCU**

*“Some participants have argued, during written and/or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?”*

### **RESPONSE TO QUESTION PUT BY JUDGE AURESCU**

This Court’s advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* eloquently addressed this issue. There, this Court recognized that the “environment” of States is protected under international law from significant harm arising from activities under other States’ jurisdiction and control. That “environment” entitled to international legal protection includes “the living space, the quality of life and the very health of human beings, including generations unborn.” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29.)



## **QUESTION PUT BY JUDGE CHARLESWORTH**

*“In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?”*

## **RESPONSE TO QUESTION PUT BY JUDGE CHARLESWORTH**

The declarations to which this question refers are in the nature of “interpretive declarations” rather than “reservations” to the UNFCCC and the Paris Agreement.

The International Law Commission’s *Guide to Practice on Reservations to Treaties* explains that a treaty reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”, while an interpretive declaration is a “unilateral statement, however phrased or named, ... that ... purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.” (*Guide to Practice on Reservations to Treaties, Yearbook of the International Law Commission, 2011, Vol. II, Part Two, p. 26, paras. 1.1(1) & 1.2.*)

No provisions of the UNFCCC or Paris Agreement purport to derogate from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change. To the contrary, the UNFCCC, in its preamble, recognizes that “States have ... 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”. The UNFCCC and Paris Agreement cannot reasonably be interpreted as derogating from those general international law principles of Transboundary Harm and State Responsibility when the UNFCCC expressly acknowledges the continuing applicability of those principles.

The UNFCCC, in Article 24, and the Paris Agreement, in Article 27, also prohibit any reservations to those agreements.

Because no provisions of the UNFCCC or Paris Agreement purport to derogate from those general international law principles of Transboundary Harm and State Responsibility, and those agreements prohibit any reservations, there are no “provisions of the treaty in their application to that State” to which a reservation in this regard might be made. Instead, the declarations at issue in this question are interpretive declarations, which may be made, modified, or revoked by any State at any time, that formally confirm the majority of States’ understanding that the UNFCCC and Paris Agreement do not derogate from general international law principles of Transboundary Harm and State Responsibility.<sup>4</sup>

Respectfully submitted.

REPUBLIC OF PALAU



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Peter Prows  
Counsel and Agent for  
Republic of Palau  
BRISCOE IVESTER & BAZEL LLP  
235 Montgomery Street, Suite 935  
San Francisco, California, 94104  
United States of America

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<sup>4</sup> Palau’s submissions to this Court concerning the interpretation of the UNFCCC and Paris Agreement as they relate to the principles of Transboundary Harm and State Responsibility are a form of interpretive declaration.