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INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN COMMENTS OF THE SWISS CONFEDERATION

7 August 2024

Contents

1. On 30 May 2024, the International Court of Justice (hereinafter ”the Court”) set 15 August 2024 as the time limit for the submission of written comments.

2. Switzerland wishes to avail itself of this possibility and, observing to the prescribed time limit and formalities, inform the Court of its comments. These supplement the information already provided in its written statement of 18 March 2024 and focus on points raised in the written statements of other states.

I. PRELIMINARY CONSIDERATIONS

3. Climate change is an existential threat that affects a variety of areas covered by different fields of international law.

4. This assertion is confirmed by resolution 77/276, adopted by consensus by the United Nations General Assembly, which contains a range of questions put to the Court requiring consideration, without limitation, of a number of general rules and specific regimes of international law:

> "*Having **particular** regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment."*[1]

5. In view of the foregoing, the Court cannot limit its advisory opinion solely to the obligations deriving from the climate change conventions but must extend it to all the rules and regimes applicable to the protection of the climate system and other components of the environment against anthropogenic emissions of greenhouse gases (hereinafter "GHG").

6. To this end, in its written comments, Switzerland maintains that the obligations under general international law, as well as the due diligence standard, complement and inform the climate change regime (II.A), that the due diligence obligation to prevent transboundary harm arising from the customary no-harm rule has been binding on all states since the 1990s, concerns future emissions and requires, in particular, states responsible for a large proportion of current emissions, as well as those whose emissions continue to increase, to implement urgent measures to reduce anthropogenic GHG emissions (II. B). The Paris Agreement put an end to the separation or bifurcation between developed and developing countries, although the nationally determined emissions and removals remain relevant (II.C). Switzerland also reiterates its conclusions regarding human rights (II. D). Lastly, Switzerland concludes that consolidation is still necessary before international law on state responsibility can fully take account of the effects of climate change, but that the obligation to cease wrongful act applies where appropriate (III.).

7. In addition, there remains a general obligation for all states to cooperate. This cannot remain a dead letter and implies concrete consequences for all. This obligation to cooperate is the result both of individual provisions and of international environmental law in general. Outlined in Articles 3 and 4 of the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC"), it is a fundamental principle of international climate change law. It is also broken down more specifically into distinct obligations, notably in the Paris Agreement.

8. Lastly, Switzerland stresses that the historic number of written statements and participants in the proceedings attest to the importance of the proceedings and the trust placed in the Court to answer the questions put to it.

[1] General Assembly resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, A/RES/77/276 (29 March 2023) (emphasis added).

II. OBLIGATIONS

A. The relationship between general international law obligations and the climate change regime

i) The complementarity and mutual reinforcement of the customary no-harm rule with the climate change regime, which is not a lex specialis

9. Contrary to certain positions expressed by other participants,[2] Switzerland and many participants in the proceedings maintain that the treaties relating to the climate change regime do not constitute autonomous regimes.[3] These treaties serve the same objective of protection as the customary no-harm rule, while remaining distinct and focusing on specific aspects of climate change, at the same time supporting each other through their complementarity. For this reason, in order to interpret them, Switzerland stresses that, according to Article 31 paragraph 3 letter c of the Vienna Convention on the Law of Treaties (hereinafter "VCLT"),[4] account must be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties.

10. This method of interpretation ensures, as the Court has observed, that treaties do not produce effects in isolation, but are "*interpreted and applied within the framework of the entire legal system in force prevailing at the time of the interpretation.*"[5] The term " *any relevant rule of international law* " includes relevant rules of treaty law and customary law.

11. In this regard, the International Law Commission (hereinafter "ILC") has concluded that "*[t]here is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.*"[6]

12. As demonstrated in Switzerland's written statement,[7] the treaty regime dealing specifically with climate change does not deal exhaustively with states' obligations to protect the climate system and other components of the environment from anthropogenic GHG emissions, but focuses on specific and complementary aspects, mainly from the point of view of cooperation between states, in particular the issues of emissions, mitigation, adaptation, finance and technology transfer or capacity building. This should enable the parties to implement their obligations without replacing those that exist independently of these treaties.

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[2] For example, the written statements of the Democratic Republic of Timor-Leste, paras. 85 ff.; the Republic of India, paras 17 ff.; the Republic of South Africa, paras. 14 ff.; the United States of America, para. 4.25; the State of Kuwait, paras. 60 ff.

[3] For example, the written statements of the Cook Islands, para. 135; the Republic of Vanuatu, para. 517; New Zealand, para. 86; the Arab Republic of Egypt, para. 73; the Republic of Costa Rica, para. 32 (these countries specifically mention the issue of *lex specialis*). In addition, the written statements of the Republic of Colombia, para. 3.9; the Republic of Kenya, paras 2.8 ff.; Grenada, para. 37; Saint Lucia, para. 38; Saint Vincent and the Grenadines, para. 94; the Commonwealth of the Bahamas, para. 83; the Republic of Kiribati, para. 109; the Republic of Ecuador, para. 3.17; the Kingdom of Spain, para. 18; Barbados, para. 129; the Democratic Socialist Republic of Sri Lanka, para. 91; the Oriental Republic of Uruguay, para. 81; the Kingdom of Thailand, para. 5; the African Union, para. 47.

[4] Vienna Convention on the Law of Treaties, 1969.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 31, para. 53.

[6] Fragmentation of international law, Report of the ILC Study Group, 2006, p. 8; see also guideline 9 of the ILC's Draft guidelines on the protection of the atmosphere, 2021.

[7] Written statement of the Swiss Confederation, paras. 48-58.

13. The climate change regime complements and supports the obligation of prevention, since it covers aspects that are distinct from it. It should be understood in the light of the scientific view that many of the changes caused by past and present anthropogenic GHG emissions are irreversible.[8]

14. However, as indicated below (see para. 20), the UNFCCC and the Paris Agreement are relevant to the interpretation of the various customary international law norms on due diligence applicable to the protection of the climate system and other components of the environment from anthropogenic GHG emissions and vice versa. In addition, the due diligence standard sheds light on the obligations specific to individual regimes, in particular through (i) the obligation of prevention (section II.B below) and (ii) certain obligations of the climate regime itself, such as the obligation to take internal mitigation measures in order to achieve the objectives of the nationally determined contributions (hereinafter "NDCs"), and the obligation to ensure the progression of these with the highest possible level of ambition under Article 4 paragraph 2 and Article 4 paragraph 3 of the Paris Agreement (section II(A)(ii) below).

15. In view of the above, the no-harm rule and the duty of due diligence required in terms of prevention are compatible with and complementary to the climate change regime.

16. At the same time, in the context of Article 194 of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), the International Tribunal for the Law of the Sea (hereinafter "ITLOS") has held that "***the Paris Agreement is not lex specialis*** *to [UNCLOS*] *and thus* [...] *lex specialis derogat legi generali has no place in the interpretation of [UNCLOS]."*[9]

17. In the same vein, the absence of conflict between the duty of due diligence required to prevent transboundary harm and the obligations of the climate change regime, which are distinct but compatible and have the same objective, makes any consideration of the principle of *lex specialis derogat generali* inappropriate.

18. Thus, the obligations of the specific conventions relating to the climate change regime do not derogate from the obligations of international law, in particular international environmental law, which govern the behaviour of states in relation to climate change. The Paris Agreement is therefore not a *lex specialis* in relation to the obligation to prevent transboundary harm, which it complements and supports.

ii) The due diligence standard and the climate change regime

19. As demonstrated, the Paris Agreement does not exhaust the obligations of states to protect the climate system and other components of the environment from anthropogenic GHG emissions. These are distinct and complementary obligations that reinforce each other without weakening one another.

20. As ITLOS found, "*the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpretating and applying [UNCLOS] with respect to marine pollution from anthropogenic GHG emissions.*"[10] The relevance that ITLOS has recognised for the UNFCCC and the Paris Agreement within the substantive limits of

[8] Climate Change 2021: The Physical Science Basis, IPCC, Working Group I contribution to the Sixth Assessment Report, 06.08.2021, p. 23.

[9] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 81, para. 224 (emphasis added).

[10] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, pp. 80, para. 222 ff. (emphasis added).

the questions put to it, i.e. UNCLOS, applies *mutatis mutandis* to all other instruments and rules relating to the protection of the climate system and other components of the environment against anthropogenic GHG emissions.

21. The duty of due diligence to prevent significant harm to the environment is a separate obligation and its content must be understood in the light of the climate change regime, in particular the Paris Agreement. In particular, Article 4 paragraph 2 and Article 4 paragraph 3 of the Paris Agreement are used to determine the standard of due diligence required.

22. Firstly, Article 4 paragraph 2 of the Paris Agreement provides that *"Parties shall **pursue domestic mitigation measures**, with the aim of achieving the objectives [of successive nationally determined contributions*]."[11] This provision does not create an individual obligation for each party to implement or achieve its successive NDCs, but provides for the continuation of national mitigation measures with a view to achieving their objectives. The obligation for all parties to establish and implement mitigation measures already existed under the UNFCCC.[12]

23. The second sentence of Article 4 paragraph 2 of the Paris Agreement in particular describes the behaviour expected of the parties in implementing their mitigation measures. The 'goal' circumscribes the relevant standard, namely that the parties are obliged to adopt measures likely to achieve the objectives of their successive NDCs, with a view to achieving the aim set out in Article 2 of the Paris Agreement.

24. This therefore creates an obligation of due diligence for the parties, which must make serious and effective efforts in pursuit of their mitigation objectives, as defined in their NDCs.[13]

25. Secondly, as stated in Article 4 paragraph 3 of the Paris Agreement, the NDCs set by the states parties must reflect a "*progression*" in relation to their previous NDCs, as well as express their "*highest possible ambition*." Article 4 paragraph 3 of the Paris Agreement therefore reflects the expectation that states will do their utmost to reduce their anthropogenic GHG emissions, which specifies the standard of due diligence that they must employ to this end. The expression "*highest possible ambition*" means that states must strive, as far as possible, to do the maximum and to deploy adequate means,[14] in particular because of the interaction between "*progression*" and "*highest possible ambition*", which means that states must not just regularly increase their NDCs, but that the progression must also reflect the highest efforts that states are able to make.[15]

26. In addition, in accordance with Article 4 paragraph 9 of the Paris Agreement, future NDC communications from the parties will have to take into account decision 1/CMA.5 of the first global stocktake, as adopted at the 28th Conference of the Parties to the Paris Agreement (hereinafter "COP28") in Dubai.

27. In addition, the variability of the standard of due diligence in the context of climate change was clarified by ITLOS in its advisory opinion on UNCLOS:

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[11] Paris Agreement.
[12] Art. 4.1(b) UNFCCC.
[13] Christina Voigt, 'The power of the Paris Agreement in international climate litigation', in the Review of European, Comparative & International Environmental Law, volume 32, number 2, 2023, p. 242; Benoit Mayer, 'Obligations of Conduct in the International Law on Climate Change: A Defence', in the Review of European, Comparative & International Environmental Law, volume 27, number 2, 2018, p. 135.
[14] *Responsibilities and Obligations of States with respect to Activities in the Area*, Advisory Opinion, ITLOS Reports 2011, p. 41, para. 110.
[15] Christina Voigt, 'The power of the Paris Agreement in international climate litigation', in the Review of European, Comparative & International Environmental Law, volume 32, number 2, 2023, pp. 240 ff.

> "*There are several factors to be considered in this regard. They include* [*(i)*] ***scientific and technological information***, [*(ii)*] ***relevant international rules and standards***, [*(iii)*] *the* ***risk of harm*** *and* [*(iv)*] ***the urgency involved***. *The standard of due diligence may* ***change over time***, *given that those factors constantly evolve.* […] *The notion of risk in this regard should be appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude.*"[16]

28. Furthermore, due diligence "*may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge*."[17]

29. In the present case, Switzerland maintains that the relevant international rules, standards and guidance of the climate change regime must be taken into account when assessing the standard and implementation of due diligence in the prevention obligation, in particular, those contained in the UNFCCC and the Paris Agreement, including the COP decisions, in accordance with the objective of limiting the global temperature increase to 1.5°C above pre-industrial levels as well as the timetable of emission trajectories to achieve this objective.

30. The COP decisions are particularly relevant for determining how the standard of due diligence evolves over time, given that:

> "***The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support*** *in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.*"[18]

31. On this subject, as indicated in decision 1/CMA.5 of the first global stocktake, COP declared that it is urgent to meet the 1.5°C target and:

> "*Notes with concern the findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change that* ***policies*** *implemented by the end of 2020* ***are projected to result in higher global greenhouse gas emissions than those implied by the nationally determined contributions***, ***indicating an implementation gap***, *and* ***resolves to take action to urgently address this gap***."[19]

32. Given the scientific and technological information available, which shows that the measures put in place before the end of 2020 will not be sufficient to achieve the NDCs, and the urgency of the situation, which, according to the COP decision, requires additional measures, Switzerland is of the opinion that what was considered sufficiently diligent before the first global stocktake can no longer be considered sufficiently diligent since that assessment. This means an increase in the standard of due diligence required under the obligation of prevention.

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[16] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 86, para. 239 (emphasis added).
[17] *Responsibilities and Obligations of States with respect to Activities in the Area*, Advisory Opinion, ITLOS Reports 2011, p. 43, para. 117.
[18] Art. 14.3 Paris Agreement (emphasis added).
[19] FCCC/PA/CMA/2023/L.17, para. 23.

33. The objectives of the Paris Agreement cannot be achieved without drastic reductions in global anthropogenic GHG emissions. As a result, particularly those states responsible for a large proportion of current emissions, as well as those whose emissions continue to rise, must put in place urgent measures to reduce anthropogenic GHG emissions that support a 1.5°C trajectory.

34. As well as recognising the urgent need to meet the 1.5°C target, decision 1/CMA.5 sets out global targets for the energy transition.[20]

35. These objectives – including (i) the shared commitment to triple renewable energy capacity and double the average annual rate of energy efficiency improvement globally by 2030, (ii) accelerating efforts to phase out coal-fired power generation without mitigation, and (iii) transitioning energy systems away from fossil fuels[21] – inform not only the application of Article 4 paragraph 2 and Article 4 paragraph 3 of the Paris Agreement, but also the standard of diligence required to prevent significant harm to the environment through GHG emissions.

36. The parties' commitment is to avoid 'locking in' emissions – known as 'carbon lock-in' – through new investments in carbon infrastructure or fossil fuels. This need to avoid carbon lock-in is thus becoming part of the standard of due diligence required to prevent significant harm to the environment through GHG emissions.

37. The urgency that has been recognised also requires increased international cooperation on climate action, in particular through the obligation to cooperate.[22]

B. Duty of due diligence to prevent significant harm to the environment

38. Many participants in this advisory proceeding maintain that the obligation to prevent significant harm to the environment is an obligation of conduct which, as the Court has found, has its origins in due diligence.[23] For Switzerland, it is important that the Court clarifies the beginning of the applicability, to anthropogenic GHG emissions, of this obligation which applies to all states and which targets future emissions.

i) Start of obligation

39. For this due diligence obligation to apply, the actor responsible must have been able to foresee the risk of causing significant transboundary harm. Switzerland considers that the obligation begins to apply when the risk of harm has become reasonably foreseeable, as argued by several other participants in the proceedings.[24] Consequently, the applicability of this legal obligation depends on the knowledge available.[25] As emphasised in Switzerland's written statement,[26] this knowledge does not presuppose total scientific certainty about the causes and consequences of climate change; it is sufficient that the result could have been reasonably anticipated at the time of the act for it to be causally linked to it.

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[20] Decision 1/CMA.5, 2024, para. 28.
[21] Decision 1/CMA.5, 2024, para. 28.
[22] Franz Xaver Perrez, *Cooperative Sovereignty – From Independence to Interdependence in the Structure of International Environmental Law*, Kluwer Law International, 2000, pp. 317-330.
[23] As, for example, the written statements of the Republic of India, para. 13; the Republic of Singapore, para. 3.4; the Solomon Islands, para. 78; the Republic of the Seychelles, para. 125; the Republic of Vanuatu, para. 261; the European Union, para. 317; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, para. 101.
[24] In particular, the written statements of the European Union, para. 315, and the African Union, para. 96.
[25] Samantha Besson, *Due Diligence in International Law*, Brill Nijhoff, 2023, pp. 157-158.
[26] Written statement of the Swiss Confederation, paras. 34-35.

40. This question of knowledge is a question of fact and constitutes the temporal limitation on the application of the obligations of diligence.[27]

41. In the case of climate change, in addition to the points developed by Switzerland in its written statement,[28] it should be borne in mind that sound scientific knowledge on the anthropogenic nature of climate change was consolidated in the early 1990s. In particular, the publication of the first assessment report by the Intergovernmental Panel on Climate Change (hereinafter "IPCC") demonstrated that *"emissions from human activities are significantly increasing atmospheric concentrations of the greenhouse gases*"[29] and that this *"may lead to irreversible change in the climate*."[30]

42. As the IPCC reports are commonly regarded as *"authoritative assessments of the scientific knowledge on climate change*,"[31] the establishment of such a causal link by this body of experts marks the beginning of the applicability of the due diligence obligation to prevent significant harm to the environment by anthropogenic GHG emissions.

ii) The obligation applies to all states

43. Switzerland maintains that the duty of due diligence to prevent significant harm to the environment by anthropogenic GHG emissions is applicable to all states. As the environmental harm caused by anthropogenic GHG emissions depends on the quantities of emissions produced, these quantities also determine the obligation to reduce them. The higher the emissions produced under a State's jurisdiction, the greater the obligation to control and reduce them. The obligation to prevent significant environmental harm due to anthropogenic GHG emissions therefore applies in particular to the states with the highest levels of emissions in the world and to those whose emissions are continuing to rise. This is also underlined by the principle of common but differentiated responsibilities: those who produce more emissions must also reduce more emissions.

44. Although applicable to all, the implementation of this obligation is nuanced, particularly in the light of the ITLOS interpretation of Article 194(2) UNCLOS, which contains an obligation of due diligence that "*bears a close resemblance to the well-established principle of harm prevention*."[32] According to ITLOS, the implementation of this obligation of due diligence "*may differ among States in accordance with the availability of means and capabilities*."[33] However, "*the reference to available means and capabilities should not be used as an excuse to unduly postpone*"[34] its implementation.

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[27] Sarah Mason-Case, Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Benoit Mayer et Alexander Zaher (eds), *Debating Climate Law*, CUP, 2021, pp. 179 ff.
[28] Written statement of the Swiss Confederation, paras. 30-36.
[29] IPCC, Climate Change: The 1990 and 1992 IPCC Assessments, 1992, p. 63.
[30] IPCC, Climate Change: The 1990 and 1992 IPCC Assessments, 1992, p. 87.
[31] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 28, para. 51.
[32] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 88, para. 246.
[33] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 90, para. 249.
[34] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 81, para. 226.

45. Therefore, in the same way as ITLOS determined in its advisory opinion on UNCLOS, the Court should find that, in terms of preventing transboundary harm from anthropogenic GHG emissions, "*all States must make mitigation efforts*,"[35] but "*States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities*."[36]

46. In this respect, Switzerland maintains that the main criterion for the increased obligation to reduce anthropogenic GHG emissions is the quantity of emissions produced, and that the states with the greatest capabilities must do more. In this context, it is important to stress that current and future capability are relevant, not the capability that a state may have enjoyed in the past.

iii) The obligation covers future emissions

47. In the words of the Court, the aim of due diligence performed within the framework of the obligation of prevention is to "*use all the means at [a State's] disposal to **avoid** activities which take place on its territory, or in any area under its jurisdiction, **causing significant damage** to the environment of another State*"[37] or to "*areas beyond national control*."[38]

48. Given that the obligation of prevention aims to avoid harm to the environment, it intrinsically concerns damage and anthropogenic GHG emissions that have not yet occurred, i.e. future or potential damage. Since the due diligence obligation to prevent significant harm to the environment by anthropogenic GHG emissions "*necessarily applies to pollution that has not yet occurred, namely, future or potential pollution*,"[39] this obligation therefore applies in particular to states with the highest levels of emissions in the world and to those whose emissions are continuing to rise.

49. The objectives of the climate change regime are similarly aimed at (i) the stabilisation of GHG concentrations and (ii) the reduction of emissions. They thus presuppose the existence of past harmful anthropogenic GHG emissions, and aim to limit and reduce current emissions and their continuation, thereby reducing future emissions.

50. In this way, the obligations of the Paris Agreement and those of prevention complement each other.

C. The Paris Agreement and the climate change regime

i) No return to the situation before the adoption of the Paris Agreement

51. Some participants in the proceedings suggested that the fact that the Paris Agreement was adopted under the UNFCCC implies that the annexes to the UNFCCC remain relevant to the Paris Agreement.[40] However, even though the Paris Agreement was adopted under the UNFCCC and makes explicit

[35] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 82, para. 229.
[36] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 82, para. 227.
[37] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 56, para. 101.
[38] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996, p. 20, para. 29 (emphasis added); Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration
[39] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 72 para. 198.
[40] For example, the written statements of the United Arab Emirates, para. 110; the Republic of India, paras. 22 ff.; the People's Republic of China, para. 79.

reference to it,[41] it is a fully-fledged multilateral agreement that sets out its own obligations. Paragraph 1 of the preamble to the Paris Agreement simply states that the parties to the Paris Agreement are also parties to the UNFCCC and not vice versa.

52. The Paris Agreement incorporates, further develops and clarifies the objective, institutions and certain tools of the UNFCCC.[42] Therefore, given that the UNFCCC and the Paris Agreement deal with the same subject matter and are sequential, the rights and obligations of the states parties must be determined in accordance with Article 30 paragraphs 3 and 4 VCLT.[43]

53. In view of the above, Article 30 paragraph 3 VCLT provides that the UNFCCC "*applies only to the extent that its provisions are compatible with those of the later treaty*,"[44] i.e. the Paris Agreement.

54. In this respect, the applicability of the obligations under the Paris Agreement is no longer based on the categories "Parties included in Annex I" and "Parties not included in Annex 1" under the UNFCCC, as the Paris Agreement distinguishes between "*developed country Parties*," "*developing country Parties*," "*small island developing States*" and "*least developed countries*". The Paris Agreement does not include such annexes. This 'separation' or 'bifurcation' has been replaced in the Paris Agreement by NDCs set individually by the parties and by a more dynamic representation of differentiation (see below paras. 56 ff.).

55. The annexes to the UNFCCC are therefore not compatible with the system and obligations of the parties to the Paris Agreement, which no longer recognises this classification, making it inapplicable within the meaning of Article 30 paragraph 3 of the UNFCCC.

ii) The 'separation' or 'bifurcation' between developed and developing countries in terms of emissions reductions is outdated

56. Although the Paris Agreement still differentiates between developing and developed countries, it removes the fixed character that the annexes to the UNFCCC gave it, allowing the distinction to adapt over time. The difference in question is limited to recognising that the developed and developing parties have certain particularities. While the preamble and Article 4 paragraph 1 of the Paris Agreement state that developed countries must "*take the lead*" in the fight against climate change,[45] Article 4 paragraph 1 recognises that developing countries will take longer to reach peak emissions.[46] However, Article 4 paragraph 4 of the Paris Agreement states that developing countries should also "*continue enhancing their mitigation efforts*."[47] Despite these particularities, contrary to what some participants in the proceedings maintain,[48] the obligations are in principle the same for all parties. Furthermore, as highlighted in Switzerland's written statement,[49] neither the UNFCCC nor the Paris Agreement define the terms "developing country Party" or "developed country Party".

57. Furthermore, the principle of common but differentiated responsibilities and respective capabilities with regard to different national situations can no longer be interpreted as implying a rigid dichotomous distinction between developed and developing countries. On the contrary, the addition of the phrase

[41] Decision 1/CP.21, section I, para. 1; Preamble, Art. 2.2, Art. 4.3, and Art. 4.19 Paris Agreement.
[42] Para. 3 Preamble, Arts 17, 18 ff. Paris Agreement; Decision 1/CP.21, para. 2.
[43] Art. 30.1 VCLT.
[44] Art. 30 para. 3 VCLT.
[45] Preamble, Art. 4 para. 1 Paris Agreement.
[46] Art. 4 para. 1 Paris Agreement.
[47] Art. 4 para. 4 Paris Agreement.
[48] For example, the written statement of the People's Republic of China, paras 34 ff.
[49] Written statement of the Swiss Confederation, paras. 51 ff.

"in the light of different national circumstances" was added deliberately to clarify that no distinction should be made between rigid groups of parties, but that the specific economic and social situation of each country should be taken into account. The separative approach of the UNFCCC and the Kyoto Protocol has evolved over time into a flexible and nuanced concept that better reflects reality. Differentiated treatment under the climate change regime now incorporates current contributions and capabilities, in order to facilitate more dynamic consideration of changes in national circumstances.

58. In particular, it reflects the consensus of the Paris Agreement that effective collective action involving all states parties is required to combat climate change.[50]

59. The obligation to mitigate applies to all parties, since each party must establish, communicate and update NDCs and take domestic measures to achieve the objectives of these NDCs.[51] "***All Parties*** *are to undertake and communicate ambitious efforts*"[52] and "*the efforts of* ***all Parties*** *will represent a progression over time*."[53] Only the least developed countries and small island developing states can establish and communicate strategies, instead of NDCs, plans and measures for low GHG emissions.[54]

60. The Paris Agreement does not link flexibility for implementation to a party's status as a developing country or developed country, but to its specific capability. For example, when it comes to reporting, only those developing countries that need it, given their capabilities, are permitted a certain degree of flexibility in implementing the provisions of the Paris Agreement's transparency framework.[55]

61. Thus, the NDCs and measures required of all parties are not assessed according to the categories of developing and developed countries – categories which have become meaningless in this context since they no longer reflect the realities of the 21st century – but in the light of the principle of common but differentiated responsibilities and respective capabilities, having regard to different national circumstances.[56] This approach makes it possible to determine the standard of due diligence applicable to the obligations of all parties on the basis of diverse and dynamic considerations.

62. These principles recognise that there are differences between the parties in terms of their contribution to climate change and their capacity to act, by broadening the parameters for differentiation.

63. Therefore, in accordance with Article 30 paragraphs 3 and 4 of the VCLT, the static approach of the UNFCCC annexes and a return to the situation before the adoption of the Paris Agreement are not tenable.

64. In view of the above, it is necessary for the Court to recognise the irrelevance of a strict 'separation' or 'bifurcation' between developed and developing countries, as provided for in the annexes to the UNFCCC.

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[50]Christina Voigt, Felipe Ferreira, "Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement" in Transnational Environmental Law, volume 5, number 2, 2016, pp. 291 ff; Cinnamon P. Carlarne, Kevin R. Gray and Richard Tarasofsky, "International Climate Change Law: Mapping the Field" in Kevin Gray, Richard Tarasofsky and Cinnamon P. Carlarne (eds), *The Oxford Handbook of International Climate Change Law*, OUP, 2016, p. 15.

[51] Art. 4 para. 2 Paris Agreement (emphasis added).

[52] Art. 3 Paris Agreement (emphasis added).

[53] Art. 3 Paris Agreement (emphasis added).

[54] Art. 4 para. 6 Paris Agreement.

[55] Art. 13 para. 2 Paris Agreement (emphasis added).

[56] Preamble, Arts 2 para. 2, Art. 4 para. 2, Art. 4 para. 3 and Art. 4 para. 19 Paris Agreement (emphasis added).

iii) The territorial approach to the Paris Agreement and the climate regime

65. According to UNFCCC decision 4/CMA.1, "*Parties account for anthropogenic emissions and removals in accordance with methodologies and common metrics assessed by the IPCC and in accordance with decision 18/CMA.1*."[57]

66. As set out in the 2006 IPCC Guidelines for National Greenhouse Gas Inventories:

> "*National inventories include greenhouse gas emissions and removals taking place within national territory and offshore areas over which the country has jurisdiction*."[58]

67. This approach remains unchanged for the 2019 Refinement to the 2006 IPCC Guidelines. The territorial accounting of emissions and absorptions remains the current practice. This approach of basing responsibility primarily on the territoriality of emissions is coherent.

68. This approach is also reflected in the due diligence required of states to prevent activities taking place on their territory, or in any area under their jurisdiction, from causing significant harm to the environment of another state or to areas beyond national jurisdiction.[59] Thus, each state has its own responsibility to control the activities that take place on its territory and to control the emissions under its jurisdiction. This makes sense not only because the states under whose jurisdiction the activities that cause anthropogenic GHG emissions take place are in the best position to control them, but also because the economic benefits from anthropogenic GHG emissions arise mainly where they occur.

69. Therefore, an approach that would transfer responsibility to the state that imports the products whose production has caused emissions would mean that differentiated treatment of products according to their method of production would have to be promoted in the global trading system. However, applying the 'production and processing method' as a criterion can be complex and requires sophisticated methods to measure the emissions contained in each product. That is why a territorial approach is generally simpler, more direct and more effective. Primary responsibility must therefore remain with the state, which can directly control emissions.

D. Human rights

70. In principle, Switzerland maintains the position it expressed in its written statement.[60]

i) The universality of human rights

71. As Switzerland has already argued in its written statement, all states – regardless of their respective level of development – are obliged to respect, protect and fulfil universal human rights within their territory.[61]

[57] Decision 4/CMA.1 UNFCCC, Annex II, para. 1.a.
[58] 2006 IPCC Guidelines for National Greenhouse Gas Inventories.
[59] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 45, para. 101; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 19, para. 29 (emphasis added); Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.
[59] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 45, para. 101.
[60] Written statement of the Swiss Confederation, paras. 59 ff.
[61] Written statement of the Swiss Confederation, para. 63.

72. Specifically, from a human rights perspective, a distinction is made between the direct physical effects of climate change on environmental media, such as the availability of water or the quality of soil for growing food, and the response of states to these effects. States have a duty to ensure that people living on their territory and under their jurisdiction can exercise their human rights. Every state must do everything in its power to implement human rights as ambitiously as possible. Article 2 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, for example, requires all contracting parties to use the maximum of available resources to achieve this objective.[62]

ii) The territorial application of human rights

73. States have a duty to ensure that people living on their territory and under their jurisdiction can exercise their human rights. This territorial application of human rights has also been confirmed in the area of climate change.[63]

74. With regard to the possible extraterritorial application of human rights and jurisdiction in situations where the state acts inside or outside its territory, UN bodies such as the European Court of Human Rights take as their starting point, despite the global impact of climate change, a narrow interpretation and as a general rule require proof of (a) "effective control" over foreign territory or (b) legal or factual control over the person acting abroad. A state's transboundary protection obligation thus only exists in respect of persons under its direct control.

III. LEGAL CONSEQUENCES

75. In its written statement, Switzerland highlighted the legal framework applicable in the area of state responsibility.[64] In addition to these considerations, certain written statements submitted to the Court call for comments on two aspects: (i) the current lack of consolidation of international law, and (ii) the relationship between the facts that potentially give rise to harm and the resulting liability.

76. On the subject of the lack of consolidation of the law, crystallisation remains necessary before international law on state responsibility can fully take account of the effects of climate change. With regard to environmental harm in general, it has been established that it may give rise to international liability on the part of a state.[65] This liability, in turn, is capable of giving rise to obligations to cease and repair, which may involve compensation.[66]

77. That said, it is necessary to take account of the difficulties inherent in establishing liability for harm arising from climate change in particular. The widespread nature of the causes of climate change, the lack of political agreement on the quantity above which anthropogenic emissions of GHGs are prohibited, the time interval between the act and the harm, and the impossibility of identifying a clear link between a specific act and specific harm, all highlight the shortcomings of current international

[62] Art. 2 para.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
[63] Recently: European Court of Human Rights, *Case Duarte Agostinho and Others v. Portugal and 32 Others*, no. 39371/20, 9 April 2024, paras. 184-207.
[64] Written statement of the Swiss Confederation, paras. 72-81.
[65] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, p. 17, para. 42.
[66] Written statement of the Swiss Confederation, para. 75.

law.[67] Treaty law cannot fill these gaps. As far as customary law is concerned, both *opinio juris* and state practice do not reach the threshold for establishing the existence of a rule in this regard.[68]

78. One of the consequences of this lack of consolidation of international law is that each individual state cannot be held responsible for a proportion of the total harm. These deficiencies were recognised by ITLOS, which found that:

> *"[…] given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States. […] this difficulty has more to do with establishing the causation between such emissions of one State and damage caused to other States and their environment."*[69]

79. Assuming that the Court sees fit to take a position on how harm should be attributed, it should be guided by the *polluter pays* principle on the basis that a due diligence obligation to prevent harm caused by anthropogenic GHG emissions has existed since the early 1990s.[70] As highlighted in its written statement,[71] Switzerland considers that the principle does not make it possible to remedy the obstacles identified above.

80. That said, the fact that this principle is primarily aimed at national legal systems, and therefore essentially at private actors,[72] does not rule out its application as a reference tool in relations between states. In this context, the *polluter pays* principle should above all serve as a guideline for negotiations between states. For example, this principle would make it possible to take specific account of major polluters or fossil fuel producers who have benefited financially from anthropogenic GHG emissions. However, the use of this principle in negotiations does not mean that *state* responsibility can be derived from it under international law as it stands.

81. The absence of an exhaustive set of appropriate rules in international law on state responsibility cannot however be taken as a blank cheque for all acts that cause climate change – quite the contrary. States remain subject to the obligations analysed in these written comments and in Switzerland's written statement and, at the very least, to the obligation to cease the wrongful act, where applicable.[73]

IV. Conclusion

82. Switzerland invites the Court to issue an advisory opinion on the questions relating to the obligations of states and the legal consequences of climate change in response to the arguments it has submitted.

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[67] Written statement of Singapore, paras. 3.15, 4.11; Written statement of the French Republic, para. 206; Written statement of the Republic of Korea, para. 46.
[68] Written statement of New Zealand, para. 140c.
[69] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Reports 2024, p. 91 para. 252.
[70] Written statement of the Swiss Confederation, paras 76 and 78; Section II.B.i), paras. 46-49 above; see also Written statement of the French Republic, para. 246; Written statement of the Republic of Ecuador, paras. 3.63-3.65; Written statement of Barbados, paras. 242, 267.
[71] Written statement of the Swiss Confederation, paras. 78-80.
[72] See also Written statement of the French Republic, paras. 247-248. See also Written statement of Sri Lanka, para. 111.
[73] Written statement by the Swiss Confederation.

Bern, 7 August 2024

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