REPUBLIQUE DE COTE D'IVOIRE

Union – Discipline – Travail

MINISTERE DE L'ENVIRONNEMENT,

DU DEVELOPPEMENT DURABLE

ET DE LATRANSITION ECOLOGIQUE

Audiences publiques de la Cour Internationale de Justice, dans le cadre de la procédure consultative sur les ***Obligations des États en matière de changement climatique***

La Haye, le 13 décembre 2024

Réponses de la République de Côte d'Ivoire aux questions posés par la Cour aux participants

A. Question asked 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?"

1. In light of the projected rise in global temperature of 2.1-2.8ºC on the basis of full implementation of the latest nationally determined contributions,[1] the State Parties to the Paris Agreement decided in 2023 to call upon Parties to contribute 'in a nationally determined manner' to various global efforts to achieve 'deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 ºC pathways'.[2] These include 'accelerating efforts towards the phase-down of unabated coal power', 'transitioning away from fossil fuels in energy systems' and 'phasing out inefficient fossil fuel subsidies'.[3]
2. Côte d'Ivoire submits that paragraph 28 of Decision CMA.5 did not create new obligations for State Parties in itself. This is reflected in the hortatory language used (*calls upon*) and its status as a decision of the CMA rather than an amendment to the Paris Agreement. However, it is submitted that paragraph 28 is a 'subsequent agreement' of State Parties within the meaning of Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties.[4] Consequently, it provides 'external context' for the interpretation of the

[1] CMA.5 ('First global stocktake') UN Doc. FCCC/PA/CMA/2023/L.17 (13 December 2023) paras 18, 24.
[2] Ibid., para. 28.
[3] Ibid.
[4] Vienna Convention on the Law of Treaties 1969, Art. 31(3)(a), 1155 UNTS 331. See also: Oliver Dörr, 'Article 31: General rule of interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (2012) 521, 561-564; Sorel and Eveno, 'Article 31: Convention of 1969' in Corten and Klein, *The Vienna Convention on the Law of Treaties: A Commentary* (2011) 289, 304-307.

obligations under paragraphs 2 and 3 of Article 4 of the Paris Agreement both for producers and consumers of fossil fuels, alongside all other participants in their supply chains.

3. In its oral submissions,[5] Côte d'Ivoire referred to the specific obligations of States within whose jurisdiction fossil fuels are produced in two respects: 1) the duty under Article 4(2) of the Paris Agreement to execute environmental impact assessments, including 'downstream' or 'Scope 3' emissions accounting for the inevitable combustion of the fuels; and 2) the duty under Article 4(3) of such States with 'high socio-economic indicators' to 'transition away' from reliance on the production of fossil fuels for national income deeper and faster than fossil-fuel-producing States with low indicators. Our interpretation of Article 4(2) for the former is based upon the meaning of the words 'pursue domestic mitigation measures' in light of the 'object and purpose' of the Paris Agreement under Article 2(1)[6] in conjunction with customary international law on environmental impact assessments and the reference to 'transitioning away from fossil fuels' in Decision CMA.5 (2023) as 'external context'.[7] Our construction of Article 4(3) for the latter rests upon the ordinary meaning of the words 'in light of different national circumstances' in combination with Decision CMA.5 as 'external context'.

4. The duty to assess the Scope 1, 2 and 3 emissions pertains to *new* projects for fossil fuel production rather than *existing* projects.[8] As States must align their NDCs under Article 4(2) to the annual synthesis reports produced by the UNFCCC Secretariat,[9] the duty to

[5] *Obligations of States in respect of Climate Change (Request for advisory opinion)* Oral Hearings, Verbatim Record (uncorrected) CR 2024/39 (Wednesday 4 December 2024, 10 a.m.) pp.25-26 (paras 8-9)
[6] VCLT, Art. 31(1).
[7] VCLT, Art. 31(3)(a), 31(3)(c).
[8] E.g. – *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment,* Federal Court of Australia (13 September 2021) (FCA 560) paras 88-89. See also, for example, the pending proceedings before the European Court of Human Rights in App. No. 34068/21 *Greenpeace and others v. Norway* concerning the lawfulness of permits for *new* fossil fuel production projects in the North Sea.
[9] For example, see the discussion on *Zeph Investments Pte. Ltd. (II) v. Australia* in the response to the question posed by Judge Tladi. See also, e.g. – ICSID Case No. ARB/23/5 *Ruby River Capital LLC v. Canada (Request for Arbitration)* (17 February 2023) paras 122-130; ibid. (Memorial) pp.59-61, 85-88; ibid., (Contre-mémoire) pp.15-21, 39-63.

'pursue domestic mitigation measures' entails the assessment of new fossil fuel projects against the evolving state of the global carbon budget, as measured in those reports. While a fossil fuel producing State Party could meet this procedural obligation by accurately assessing the emissions impact of a new project and yet decide to proceed with the project, such a decision could constitute a breach of its substantive duty to mitigate greenhouse gas emissions if the assessment showed the emissions impact of the project to exceed the level required for alignment with the collective temperature objective.[10]

5. Decision CMA.5 shapes the construction of the obligations of State Parties for the consumption of fossil fuels. When the Netherlands enacted legislation for a progressive ban on the consumption of coal for the generation of electricity until 2030,[11] for example, they were motivated by their duty to reduce greenhouse gas emissions produced in their territories. In this respect, the references in the decision to 'accelerating efforts towards the phase-down of unabated coal power' and 'transitioning away from fossil fuels in energy systems' are relevant. The reference in paragraph 28 to 'a nationally determined manner' refers to the margin of appreciation for States to decide the combination of measures to adopt in their particular circumstances.
6. However, the reference to 'phasing out inefficient fossil fuel subsidies' in paragraph 28 of Decision CMA.5 refers to a specific measure to be taken by fossil fuel *producing* and *consuming* States. Though not binding in itself, this measure provides interpretation to the duty under paragraphs 2 and 3 of Article 4 concerning how State Parties must 'transition away' from fossil fuel production and consumption. Consequently, it is submitted that State Parties using fossil fuel subsidies are obliged to include a plan for the progressive discontinuance of subsidies in their NDC submissions.

[10] Ibid.
[11] See the response to the question posed by Judge Tladi.

7. In construing Article 4(3) to oblige States with high socio-economic indicators and in whose territory fossil fuels are produced to transition away from fossil fuel production 'deeper and faster' than States with low indicators, Côte d'Ivoire argued that such criteria are wealth, technical capacity and human development. One basic indicator of wealth is gross domestic product per capita, as measured by the World Bank and International Monetary Fund. Another is the size and power of sovereign wealth funds of which the largest in the world (save the China Investment Corporation and the SAFE Investment Fund) were built on fossil fuel income. In this respect, the pace and depth of progressive transition away from fossil fuels is to be aligned to the annual synthesis reports. Due to the alignment of NDCs with the collective objective, this means that fossil fuel-producing States with wealth and technical capacity (e.g. – Kuwait, Saudi Arabia) are obliged to design and implement NDC submissions with 'economy-wide emission targets' providing for transitional plans away from fossil fuels according to 'deeper and faster' targets than poorer producers (e.g. – Timor Leste, Colombia).

B. Question asked 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?"

1. On 4 December,[12] Côte d'Ivoire made the following submission:

> 'On question (a), Côte d'Ivoire supports the remarks of Pakistan[13] and others[14] in asserting the collective objective on global temperature [in Article 2(1)] to be the cornerstone of the Paris Agreement[15]. As this provision does not use binding language[16], we agree with Australia[17] and others[18] in averring its non-binding character in light of its drafting history[19]. Given the consensus on the binding character of the individual duties in Article 4[20], we submit that the collective objective as 'internal context'[21] infuses their interpretation[22].
>
> Consequently, the standard of the collective objective is a key issue for the clarification of the standard of these individual duties. In this respect, neither the text nor any subsequent [CMA] decision elaborates upon the meaning of the words 'well below 2º C'. While we concur with China that the collective temperature goal 'is a range instead of one fixed level',[23] it is submitted that a ceiling exists between the hortatory ambition to

[12] *Obligations of States in respect of Climate Change (Request for advisory opinion)* Oral Hearings, Verbatim Record (uncorrected) CR 2024/39 (Wednesday 4 December 2024, 10 a.m.) pp.25-26 (paras 8-9) (translated by Côte d'Ivoire from the original French).
[13] Pakistan, Written Statement (22 March 2024), paras. 50-51.
[14] Ecuador, Written Statement (22 March 2024), paras. 3.76-3.77; Grenada, Written Statement (21 March 2024), paras. 25-30; Indonesia, Written Statement (22 March 2024), paras. 51-53. Voir aussi : CIJ, Obligations des États en matière du changement climatique, audience publique, CR 2024/35, p.142, par. 12 (Allemagne).
[15] E.g. Colombia, Written Statement (11 March 2024), paras. 3.32-3.34; Chile, Written Statement (22 March 2024), paras. 55, 59; El Salvador, Written Statement (22 March 2024), para. 30; Solomon Islands, Written Statement (22 March 2024), paras. 61-63; Micronesia, Written Statement (25 March 2024), para. 89; Timor-Leste, Written Statement (22 March 2024), paras. 96-101. The temperature target 'reduces the uncertainty that has long attached to the UNFCCC's Objective' – Navraj Singh Ghaleigh, 'Article 2: Aims, Objectives and Principles' in Geert van Calster and Léonie Reins, The Paris Agreement on Climate Change: A Commentary (2021) 73, 80 ; Halldór Thorgeirsson, 'Objective (Article 2.1)' in Klein et al., The Paris Agreement on Climate Change: Analysis and Commentary (2017) 123, 127-128.
[16] Ghaleigh (note 15) 81; Thorgeirsson (note 15) 128.
[17] Australia, Written Comments (15 August 2024), paras. 2.23-2.24; Australia, Written Statement (22 March 2024), para. 2.62.
[18] Saint Lucia, Written Statement (21 March 2024), para. 53; Saudi Arabia, Written Comments (15 August 2024), paras. 4.22-4.30; Saudi Arabia, Written Statement (21 March 2024), para. 4.58-4.60; United States of America, Written Statement (22 March 2024), para. 3.15; United Kingdom, Written Comments (12 August 2024), para. 14-18 ; Kuwait, Written Statement (22 March 2024), paras. 31-32.
[19] Contra: Sierra Leone, Written Statement (22 March 2024), paras. 3.23-3.24; Germany, Written Statement (March 2024), para. 44, 100-102; Nepal, Written Statement (22 March 2024), paras. 18-19; Romania, Written Statement (February 2024), para. 88; Marshall Islands (March 2024), paras. 64-65; Viet Nam, Written Statement (22 March 2024), para. 19; Namibia, Written Statement (22 March 2024), paras. 46, 72; Portugal, Written Statement (March 2024), paras. 51, 53.
[20] United Kingdom, Written Comments (12 August 2024), para. 20.
[21] Convention de Vienne sur le droit des traités, art. 31, al. 2.
[22] Latvia, Written Comments (14 August 2024), para. 19; Sierra Leone, Written Comments (15 August 2024), para. 3.5; Samoa, Written Comments (15 August 2024), para. 52; Mauritius, Written Comments (15 August 2024), paras. 40-42; Kenya, Written Comments (13 August 2024), paras. 4.36-4.37, 4.44.
[23] China, Written Statement (22 March 2024) para. 22. *Contra*: Sierra Leone, Written Comments (15 August 2024) para. 3.5.

'pursue efforts to limit the temperature increase to 1.5ºC'[24] and the reference point of 2ºC.[25] Whilst certain participants maintain that the limit is below 1.5º C,[26] this construction is not sustained by the words 'pursuing efforts to' [in Article 2(1)]. In its 'internal context',[27] including the precautionary principle,[28] it is submitted that the most faithful interpretation of the common intention [of the Contracting States] is the level of 1.6º C, which constitutes the least dangerous of the five 'possible climate futures' beyond 1.5º C as presented by the IPCC.'[29]

2. In its submissions on the construction of paragraphs 1 to 5 of Article 4,[30] Côte d'Ivoire agreed with those participants who maintained in their written pleadings that the word 'should' carries a hortatory meaning in paragraphs 1 and 4. By the same token, we also concurred with the great majority of participants in averring that the words 'shall' in paragraph 2 and 'will' in paragraph 3 manifest their binding character. Since Article 2(1) does not impose a joint duty to achieve the collective objective of the global temperature goal, a failure to achieve the collective objective would not give rise to *joint* responsibility.

3. Rather, State Parties would incur *individual* responsibility for breaches of their individual duties under paragraphs 2 and 3 of Article 4. We consider the key issue concerning the mitigation duties under the Paris Agreement to be the identification of the precise standards imposed upon State Parties thereto. As we argued: 'Though 'ambiguous' on its own terms,[31] the drafting history of paragraph 1[32] shows it to be "internal context"[33] linking the

[24] CMA.5 ('First global stocktake') UN Doc. FCCC/PA/CMA/2023/L.17 (13 December 2023) paras 3-4.
[25] *Contra*: China, Written Statement (22 March 2024) para. 24.
[26] E.g. – Namibia, Written Statement (22 March 2024) paras 46, 69; Vanuatu, Written Statement (21 March 2024) paras 401-403; Tuvalu, Written Statement (22 March 2024) paras 105-111; Tuvalu, Written Comments (14 August 2024) paras 30-33.
[27] CVDT, art 31 alin. 2.
[28] Convention-cadre des Nations-Unis sur le changement climatique, signé le 9 mai 1992, 1771 UNTS 107, préambule. Voir aussi : Xue Hanqin, *Transboundary Damage in International Law* (2003) 256.
[29] GIEC, « Changement climatique 2021 les bases scientifiques physiques : Contribution du groupe de travail I au sixième Rapport d'évaluation » page 15 (octobre 2021) https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WG1_SPM_French.pdf.
[30] CR 2024/39 (note 12) pp.27-36 (paras 11-22).
[31] VCLT, Art. 32. See also: Oliver Dörr, 'Article 32: Supplementary means of interpretation' in Dörr and Schmalenbach (note 4) 571, 582-585.
[32] Winkler H, 'Mitigation (Article 4)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017) 141, 144; Benoît Mayer, 'Article 4: Mitigation' in van Geert van Calster and Leonie Reins, *The Paris Agreement on Climate Change : A Commentary* (Edward Elgar 2021) 109, 112.
[33] VCLT, Art. 31(2). See further: Gardiner, *Treaty Interpretation* (OUP 2015) 210.

binding duties in paragraphs 2 and 3 to the collective objective in Article 2(1).[34]' In our view, the collective objective, as the 'object and purpose' of the Paris Agreement, is thus 'internal context' to identify the *standards of mitigation* for the individual duties of mitigation.

4. Whereas Côte d'Ivoire has argued that the precautionary principle in customary international law applies as 'external context' to the interpretation and application of the collective objective and individual mitigation duties under the Paris Agreement, it also applies as 'internal context' through Article 3(3) of the UNFCCC.[35] Whilst we have argued that the *lex posterior* rule precludes the application of the UNFCCC unless consistent with the Paris Agreement,[36] the precautionary principle embodied in the 'principles' of the 'framework' Convention is consistent with its treaty of implementation.

5. If the Court were to accept our interpretation of Article 2(1) in the application of the precautionary principle as providing for a range between an aspirational goal of 1.5º C and a legal limit of 1.6º C, this would mean that State Parties are bound to strive to achieve the 1.5 º C aspiration with 0.1 º C as the permitted 'excess'.[37] This is manifested in the design and implementation of their NDCs under the customary standard of due diligence[38] as 'external context'[39] for the interpretation of Article 4(3):

[34] Winkler (note 32) 144.
[35] CR 2024/39 pp.26, 33, 34-35 (paras 9, 18, 21, Côte d'Ivoire).
[36] Ibid., p.22 (para. 3, Côte d'Ivoire).
[37] On expert evidence concerning the likelihood of 'overshoot' in the middle of the twenty-first century with a view to recovery to 1.5 degrees by 2100, see: *Waratah Coal Pty Ltd v. Youth Verdict Ltd & Ors (No 6)* Land Court of Queensland [2022] QLC 21, paras 1394-1409, 1595-1597.
[38] Note 30.
[39] VCLT, Art. 31(3)(c).

'Whereas Kuwait,[40] Saudi Arabia[41] and the United States[42] maintain that the standard of NDCs is exclusively determined by each State Party, Côte d'Ivoire agrees with Australia,[43] Colombia,[44] Sierra Leone,[45] Tonga[46] and others[47] that they must be aligned to the 'object and purpose'[48] of the collective objective, as decided by the CMA in 2022.[49] This alignment is evaluated against the Global Stocktake in the annual synthesis reports under the enhanced transparency framework.[50]'

In our submission, State Parties must align their NDCs to the 1.5º C aspiration as the benchmark designated by the CMA for due diligence efforts under Article 4(3). Varying according to the 'different national circumstances' of each State,[51] the collective temperature goal indirectly defines the targets of each State under its own carbon budget, which, we contend,[52] is a duty under Article 4(3).

6. The 'bottom-up' system of the Paris Agreement requires State Parties to continually align their *national* emission targets in their carbon budgets to the fluctuating state of the *global* carbon budget. Since the annual synthesis reports of the UNFCCC Secretariat provide State Parties with a clear indication of the state of the global carbon budget in terms of emissions

[40] Kuwait, Written Statement (22 March 2024) paras 42, 51, 54-55.
[41] Saudi Arabia, Written Statement (21 March 2024) paras 4.66-4.68.
[42] United States of America, Written Comments (15 August 2024) para. 3.13.
[43] Australia, Written Comments (15 August 2024) para. 2.28.
[44] Colombia, Written Comments (14 August 2024) para. 3.29; Colombia, Written Statement (11 March 2024) paras 3.35, 3.39.
[45] Sierra Leone, Written Statement (22 March 2024) paras 3.20-3.24.
[46] Tonga, Written Statement (15 March 2024) para. 160.
[47] République démocratique du Congo, Exposé écrit (4 mars 2024) par. 208 ; Mauritius, Written Comments (15 August 2024) paras 44, 48; Seychelles, Written Statement (22 March 2024) para. 96; Vanuatu, Written Statement (21 March 2024) para. 404.
[48] VCLT, Art. 31(1). See further: Gardiner (note 33) 210-222.
[49] CMA Decision 1/CMA.4, UN Doc. FCCC/PA/CMA/2022/10/Add.1 (17 March 2023) para. 23.
[50] Bahamas, Written Comments (14 August 2024) paras 46-47; Latvia, Written Comments (14 August 2024) paras 12-14, 16; United Kingdom, Written Comments (12 August 2024) paras 25-26; Australia, Written Comments (15 August 2024) paras 2.34-2.37; Australia, Written Statement (22 March 2024) paras 2.47-2.53; European Union, Written Statement (March 2024) paras 145, 162; Mexico, Written Comments (August 2024) para. 33; Germany, Written Statement (March 2024) para. 57; New Zealand, Written Statement (22 March 2024) para. 54; Indonesia, Written Statement (22 March 2024) para. 55; Madagascar, Exposé écrit (22 mars 2024) par. 42; Dominican Republic, Written Statement (22 March 2024) para. 4.26, 4.31; Singapore, Written Statement (20 March 2024) paras 3.32, 3.35; Antigua and Barbuda, Written Statement (22 March 2024) paras 263-284; Solomon Islands, Written Comments (15 August 2024) para. 50.
[51] Ibid., pp.35-36 (para. 22, Côte d'Ivoire).
[52] Ibid., pp.32 (para. 17, Côte d'Ivoire).

and the current state and rate of global warming,[53] they are able to readily identify their own national targets in each NDC iteration. As many State Parties have done,[54] this includes 'updates' to NDCs to adjust them to an annual synthesis report during the course of the regular quinquennial NDC cycle. Whereas a State Party might breach its mitigation duties by failing to exercise due diligence 'leading to the precise result'[55] of 1.5º C aspiration, it might also violate them in the event of the 1.6º C limit being exceeded.

7. As 'internal context' through Article 4(1), the 'object and purpose' also defines the standards of mitigation applicable to the duty to take national mitigation measures under paragraph 2. At the sector level, for example, State Parties are obliged to align their environmental impact assessments to the 1.5º C collective objective. For instance, the lawfulness of the 2019 Prohibition of Coal in Electricity Production Act of the Netherlands – directly prompted by the *Urgenda Case*[56] in providing for a phasing out of coal-based electricity production variable according to the exact facility between 2022 and 2030 – for the rights of the investors was upheld by the District Court of The Hague in 2022.

8. The Court found the impugned ban for the Amercentrale electricity plant was justified by the failure by the Claimant to achieve the decarbonisation ambitions in the Sector Agreement with the Dutch State; in particular, the failures to convert the facility in question to the use of biomass and to use carbon capture and storage to offset its greenhouse gas emissions.[57] While the Court found the use of a transition period instead of compensation in the impugned measures to have respected the proprietary rights of the foreign investors,[58] the latter initiated a claim under the 1991 Energy Charter Treaty for 'at least' EUR 1.4

[53] UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (14 November 2023) UN Doc FCCC/PA/CMA/2023/12, paras 8-16.
[54] Ibid., paras 81-84.
[55] CR 2024/39 (note 12) pp.27-28 (para. 11, Côte d'Ivoire).
[56] Case No. C:/09/608588/HA ZA 21-245 *RWE Generation NL B.V. v. State of the Netherlands*, District Court of The Hague (Judgment of 30 November 2022) paras 5.17-5.17.58.
[57] Ibid., paras 5.17.32-5.17.33, 5.17.35, 5.18.1-5.19.8.
[58] Ibid., paras 5.20-5.22.1.

billion.[59] While the arbitration was ultimately discontinued[60] by the majority-State-owned German investors in the context[61] of the 'intra-EU jurisdictional objection' for investor-State arbitrations initiated by a national of one EU Member State against another EU Member State,[62] it exemplifies the salient importance of the standards of mitigation defined by the Paris Agreement. In that case, the measures of the Netherlands for the coal sector – a major source of their economy-wide GGEs – were taken pursuant to their mitigation targets, as embodied in the relevant Dutch and European Union legislation implementing the NDC submission of the European Union under the Paris Agreement.[63]

9. At the project level, this infusion of the collective objective into Article 4(2) is exemplified in the pending investor-State arbitration of *Zeph Investments Pte. Ltd. (II) v. Australia*.[64] The dispute concerns the denial by the Queensland Department of Environment and Science[65] of a land lease and environmental permit for the Galilee Coal Mine project on the basis of an advisory opinion of the Queensland Land Court that it would, *inter alia*, 'contribute to climate change directly and indirectly'.[66] In taking extensive expert and

[59] ICSID Case No. ARB/21/4 *RWE AG and Another v. Netherlands (Memorial of 18 December 2021)* paras 573, 626.
[60] ICSID Case No. ARB/21/4 *RWE AG and Another v. Netherlands (Discontinuance Order and Decision on Costs of 12 January 2024)* para. 72.
[61] Case No I ZB 75/22 *Kingdom of the Netherlands v. RWE AG* Federal Court of Justice of Germany (Budesgerichtshof)(First Civil Senate)(Judgment of 27 July 2023) paras 117-147, English translation at: https://www.italaw.com/sites/default/files/case-documents/italaw181754.pdf.
[62] For an overview of the *Achmea* and *Komstroy* judgments of the Court of Justice of the European Union and the ongoing question of their effects in the context of enforcement of arbitral awards, see: Case C-516/22 *European Commission v. United Kingdom*, Court of Justice of the European Union (Judgment of 14 March 2024) https://curia.europa.eu/juris/document/document.jsf;jsessionid=90174EB992CC05434F32D79310A3812C?text=&docid=283829&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=587471; Affaire nº 4A_244/2023 *Royaume d'Espagne c. la Société de droit français « A »* Tribunal federal de la Suisse (arrêt du 3 avril 2024) https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza://03-04-2024-4A_244-2023&lang=de&zoom=&type=show_document.
[63] Approving the judgments of the courts below, which were cited in *RWE Generation NL B.V. v. Netherlands* judgment rendered in the same month, see: *Urgenda Foundation v. The State of Netherlands*, C/09/456689/ HA ZA 13-1396, Supreme Court of the Netherlands (9 October 2019) paras 7.2.7-7.2.11. 7.4.1-7.5.2.
[64] PCA Case No. 2023-67 *Zeph Investments Pte Ltd v. Australia (II)*, https://pca-cpa.org/en/cases/304/.
[65] Queensland Government, Department of Environment, Tourism, Science and Innovation, Press Release, 'Waratah Galilee Coal Mine EA refused' (3 April 2023) https://www.desi.qld.gov.au/our-department/news-media/mediareleases/2023/waratah-galilee-coal-mine-ea-refused.
[66] *Waratah Coal Pty Ltd v. Youth Verdict Ltd & Ors (No 6)* Land Court of Queensland [2022] QLC 21, para. 1018.

documentary evidence on its environmental impact, the Court assessed the anticipated emissions – including 'downstream' Scope 3 emissions emanating from the exported combustion of the mined coal for the production of electricity – against the benchmark of the 1.5 º C temperature goal under the Paris Agreement.[67] According to the Department of the Attorney General of Australia, the Claimant in the pending arbitration seeks AUD 41 billion in damages from the Commonwealth of Australia.[68]

10. In summary, we submit that the 'object and purpose' of the Paris Agreement and the UNFCCC permeates the interpretation of Article 4. Like the magnifying and focusing effects of a telescope, it provides 'internal context' within which States are to design and implement their NDCs and take regulatory, administrative and judicial measures at project, sector and economy levels to execute their duties under paragraphs 2 and 3 under the customary standard of due diligence. The precautionary principle in Article 3(3) of the UNFCCC also provides 'internal context' to construe the 'object and purpose' of the Paris Agreement and individual duties of mitigation.

C. Question posée par M le juge Aurescu

"Some participants have argued, during the 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?"

« Certains participants ont fait valoir, dans leurs écritures et/ou lors de la phase orale de la procédure, que le droit à un environnement propre, sain et durable existe en droit international.

[67] Ibid., paras 22, 35, 692-695, 757-797, 944-954, 1015-1028, 1394-1409, 1595-1597.
[68] Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, 'Budget Estimates 2023-2024, Attorney-General's Department, BE23-059 – Mr Palmer's entity Zeph – contents of notice of intention', https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId21-PortfolioId5-QuestionNumber58.

Pourriez-vous expliciter, de votre point de vue, quel est le contenu juridique de ce droit et quelle est sa relation avec les autres droits de l'homme que vous considérez pertinents aux fins du présent avis consultatif ? »

11. La Côte d'Ivoire a voté en faveur de la résolution 76/300 en 2022 (Droit à un environnement propre, sain et durable). Certains participants ont identifié au second tour des plaidoiries écrites que la question d'un « droit à un environnement propre, sain et durable » concerne l'interprétation de cette résolution touchant les deux Pactes internationaux.[69] La CEDH a remarqué que « ni l'article 8 ni aucune disposition de la Convention ne garantit spécifiquement une protection générale de l'environnement ».[70]

12. Selon la Côte d'Ivoire, la résolution n'a pas modifié les deux Pactes internationaux pour fonder un nouveau droit pas prévu à l'origine. Cette interprétation est basée sur le texte de la résolution dans lequel il n'y a aucune référence à une modification aux deux Pactes internationaux. Par ailleurs, l'article 51 du Pacte internationale sur les droit civils et politiques et l'article 29 du Pacte international sur les droits économiques, sociales et culturels prévoient des procédures spécifiques pour la modification des deux Pactes qui n'avait pas touchée par la résolution 76/300. Par exemple, elle a n'établit aucun mécanisme pour la mise en œuvre d'un nouveau droit, comme, par exemple, l'établissement d'un « ombudsman[71] » ou du droit d'*actio popularis*[72] pour la représentation de l'« environnement » par un État partie.

13. Cependant, nous soutenons que la résolution est un « accord subséquent » au sens de l'article 31 alinéa 3) b) de la CVDT à propos de l'interprétation des droits établis dans les

[69] Requête no 41666/98 *Affaire Kyrtatos c. Grèce*, Cour européenne des droits de l'homme (arrêt de 22 mai 2003) par. 52.
[70] Ibid.
[71] E.g. – the National Ombudsman (*nationale Ombusman*) of the Netherlands.
[72] E.g. – Requête nº 39371/20 *Affaire Duarte Agostinho et autres c. Portugal et 32 autres (décision du 9 avril 2024)* Cour européenne des droits de l'homme [GC] par. 40, 219-220.

deux Pactes internationaux. À notre avis, celle-ci est le sens des mots « *Constate* que le droit à un environnement propre, sain et durable est lié à autres droits et au droit international existant.[73] » Le soutien des Etats parties pour l'établissement d'un droit à l'environnement constitue « *opiniones juris* » en faveur de l'avis que les « atteintes graves à l'environnement peuvent affecter le bien-être d'une personne et la priver de la jouissance de son domicile de manière à nuire à sa vie privée et familiale sans pour autant mettre en grave danger la santé de l'intéressée…l'élément crucial qui permet de déterminer si, dans les circonstances d'une affaire, des atteintes à l'environnement ont emporté violation de l'un des droits sauvegardés…est l'existence d'un effet néfaste sur la sphère privée d'une personne, et non simplement la dégradation générale de l'environnement.[74] »

14. À propos de la question de la mise en œuvre des devoirs d'atténuation dans le cadre des traités sur les droits de l'homme, la France[75] et d'autres[76] rappellent que la CEDH dans l'affaire *Agostinho* a approuvé l'argument conjoint selon lequel les demandeurs n'avaient aucune capacité juridique pour invoquer la responsabilité des 32 défendeurs sauf celle du Portugal à cause du manque du lien juridictionnel.[77] Concurring with Germany,[78] Russia,[79] New Zealand,[80] the Nordics[81] and others,[82] Côte d'Ivoire supports the approach of the ECtHR[83] to reject the 'cause and effect' test proposed by the IACtHR[84] and endorsed by

[73] Résolution 76/300 de l'Assemblée générale du 28 juin 2022, par. 2.
[74] Requêtes n[os] 54414/13 et 54264/15 *Cordella et autres c. Italie (arrêt du 24 janvier 2019)* Cour européenne des droits de l'homme, par. 101.
[75] France, Exposé écrit (22 mars 2024) par. 24.
[76] Voir par ex. – Netherlands, Written Comments (15 August 2024) para. 2.13.
[77] *Duarte Agostinho* (note 72) par. 208, 213.
[78] Germany, Written Statement (March 2024) paras 91-93, 99.
[79] Russian Federation, Written Statement (22 March 2024) p. 11.
[80] New Zealand, Written Statement (22 March 2024) para. 116(a).
[81] Denmark, Finland, Iceland, Norway, Sweden, Joint Written Statement (21 March 2024) para. 86.
[82] Australia, Written Comments (15 August 2024) paras 4.14-4.15; Canada, Written Statement (20 March 2024) para. 28.
[83] *Duarte Agostinho* (note 72) para. 210. See further: App. No. 38263/08 *Georgia v. Russia (II)(Judgment of 21 January 2021)* European Court of Human Rights (Grand Chamber) para. 124.
[84] *State Obligations in relation to the Environment (Advisory Opinion OC-23/17)* Inter-American Court of Human Rights (15 November 2017) paras 102-103.

the Committee on the Rights of the Child.[85] As Albania[86] and Indonesia[87] have argued,[88] this is consistent with *Urgenda*[89] and subsequent cases in finding that States have mitigation duties for sources *under their jurisdiction* to prevent harm to individuals *under their jurisdiction*. In the *Future Generations Case*, the Supreme Court of Colombia held the authorities to have breached duties on deforestation under the Paris Agreement owed to its *residents*.[90]

D. Question asked 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?"

15. Côte d'Ivoire made no declaration in expressing its consent to be bound by the UNFCCC and Paris Agreement. In its view, such declarations are 'interpretative declarations' within the meaning of the 2011 ILC Guide to Practice on Reservations to Treaties.[91] The declarations of Fiji, Kiribati, Nauru, Papua New Guinea, Tuvalu, the Cook Islands, Micronesia, Niue, the Solomon Islands, the Marshall Islands and Vanuatu provide contemporaneous evidence of their individual interpretations of the UNFCCC and Paris Agreement. It is plain from the phrasing of the declarations that these eleven States

[85] *Chiara Sacchi and Others v. Argentina* Committee on the Rights of the Chile, UN Doc. CRC/C/88/D/104/2019 (11 November 2021) paras 10.7-10.9.
[86] Albania, Written Statement (22 March 2024) para. 102.
[87] Indonesia, Written Statement (22 March 2024) para. 44.
[88] *Contra* : République démocratique du Congo, Observations écrites (2 août 2024) par. 31-32.
[89] *Urgenda* (note 63) paras 2.2.1, 5.2.1, 5.6.2, 5.9.2, 6.1.
[90] *Future Generations v. Ministry of the Environment and Others*, Colombia Supreme Court, Decision STC 4360-2018 (5 April 2018) (excerpts, selected and translated by Dejusticia), No. 11001-22-03-000-2018-00319-01, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf.
[91] International Law Commission, Guide to Practice on Reservations to Treaties 2011, *Yearbook of the International Law Commission* (2011) vol. II, Part Two, p.26, para. 1.2.

considered the provisions of the two treaties – in particular, Article 8 of the Paris Agreement – not to comprise a waiver of legal claims or a derogation from the general international law of State responsibility under Article 55 of the 2001 Articles.[92]

16. However, none of these declarations contains conditional language that would subject their 'consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.'[93] Likewise, none of them expresses an intention 'to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State' as reservations.[94] In any event, reservations are excluded by Articles 27 and 24 of the UNFCCC and Paris Agreement, respectively.

17. Whilst these interpretative declarations are contemporaneous evidence of the positions of the declaring States, the approval or opposition of other State Parties is not to be presumed from their silence.[95] While Côte d'Ivoire is not aware of such approval or opposition being expressed by other counterparties, the positions expressed during the course of these advisory proceedings do so opposition. Consequently, Côte d'Ivoire submits that the Court may rely upon these positions to identify the dominant or majority view amongst the State Parties to the climate change treaties on the question of their effect (if any) on the applicability of the general international law of State responsibility to claims arising from alleged internationally wrongful acts with respect to climate change.

[92] CR 2024/39 (note 12) pp.38-39 (para. 25, Côte d'Ivoire).
[93] ILC Guide to Practice on Reservations to Treaties 2011 (note 91) para. 1.4.
[94] Ibid., para. 1.1.
[95] Ibid., para. 2.98.