20 December 2024

H.E. Mr Philippe Gautier
Registrar
International Court of Justice

Dear Registrar,

1. Nauru has the honour, with reference to the oral proceedings in *Obligations of States in respect of Climate Change*, to submit its response to the question posed by Judge Charlesworth. The question is in these terms:

> "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?"[1]

2. This written reply will first set out that the declarations, made by "specially affected States", bar the UNFCCC and the Paris Agreement from conditioning or varying principles of general international law (**A**). It then sets out that they furthermore serve as an indication that the correct interpretation of the UNFCCC and the Paris Agreement is that they do not derogate from the principles of general international law (**B**).

A. The declarations, by "specially affected States", bar the UNFCCC and the Paris Agreement from conditioning principles of general international law

3. The declarations provide, with some variations, that the fact of the States in question becoming parties to the UNFCCC and the Paris Agreement should "in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change" and that no provision in either instrument could "be interpreted as derogating from the principles of general international law".[2] They

[1] CR 2024/54, p. 40.

[2] 1771 *U.N.T.S.* 318 (tab 1, Nauru's judges' folder); 3156 *U.N.T.S.* 95 (tab 2, Nauru's judges' folder) (emphasis added); see Written Comments of Nauru, para. 31; see also Cook Islands (3156 *U.N.T.S.* 87); Fiji (1771 *U.N.T.S.* 317); Kiribati (1771 *U.N.T.S.* 317–318); Marshall Islands (3156 *U.N.T.S.* 92); the Federated States of Micronesia (3156 *U.N.T.S.* 94); Niue (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en); Papua New Guinea (1771 *U.N.T.S.* 321); Philippines (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en); Solomon Islands (3156 *U.N.T.S.* 96); Tuvalu (1771 *U.N.T.S.* 318; 3156 *U.N.T.S.* 97); and Vanuatu (3156 *U.N.T.S.* 98).

attracted no objections from other States parties, over a considerable period of time, whether in the context of the UNFCCC or the Paris Agreement.[3]

4. Whether the declarations are "interpretative declarations"[4] or "unilateral statements other than reservations and interpretative declarations",[5] they do not modify the treaty obligations as such. Neither interpretative declarations or other unilateral statements can achieve such an outcome in a manner opposable to other States.[6] The significance of the declarations is apparent in a different context. As is well-known, the conduct of States "in treaty-making may contribute to the formation of a rule of customary international law".[7] It is in that broader context — in the interaction between the provisions of the treaties and general international law — that the declarations have significance and produce their legal effects.[8]

5. Nauru notes that, in the context of the interpretation of unilateral declarations, "the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text."[9] It should not hesitate "to place a certain emphasis on the intention" of the declaring State,[10] which "may be deduced not only from the text of the relevant clause, but also from the context … and the purposes intended to be served".[11] Nauru makes two points in this regard.

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[3] See Written Comments of Pakistan, para. 20(b).

[4] That is, unilateral statements whereby the States in question purport "to specify or clarity the meaning or scope" of the treaties in question or of certain of their provisions: Guide to Practice on Reservations to Treaties, 1.2 Definition of interpretative declarations.

[5] That is, "statements which relate to the treaty but seek neither to exclude or modify the legal effect of certain of its provisions (or of the treaty as a whole with respect to certain specific aspects) in their application to the author nor to interpret the treaty, and which are thus neither reservations not interpretative declarations": *ibid.*, 1.5 Unilateral statements other than reservations and interpretative declarations, Commentary, para. 2.

[6] *Cf. Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 78, para. 42.

[7] C. McLachlan, *The Principle of Systemic Integration in International Law* (2024), p. 388.

[8] It is not unusual in treaty practice to find declarations of this kind: see the declarations made in relation to the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, 11 February 1971, 955 *UNTS* 115: e.g. Canada (*ibid.*, pp. 189–190); India (*ibid.*, pp. 190–192); and the objection of the United States to the declaration of Yugoslavia, in which the United States expressed its view that, insofar as Yugoslavia's declaration was intended to be interpretative of the Convention, "the United States does not consider that it can have any effect on the existing law of the sea" (972 *UNTS* 421). See L. Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty" (1985), vol. 6, Italian Yearbook of International Law, pp. 107, 110, 115–118.

[9] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction, Judgment, I.C.J. Reports 1998*, p. 454, para. 47.

[10] *Ibid.*, p. 454, para. 48.

[11] *Ibid*., p. 545, para. 49; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 244, para. 36.

6. First, an important part of the context of the UNFCCC negotiations is the informal paper of the Alliance of Small Island States, put forward on its behalf by Vanuatu on 5 June 1991.[12] This informal paper proposed as elements for inclusion in a framework convention on climate change a provision to the effect that:

> "This convention, and participation in the negotiations leading to its conclusion, is without prejudice to the existing rights under international law, including rules governing international liability for damage to people, property and the environment."[13]

7. It also set out certain "governing principles", principles of general international law, in the context of which the convention should be interpreted. Among them were the "polluter pays principle: the principle that those responsible for causing damage to the environment bear the responsibility for rectifying that damage".[14] It also set out a liability principle: "Liability: This Convention shall be without prejudice to the application of the rules of international law governing the liability of States."[15] It soon became evident, however, that these provisions, which had been important to the membership of the Alliance of Small Island States, including Nauru and other declaring States, would not be included in the final text of the UNFCCC.

8. Second, in one of the last consolidated text versions before the final text of the UNFCCC was adopted, both the principle of prevention in general international law and a provision relating to State responsibility for the adverse effects of climate change appeared *in the operative provisions of the draft text*.[16] In this draft, the first operative provision of the draft convention text, which had the general heading "Principles", set out under the specific heading "Sovereignty" that "States have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

[12] Vanuatu, Elements for a framework convention on climate change, proposed by Vanuatu on behalf of States Members of the United Nations and of the specialized agencies that are members of the Alliance of Small Island States (AOSIS)(sent with letter of 5 June 1991), in Set of informal papers provided by delegations, related to the preparation of a framework convention on climate change, A/AC.237/Misc.1./Add.3.

[13] *Ibid*., p. 22.

[14] *Ibid.*, p. 24.

[15] *Ibid.*, p. 24.

[16] Consolidated text based on proposals regarding principles and commitments, presented by delegations, Submitted by the Bureau of Working Group I, A/AC.237/Misc.9, 27 August 1991.

jurisdiction."[17] Under the specific heading "Liability", the draft convention provided that: "This Convention shall be without prejudice to the application of the rules of international law governing the liability of States."[18]

9. In this context, a natural and reasonable reading of the declarations, informed by the purposes they must have been intended to serve, is that they placed on record, and achieved notoriety for, the position of a number of States specially affected by climate change that the UNFCCC, and later the Paris Agreement adopted under it, did not condition, or otherwise vary, the principles of general international law, notably the principle of prevention of transboundary harm,[19] or the principles of State responsibility. These principles of general international law were, according to the declarations, to continue to apply separately to the UNFCCC and the Paris Agreement; no provision of either instrument could be interpreted as detracting from, conditioning, or varying those principles of general international law. The declarations set forth the position of the declaring States that, as a matter of their State practice, the provisions of the treaties could not detract from, condition, or vary "the principles of general international law" or lead to the loss by the declaring States of "*any rights* under international law concerning State responsibility for the adverse effects of climate change".[20]

10. In the language of the *North Sea* case, the declaring States sought thereby to act, through their practice, as a "bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule"[21] — a development for which the existence of "State practice, *including that of States whose interests are specially affected*" would be an indispensable requirement.[22] Acting as specially affected States, they used the instrumentality of their declarations "for the protection of their voice and their interests in the formation of customary international law".[23] This

[17] *Ibid.*, p. 4.
[18] *Ibid.*, p. 7.
[19] *Cf. Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022*, p. 648, para. 99: "The Court recalls that in general international law it is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'", citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.
[20] Emphasis added.
[21] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 43, para. 74.
[22] *Ibidem* (emphasis added).
[23] *Cf.* G. Nolte, "How to Identify Customary International Law: On the Outcome of the Work of the International Law Commission" (2018), vol. 62, Japanese Yearbook of International Law, p. 269.

is so because each of the declaring States is, in the language of the *Marshall Islands* cases, a State which, "by virtue of the suffering which its people endure[s]" as a result of climate change, "has *special reasons for concern*" as regards the phenomenon of climate change.[24] They are "specially affected States" in the sense that the General Assembly referred to that category in its request for an advisory opinion.[25]

11. The Court was, as Nauru and other participants have argued,[26] correct to hold in the *North Sea* case that, if it was possible for the rules of a convention to become part of general international law, even without the passage of any considerable period of time, that could be the case only in the event that participation "included that of States whose interests were specially affected".[27] The requirement goes beyond the specific context in which it was set out in the *North Sea* case, where the Court was referring to the rapid formation of a new rule of customary international law on the basis of what was originally a conventional rule,[28] although that is exactly the situation in the present case.

12. The requirement laid down in the *North Sea* case was echoed in *Texaco* v. *Libya*,[29] where, in the context of "the new international economic order", a small number of capital exporting States was held to have been specially affected and, on that basis, to act as a bar to the formation of a rule of customary international law.[30] There was also

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[24] *Cf. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 272, para. 41; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 569, para. 41; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 851, para. 44 (emphasis added).

[25] General Assembly resolution 77/276, 29 March 2023, Question (*b*)(i); see O. Sender and M. Wood, *Identification of Customary International Law* (2024), pp. 145–146.

[26] CR 2024/46, Nauru, p. 9, para. 5 (Aingimea); and p. 16, para. 7; p. 18, para. 16 (Bjorge); see also CR 2024/36, Antigua and Barbuda, p. 26, para. 41(Phillips); CR 2024/36, Bangladesh, p. 64, para. 2 (Muhammad); CR 2024/41, Grenada, p. 44, para. 2 (Joseph); CR 2024/42, Cook Islands, p. 16, para. 27 (Thondoo); CR 2024/43, Kiribati, p. 47, para. 22 (Benvenisti); CR 2024/51, Tonga, p. 43, para. 9 (Bajaj); CR 2024/52, Pacific Islands Forum Fisheries Agency, pp. 40–41, para. 4 (Manoa); CR 2024/52, Alliance of Small Island States, pp. 48–49, paras. 9–13 (Luteru); and p. 56, para. 35 (Rudyk). See also Written Comments of Pakistan, para. 20(b); Written Comments of Belize, para. 36(c)(iii).

[27] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 42, para. 73; see also *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 47, para. 89, where the Court observed that, in the context of diplomatic protection, "as elsewhere, a body of rules could only have developed *with the consent of those concerned*" (emphasis added).

[28] P. Reuter, *Droit international public* (7th edn., 1983), p. 29; O. Sender and M. Wood, *Identification of Customary International Law* (2024), p. 145.

[29] *Texaco* v. *Libya* (1977), vol. 53, *ILR*, p. 491, para. 86 (Sole Arbitrator: René-Marie Dupuy).

[30] R. Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes" (1991), vol. 230, *Recueil des cours*, p. 58.

an echo of the statement in *Nuclear Weapons*,[31] where again a putative rule of general international law was barred from emerging on account of it not having had the assent of "those who would have been specially affected by such a rule",[32] i.e. the small number of nuclear States (and potentially also their allies). The jurisprudence of municipal courts also relies on the requirement.[33]

13. State practice constantly recalls the requirement expressed in the *North Sea* case:[34]

    a. First, in the context of "the new international economic order", Mr. Hecker, on behalf of the Federal Republic of Germany, expressed the view that the *North Sea* case "underlined the special role which States whose interests were 'specially affected' should play in the development of international customary law. His delegation believed that that was a rule which the [Sixth] Committee should observe in its work. It could therefore not agree to references being made to resolutions which his country, like other major trading countries, had not supported."[35]

    b. Second, the United States observed that it did not believe "that customary international law was easily created or inferred"; "only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* were met was customary international law formed".[36] The United States also referred to "the important role of specially affected States", which it considered to be "an integral part of the *North Sea Continental Shelf* standard";[37] it was, on this basis, "critical that 'negative practice' be given sufficient weight."[38]

    c. Third, the People's Republic of China emphasized the importance of the role of "specially affected States" with respect to the identification of customary

[31] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 255, para. 71.

[32] P. Tomka, "Custom and the International Court of Justice" (2013), vol. 12, *Law and Practice of International Tribunals*, p. 212.

[33] See e.g. *C* v. *Director of Immigration* [2008] 2 HKC 165, 18 February 2008, paras. 113, 115 (Hong Kong); *The Freedom and Justice Party and Others* v. *Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA (Civ.) 1719, 19 July 2018, paras. 82–83 (England and Wales); *Prefecture of Voiotia* v. *Federal Republic of Germany* (2000), vol. 129, *ILR*, p. 515 (Greece); *United States* v. *Hasan*, 747 F. Supp. 2d 599, 634 (United States District Court, E.D. Virginia 2010) (United States).

[34] This State practice also predates the *North Sea* case: see e.g. the statement by Great Britain in 1908 referring to the particular importance in the law of the sea of the role of those States which were "most directly interested" in the codification of customary international law: *AJIL Supplement* (1947), vol. 41, p. 44.

[35] Summary record of the 71st meeting of the Sixth Committee, A/C.6/35/SR.71, 11 December 1980, p. 10, para. 32.

[36] General Assembly, Seventieth session, official records, A/C.6/70/SR.22, 23 November 2015, p. 7, para. 40.

[37] International Law Commission, Seventieth session, Identification of customary international law, Comments and observations received from Governments, A/CN.4/716, 14 February 2018, p. 33.

[38] *Ibid*., pp. 33–34.

international law, whether the State in question be "big or small, rich or poor, or strong or weak".[39]

d. Fourth, the African Union expressed its view, in the context of the *Chagos Archipelago* advisory proceedings, that on the basis of the Court's statement in the *North Sea* case it was essential to look to the State practice of "the African States and then those States that have been victims of colonialism", as they were in the relevant context the "concerned States".[40]

14. Eminent publicists have emphasized the importance in particular of the final requirement to which the Court gave expression in the *North Sea*:[41]

a. First, Lacharrière observed that "*le droit coutumier, dans sa version traditionnelle, ne comptabilise pas n'importe quelle position étatique. Comme il suppose l'obligation d'une pratique, seules comptent les positions de ceux qui ont expérimenté le problème*".[42]

b. Second, Reuter observed that, among the requirements set out in the *North Sea* case, "[*c*]*'est en effet la position des États particulièrement intéressés qui est la plus chargée de signification juridique. Leur acceptation expresse ou, au contraire, leur silence face à une prétention adverse qui lèse précisément ces intérêts peuvent avoir un poids qui n'existe plus quand il s'agit d'autres États moins intéressés*."[43]

c. Third, Dire Tladi observed, in the context of the work of the International Law Commission on the identification of customary international law, that "there is a definite acceptance of the doctrine of specially affected states"; but he also cautioned wisely that the doctrine of specially affected States, on the occasions when it does apply, "does not relate to the relative power of states."[44]

d. Fourth, Georg Nolte observed, in the same context, that "[t]he concept of 'specially affected States' does not and should not privilege great powers, or stronger States in general. To the contrary. A great power that claims to be affected by everything because it involves itself in everything cannot claim to be 'specially affected' by everything, but only that it is, so to speak, 'generally affected'. A smaller or weaker State which has recognizable specific interests, on the other hand, can often more plausibly invoke the concept. Smaller States

[39] International Law Commission, Seventieth session, Identification of customary international law, Comments and observations received from Governments, A/CN.4/716, 14 February 2018, p. 30.

[40] Written Comments of the African Union in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 15 May 2018, paras. 23–29.

[41] Such views by eminent publicists predate the *North Sea* case: see e.g. J. Westlake, *Chapters on the Principles of International Law* (1894), p. 84: "[s]pecial authority is often claimed for the practice of those states which are most concerned with a particular branch of international law", adding that "[t]here is a good foundation for such a claim in the fact that the powers most concerned with a subject must understand it best".

[42] G. de Lacharrière, *La politique extérieure* (1983), pp. 36–37 (underlined here).

[43] P. Reuter, *Droit international public* (7th edn, 1983), p. 29 (underlined here).

[44] D. Tladi, "The International Law Commission is 70 … Staying with the Old and Playing with the New? Reflections on the Work of the Commission during its Commemorative Year" (2018), vol. 43, South African Yearbook of International Law, p. 108 (underlined here).

> need the concept of 'specially affected States' more than larger States for the protection of their voice and their interests in the formation of customary international law."[45]

15. Nauru submits that these views — including the sensible evolution in the understanding of the concept over time — are correct. It was against this background that the International Law Commission was able to note in its commentary to its Conclusion 8 on the Identification of customary international law that: "in assessing generality, an indispensable factor to be taken into account is the extent to which those States that … are most likely to be concerned with the alleged rule ('specially affected States') have participated in the practice."[46] Nauru submits furthermore that the Special Rapporteur, Sir Michael Wood, was correct to note that:

> "any assessment of international practice ought to take into account the practice of those States that are 'affected or interested to a higher degree than other states' with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging)."[47]

16. In conclusion, the significance of the declarations is in Nauru's submission that they set forth the position of the declaring specially affected States that, as a matter of their State practice, the provisions of the UNFCCC and the Paris Agreement cannot be held to detract from, to condition, or to vary "the principles of general international law",[48] or otherwise to lead to the loss of "any rights under international law concerning State responsibility for the adverse effects of climate change". The declarations therefore have the effect of acting as a "bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule",[49] for which it would be necessary that there was an extensive and virtually uniform State practice "including that of States whose interests are specially affected".[50]

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[45] G. Nolte, "How to Identify Customary International Law: On the Outcome of the Work of the International Law Commission" (2018), vol. 62, Japanese Yearbook of International Law, p. 269 (underlined here).

[46] Paragraph 4 of the commentary to Conclusion 8.

[47] Second Report, para. 54 (underlined here); see also O. Sender and M. Wood, *Identification of Customary International Law* (2024), p. 147.

[48] See also CR 2024/46, Nauru, pp. 17–19, paras. 10–16 (Bjorge).

[49] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 43, para. 74.

[50] *Ibidem*.

B. The declarations serve as an indication that the the UNFCCC and the Paris Agreement do not derogate from the principles of general international law

17. The declarations, which were made by specially affected States and gave rise to no objections by any other parties, reaffirm and serve as an indication that the Paris Agreement and the UNFCCC should not be interpreted as derogating from existing international obligations under the principles of general international law.

18. Interpretative declarations may provide "an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties".[51] As a matter of the rules of interpretation codified in the Vienna Convention on the Law of Treaties of 1969, it does not matter whether the declarations are considered to be part of "[t]he context for the purpose" of the interpretation of the UNFCCC and the Paris Agreement (Article 31(2)) or instead subsequent practice in the application of the UNFCCC and the Paris Agreement (Article 31(3)).

19. Nauru submits that, as arbitral tribunals have correctly observed, international law "does not sanction any absolute and rigid method of interpretation".[52] More specifically, the provisions of treaty interpretation in Articles 31–32 of the Vienna Convention "must not be misread as introducing either a rigid, or still less a hierarchical, set of rules".[53] The wisdom of these statements becomes apparent in a case such as the present, where the declarations were made contemporaneously with the adoption of the treaties in question, but where, owing to the reaction over time by other States which gave their implied assent, their effects became evident only subsequently. As one eminent publicist has observed, a State making an interpretative declaration "is taking the opportunity in advance to influence any subsequent interpretations of the treaty, the extent of that influence in part being affected by the reaction of other States to the declaration".[54]

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[51] Guide on Practice to Reservation to Treaties, Yearbook of the International Law Commission, 2011, vol. II, Part Two, Guideline 4.7.1.

[52] *Rhine Chlorides Arbitration (Netherlands/France)*(2004), vol. 144, *ILR*, p. 294, para. 64 (Skubiszewski, P.; Judge Kooijmans; Judge Guillaume); *Lake Lanoux (Spain/France)*(1957), vol. 24, *ILR*, p. 121 (Petrén, P.; Bolla; de Luna; Reuter; de Visscher).

[53] *HICEE BV* v. *Slovak Republic*, PCA Case No. 2009–11, Partial Award, 23 May 2011, para. 135 (Sir Frank Berman, P.; Brower; Judge Tomka).

[54] D. McRae, "The Legal Effect of Interpretative Declarations" (1978), vol. 49, *BYIL*, p. 170.

20. In the case of multilateral treaties, the practice of only some of the parties may serve as a means of interpretation; even if it does not cover a broad group of parties, it can "serve as an indication" of the intention of the parties.[55] As Sir Humphrey Waldock explained:

> "a unilateral document cannot be regarded as part of the 'context' for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a 'unilateral' or a 'group' document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of principle — the need for express or implied assent."[56]

21. As another eminent publicist observed in the context of subsequent practice, this phenomenon being a "*simple indice de la volonté des Parties, elle peut être retenue même si elle émane d'un seul État. Sa valeur probatoire dépend alors des circonstances de l'espèce.*"[57] The circumstances in the present case is that a number of States made declarations to which the other parties gave their implied assent by not objecting. In such circumstances, the declarations serve as an indication of the intention of the parties to the UNFCCC and the Paris Agreement.

22. This is all the more so as the particular circumstances of the present case include the fact that the declaring States were "States whose interests are specially affected". The notion of specially affected States has an incidence in international law well beyond the question of the formation of customary international law.[58] It plays an important role for example in the context of participation in the discussions of the Security Council,[59]

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[55] Yearbook of the International Law Commission, 1964, vol. I, p. 282, para. 3 (Sir Humphrey Waldock); R. Kolb, *Interprétation et création du droit international* (2006), p. 488.

[56] Yearbook of the International Law Commission, 1966, vol. II, p. 98, para. 16.

[57] J. P. Cot, "La conduit subséquente des parties à un traité" (1966), vol. 70, *RGDIP*, p. 645; see also R. Kolb, *Interprétation et création du droit international* (2006), p. 488. See furthermore *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135–136, which furnishes an example of circumstances where the practice of only one State may serve as an indication.

[58] P. Reuter, *Droit international public* (7th edn., 1983), p. 29 ("*Ce phénomène dépasse même le cadre de la coutume.*"); O. Sender and M. Wood, *Identification of Customary International Law* (2024), p. 145 ("The notion of States whose interests are specially affected is not peculiar to the determination of customary international law.").

[59] Art. 31, UN Charter ("Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.").

in international negotiations,[60] and in the context of State responsibility.[61] The importance of the practice of specially affected States in the context of the interpretation of treaties is apparent from the Court's jurisprudence. In *Namibia* it was the subsequent practice of those States that were members of the Security Council to which the Court turned in its interpretation of Article 27(3) of the Charter of the United Nations.[62] It would have been impractical to look to the practice of other States. The Court did, however, note that the practice by these specially affected States had not attracted any objections by other States.[63] In *Whaling* the Court accorded particular importance to the subsequent practice of Japan, a State that, given its tradition of whaling, was a specially affected State in the context of the interpretation of the Whaling Convention.[64]

23. The declarations to the UNFCCC and the Paris Agreement — to which the other States parties gave their implied assent and which were made by States specially affected — reaffirm and serve as an indication that the Paris Agreement and the UNFCCC do not derogate from the principles of general international law.

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[60] GA resolution 53/101, 8 December 1998, para. 2(b) ("States should take due account of the importance of engaging, in an appropriate manner, in international negotiations the States whose vital interests are directly affected by the matters in question.").

[61] Yearbook of the International Law Commission, 2001, vol. II (Part Two), p. 117, Art. 42; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 17, para. 41 ("any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*").

[62] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 22, paras. 21–22.

[63] *Ibidem*.

[64] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 257, para. 83 (where the Court noted that the resolutions in question "were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan" (underlined here)).