

ICJ Highlights: Thursday, 12 December 2024

Timor-Leste underscored the difference between subsistence and luxury emissions, and called on industrialized countries to leave what little remains of the carbon budget for developing States, chiefly least developed countries (LDCs) and small island developing States. Many speakers urged enhanced provision of finance and technology transfer to support developing countries' mitigation and adaptation actions.

Statements

THAILAND reminded the Court that nature is "interdependent and interconnected." Highlighting the importance of words as "seeds for actions," they reiterated their hopes for the advisory opinion and suggested the Court: reaffirm justice for all, not for a few; state clearly what the law is; and construe the different international rules applying to climate change harmoniously. THAILAND said States' obligations to protect the climate system are obligations of conduct, not result, while noting that the due diligence standard is "stringent and objective" as well as oriented towards the best available science. Acknowledging that States are allowed a level of discretion in determining what measures are necessary, they said "discretion is not a license for inaction" and emphasized the need for States to calculate their remaining carbon budget.

THAILAND highlighted three dimensions of equity as crucial for interpreting the obligations in question:

- equity within States, underscoring the importance of just transition and respecting socioeconomic rights;
- equity across States, emphasizing the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) and the duty to cooperate, including through the provision of scientific, technological, and financial assistance to developing countries; and
- equity across generations, noting the recognition of intergenerational equity in various legal instruments and the upsurge in domestic and regional climate litigation seeking to protect the rights of future generations.

TIMOR-LESTE emphasized that the climate crisis cannot be considered in isolation from problems of global poverty and inequality, and affirmed that the global economic system is organized against the interests of people from LDCs. They further submitted that the climate crisis is the result of the historical and ongoing actions of industrialized nations who have reaped the benefits of rapid economic growth powered by colonial exploitation and carbon-intensive industries and practices.

TIMOR-LESTE highlighted the distinction between subsistence pollution—necessary for survival—and luxury pollution. Acknowledging that all States have a common duty to address climate change and need to change their consumption habits, they underlined this duty must reflect both their historical

responsibility and current capabilities. They underlined that despite their country's heavy reliance on the petroleum sector to support their socioeconomic development, their emissions remain extremely low. They said that while the transition to a low-carbon future is necessary, its costs cannot be disproportionately borne by the most vulnerable.

On the applicable law, TIMOR-LESTE asserted that while the international climate change regime does not replace customary international law, it is the latest expression of States' consent and must be given its due weight. They therefore submitted that pre-existing and more general rules of customary international law, such as the prevention duty, human rights treaties, the UN Convention on the Law of the Sea (UNCLOS), and the Convention on Biological Diversity, serve as interpretive tools to complement and enhance the regime. Noting that the climate regime has not succeeded in averting the climate crisis, TIMOR-LESTE urged the Court to find that in implementing their duty to cooperate, States are under an obligation to negotiate new agreements in good faith that adapt to the evolving best available science.

TIMOR-LESTE also clarified that the CBDR-RC principle, as expressed under the climate change regime, recognizes not just present capabilities, but also normative elements of climate justice and historical emissions. They recalled provisions in the climate treaties that: require consideration of States with economies that are highly dependent on fossil fuel-generated income; and acknowledge that developing countries' emissions will increase in the near term. They highlighted these aspects as critical to protect LDCs and SIDS that are entirely dependent on their energy sector to stay afloat. They said questions before the Court pertain to all greenhouse gas (GHG) emissions from all sources, not just the energy sector.

TONGA highlighted its extreme vulnerability to climate change, citing severe impacts on its economy, food security, and population's well-being, including the devastation caused by Tropical Cyclone Gita in 2018, which resulted in damages amounting to one-third of the country's gross domestic product. They hoped the advisory opinion would drive States to fulfill and exceed their commitments through transformational actions.

TONGA emphasized that systemic integration applies across the relevant rules of international law, which include climate change and human rights treaties, as well as UNCLOS. Citing the Court's jurisprudence, they stressed that principles like CBDR-RC are crucial to achieving equitable results, requiring consideration of the capabilities and circumstances of developing States, while placing a greater burden on those that have contributed the most to the crisis and benefited from it, particularly through obligations to provide financial and technical assistance.

TONGA urged the Court to confirm that the scope of the duty to cooperate, which they called an "uncontroversial" principle of international law, includes positive obligations in the climate

change treaties. They emphasized that meaningful cooperation on climate finance is necessary to satisfy such duty and underscored that fulfillment of developed States' obligations to provide financial and technical support is key for developing States to meet their treaty obligations.

TUVALU explained it is the first country expected to be completely lost to climate-related sea-level rise—first rendering its islands uninhabitable, before submerging them completely. They outlined steps taken, including a coastline adaptation project, land reclamation, and an initiative for digital preservation of the nation's culture, and vouched that "Tuvalu will not go quietly into the rising sea."

TUVALU reiterated the right to self-determination, which "cuts to the very core" of the UN Charter, the international human rights covenants, and the UN Declaration on the Rights of Indigenous Peoples. They stressed that the Court has recognized self-determination to be an *erga omnes*, non-derogable international norm extending beyond its origins in decolonization, and said there could be no doubt that Tuvalu's right to self-determination is being violated by threats to its territorial integrity, forced displacement of Tuvaluans, and deprivation of the local population of means of subsistence. They said the fact that the nation's very survival is at stake must inform the Court's assessment of States' obligations, and warned that SIDS will not stay above the rising tides without technical and financial assistance for adaptation.

Highlighting the basic nature of a nation's right to survival, TUVALU noted there is not yet well-developed jurisprudence on this right, and invited the Court to contribute to its development. With reference to the concept of statehood continuity, they specified that the Montevideo Convention on the Rights and Duties of States provides that the recognition of a State is "unconditional and irrevocable." On the principle of territorial integrity, they said this norm covers both tangible and intangible assets, and is reinforced by the principle of permanent sovereignty over natural resources. They demanded: deep and immediate emission cuts; ambitious adaptation action and support; and respect for existing maritime zones.

The COMOROS emphasized the country is under serious threat from climate change impacts, particularly sea-level rise, lamenting that over the last 25 years, more than 90% of its beaches have disappeared.

On applicable law, the COMOROS asserted that relevant obligations can be derived not just from the international climate regime, but also from UNCLOS, human rights law, and general international law. On the climate regime, they: highlighted obligations relating to mitigation, adaptation, finance, and cooperation; and submitted that these obligations are not discretionary, but are governed by objective criteria, and diligence tests and standards set out in the Paris Agreement. When interpreting these obligations, they urged the Court to take account of the principles underpinning the climate treaties, such as CBDR-RC and intergenerational equity.

The COMOROS further requested the Court to affirm that States' primary obligations under international human rights law apply fully to climate change, and should take the form of positive obligations to adopt mitigation, adaptation, and loss and damage measures. They further submitted that States' fundamental right to survival implies recognition of statehood continuity and their international boundaries, even where parts of their land territory are submerged under water. They affirmed that this right imposes a duty on polluting States to reduce their GHG emissions, as climate change threatens the survival of island States and infringes on their rights to self-determination and subsistence.

On legal consequences, the COMOROS asserted the applicability of the law of State responsibility as outlined in the Articles on Responsibility of States for Internationally Wrongful

Acts (ARSIWA), identifying wrongful acts as States' failure to adopt all necessary measures to prevent atmospheric and marine pollution caused by GHG emissions from activities under their jurisdiction or control, as well as their failure to cooperate. Arguing that SIDS are directly injured by GHG emissions, they asserted that the Comoros is entitled to invoke the responsibility of high-emitting States both individually and as a member of SIDS, in accordance with Articles 42(a) and (b) of ARSIWA.

URUGUAY lamented the severe threats to its territory and to present and future generations, and urged leading economies to redouble their commitment to address climate change. They called for a good faith assessment based on the entire corpus of international law, including customary international law principles and human rights law. They emphasized the principle of sustainable development, "duly framed to avoid so-called green protectionism."

They considered that the duty to prevent transboundary harm applies to climate change, even in the absence of full certainty of the potential damage to be prevented. URUGUAY further noted the customary obligation of due diligence to prevent transboundary harm is not superseded by obligations under environmental treaties. They asserted that, in light of CBDR-RC, the duty to cooperate is primarily owed by developed States, who have contributed the most to GHG emissions, and takes the form of financial and technical support for developing countries' adaptation and mitigation actions.

URUGUAY underscored that challenges in establishing a causal link between the conduct of specific States and specific harm does not mean States that have caused harm should be released from legal consequences of the breach of obligations. Noting the UN General Assembly's (UNGA) request for an advisory opinion specifically refers to SIDS, they underscored that other States, including Uruguay, are also severely vulnerable. They argued no distinction should be made between categories of States based on their vulnerability or exposure to harm, suggesting that questions of legal consequences be addressed more generally from the perspective of wide-ranging harm to the environment.

VIET NAM said obligations under international law to protect the climate system and environment extend beyond the climate treaties, citing instruments such as the UN Charter, UNCLOS, and customary international law, including the no-harm principle. They stressed that the CBDR-RC principle should guide the application of broader international obligations, including the duties to prevent harm and to cooperate.

They affirmed that due diligence, rooted in the customary no-harm principle, entails: vigilance and proper control of public and private operators, proportionality to the degree of risk, and reliance on scientific and technological information, as noted in the International Tribunal for the Law of the Sea's Advisory Opinion. They argued that the standard of due diligence must be stringent, given the scientific evidence on climate risks, while incorporating CBDR-RC. Addressing divergent views on when the obligation to prevent harm to the climate system came into being, they pointed to scientific evidence of harm dating back to the 1960s and noted the adoption of the UN Framework Convention on Climate Change (UNFCCC) in 1992 was the culmination of efforts to address existing concerns about GHG emissions.

VIET NAM highlighted the duty to cooperate, as stipulated in the UNFCCC, Paris Agreement, and customary international law, and said the duty requires cooperation on technology transfer, conservation and enhancement of carbon sinks and reservoirs, adaptation to climate impacts, research, and education.

They said States must take immediate and concrete actions to reduce GHG emissions, as per recommendations of the Intergovernmental Panel on Climate Change, with developed States taking the lead, given their historical responsibility. Reparation

measures, they stressed, must reflect the specific injuries and circumstances of affected States and include compensation for damages, restorative measures such as reforestation and biodiversity recovery, support for mitigation and adaptation efforts through financial and technical assistance, and resilience actions such as disaster relief and infrastructure rebuilding.

ZAMBIA described the debt crisis as a “python wrapped around [their] neck,” leaving no space to invest in adaptation and mitigation measures and address loss and damage. Showing pictures of the dried up Victoria Falls, they underscored that droughts have deprived their country of essential income from tourism and compromised food security and hydropower production, leaving them no choice but to reactivate a retired coal power plant.

ZAMBIA highlighted that States have a due diligence duty to prevent transboundary harm from GHG emissions, which must be construed in line with the CBDR-RC principle. They said the same principle should guide the interpretation of the duty to cooperate, meaning developed countries must provide financial and other assistance to developing countries. They lamented that climate finance is oftentimes not additional to humanitarian aid and takes the form of loans, and called for measures tailored to the needs of vulnerable countries, including debt relief and debt-for-climate swaps.

ZAMBIA further urged the Court “not to be afraid of State responsibility,” noting that “no amount of legal or semantic acrobatics” can read State responsibility out of the UNGA’s request. They also dismissed the United Kingdom’s argument that State responsibility must be limited to obligations in the Paris Agreement. They underlined that finding a State responsible for a wrongful act does not require a causal nexus as long as the State has breached its obligations. Causation, they said, only matters in the determination of reparations, noting that, as per the Court’s earlier jurisprudence, the evidentiary burden must not be set excessively high.

The PACIFIC ISLANDS FORUM FISHERIES AGENCY (the AGENCY) highlighted fishery resources as vulnerable to climate change impacts, hence the interest of the Agency and its members, which are predominantly SIDS, in the current proceedings. They delineated already materializing impacts, particularly Ocean warming, deoxygenation, and acidification, underscoring their catastrophic repercussions on regional tuna stocks, coral reef systems, and coastal fisheries, on which many SIDS communities are heavily reliant.

The AGENCY underlined that climate change is driving tuna outside of its members’ exclusive economic zones and into the high seas, thereby threatening the food security of Pacific SIDS, their economies, and the sustainable management of the world’s largest tuna fishery, whose stocks are the largest and healthiest in the world, with none overfished.

They lamented that climate change-exacerbated environmental impacts have forced many coastal communities to abandon their traditional lands and important traditional food sources, leading to: loss of cultural heritage, identity, and practices; loss of social cohesion; and economic instability and insecurity.

The AGENCY stressed that these current and expected impacts could be mitigated by reducing GHG emissions and urged the international community to swiftly take the necessary action to address the issue of anthropogenic GHG emissions and the consequences for SIDS.

The ALLIANCE OF SMALL ISLAND STATES (AOSIS) emphasized that, despite their negligible contribution to climate change, SIDS face existential threats to their economies, cultures, and ecosystems.

They submitted that, in the context of climate change, the unique circumstances of SIDS should be considered not only

as a matter of equity but also in the development of customary international law and the interpretation of treaty obligations. Citing the *North Sea Continental Shelf* cases, where the Court noted that States whose interests are especially affected have a particular role in the development of customary international law, they highlighted that widespread and representative participation by such States can lead to the rapid emergence of general rules of international law. They also noted the Paris Agreement’s acknowledgment of the specific needs and vulnerabilities of SIDS in various provisions, such as those related to mitigation, adaptation, finance, capacity building, and transparency requirements. They said recognizing SIDS as “specially affected States” in the climate context ensures those most impacted by circumstances beyond their control are given appropriate consideration when interpreting and applying legal rules.

AOSIS underscored the duty of cooperation as a general principle of international law, supported by significant State practice and enshrined in the UN Charter and Paris Agreement.

They stressed the stability of maritime zones as a foundational principle under UNCLOS and customary international law, asserting the need for legal stability, security, certainty, and predictability. They urged the Court to affirm that maritime zones, once established and notified in accordance with UNCLOS, shall remain unchanged despite physical changes caused by sea-level rise. They argued this is essential to safeguard the legal entitlements and sovereign rights of SIDS and to uphold the principles of justice and equity that are fundamental to the international legal order.

AOSIS explained that the principle of statehood continuity is well established in international law and that statehood, once established, endures despite physical changes to, or complete inundation of, a State’s land territory due to sea-level rise.

In the Corridors

Climate change is routinely characterized as an existential threat. But for no country is this threat more real and more painful than for Tuvalu—the first nation expected to become entirely uninhabitable and eventually submerged because of sea-level rise. One of their lawyers noted, “A State’s right to survival is so basic, so fundamental to the international order, that there is little jurisprudence on it.” Yet, they defiantly promised that Tuvalu will not go down without a fight.

Tuvalu’s heartfelt plea made it abundantly clear that emissions must be reduced as soon as possible. Some speakers offered concrete suggestions for doing so. Thailand argued that States are obliged to calculate their remaining carbon budget, and Timor-Leste said this budget must be used for the most pressing needs in terms of “subsistence, rather than luxury, emissions.”

The day also featured the last country statement, that of Zambia, which highlighted the expenses incurred and assistance needed to appear before the Court to make their voice heard. “Many poor countries simply do not have the capacities to engage with such protracted legal proceedings,” commented an observer. Just how much it meant for Zambia, a least developed country ravaged by repeated droughts, to speak up became clear when their Solicitor General broke into tears while presenting an image of the completely dried-up Victoria Falls.

The Peace Palace’s newly installed Christmas tree illuminated participants’ path as they left into the cold night. It stood as a symbol for countries’ expectations from the Court—and as a beacon of guidance and hope.

The *Earth Negotiations Bulletin* summary and analysis of the ICJ Hearings will be available on Monday, 16 December 2024 at enb.iisd.org/international-court-justice-climate