POLICY BRIEF

What the ICJ Opinion Means for Loss and Damage Finance

By Asociación La Ruta del Clima, African Futures Lab with technical and financial support from Heinrich-Böll Stiftung

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Executive Summary

The Fund for responding to Loss and Damage (FRLD) was established under the UNFCCC and the Paris Agreement to channel financial support to countries experiencing climate related harm. Yet its design, scale and accessibility have been questioned as climate impacts accelerate and as scientific evidence confirms that losses already exceed the adaptive capacity of many developing states. Recent advisory opinions from the International Tribunal for the Law of the Sea, the Inter American Court of Human Rights and the International Court of Justice now clarify with unprecedented precision, the legal obligations of States with respect to climate harm. Taken together, these opinions confirm that duties of prevention, cooperation, human rights protection and reparation form a binding legal framework that governs the provision of loss and damage finance. They further affirm that these obligations arise under general international law and customary international law, and therefore apply to all States, irrespective of whether they are parties to specific climate treaties.

This policy brief assesses what these advisory opinions require of the FRLD and to what extent its governance, financing structure and safeguards are consistent with clarified international law obligations. The analysis draws on doctrinal review of the advisory opinions, case law and applicable rules of international law, and secondary literature, as appropriate, as well as an institutional assessment of the Fund's governing instrument, COP and CMA decisions, relevant climate finance norms and applicable human rights standards. This combined method allows the brief to evaluate both the legal content of States' obligations and the institutional adequacy of the Fund through which those obligations are intended to be discharged.

Three overarching conclusions emerge. First, the advisory opinions make clear that loss and damage finance is not discretionary. It is a legal requirement that flows from the duties of cooperation and prevention and from the obligation to provide reparation when harm occurs. The Courts emphasise that financial cooperation must be adequate, predictable and commensurate with the scale of risk. Reliance on voluntary pledges or politically convenient funding structures is inconsistent with these duties.

Second, the advisory opinions significantly raise the standard of due diligence. States must act in light of clear scientific evidence, foreseeability of harm and the recognised vulnerability of affected populations. For the Fund, this means that its

procedures and financing windows must enable funding disbursement for rapid and anticipatory action, support for both rapid onset and slow onset impacts and direct access modalities for communities who experience the most severe consequences of climate change. Institutional delays, burdensome access requirements or insufficient capitalisation undermine States' ability to meet the standard articulated by the Courts.

Third, the opinions underscore that climate finance mechanisms must operate within a rights-based framework. States remain responsible for safeguarding the rights of those affected by climate harm, including procedural rights to information and participation and substantive rights to life, health, food, water, housing and culture. The Fund's safeguard, information disclosure and stakeholder engagement and participation systems are therefore not a technical addition but part of the legal infrastructure through which States demonstrate compliance with their obligations.

The brief further clarifies that such a rights-based framework includes substantive equality and non-discrimination, participation and capacity strengthening, transparency, the production and use of data, accountability and access to justice – principles that are essential to make the gendered and intersectional dimensions of loss and damage loss and damage visible and remediable. Financing mechanisms designed through gender-neutral frameworks fail to identify and adequately remedy harms, thereby undermining the due diligence standard that these opinions reinforce.

The advisory jurisprudence from international and regional courts and tribunals leaves no doubt that the FRLD is an instrument through which States must discharge their legal duties. Its effectiveness will be judged not only by political expectations but by whether it aligns with the requirements of international law in an era of rapidly intensifying climate harm.

1. Introduction

The Fund for responding to Loss and Damage (FRLD) emerged from a decade of political stalemate, culminating in a decision by the Conference of the Parties (COP) and the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA) to establish new funding arrangements and a dedicated fund for responding to loss and damage.[1] The Fund is mandated to provide new, additional, and grant-based financial support across the full spectrum of loss and damage: rapid-onset events, slow-onset processes, displacement, cultural and livelihood loss, and the systems needed to manage and recover from climate impacts.[2] The FRLD's establishment reflects an undeniable reality: the scale of climate loss and damage already exceeds the adaptive capacity of many developing countries, particularly small island developing states and least developed countries that bear least responsibility for the climate crisis. At their twenty-eight and fifth sessions respectively, the COP and CMA operationalized the FRLD as an entity entrusted with the operation of the Financial Mechanism of the Convention, which would also serve the Paris Agreement. The Fund is accountable to and operates under the guidance of both the COP and the CMA.

Parallel to the UNFCCC process, in 2025 the Inter American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ), and in 2024, the International Tribunal for the Law of the Sea (ITLOS) (hereinafter 'the Courts') issued advisory opinions that fundamentally clarify States' legal obligations relating to climate change.[3] These opinions converge on four central propositions: First, States must cooperate

1 UNFCCC (2022) 'Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage'. FCCC/CP/2022/10/ Add.1. Decision 2/CP.27 <https://unfccc.int/sites/default/files/resource/cp2022_10a01_adv.pdf#page=11>;UNFCCC (2022), 'Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage', FCCC/PACMA/2022/10/Add.1, Decision 2/CMA.4, <https://unfccc.int/sites/default/files/resource/cma2022_10a01_adv.pdf#page=13

2 UNFCCC (2023) 'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4', FCCC/CP/2023/11/Add.1, Decision 1/CP.28, <https://unfccc.int/sites/default/files/resource/cp2023_11a01E.pdf>, Annex I, paras. 2-5; UNFCCC (2023) 'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4',FCCC/PA/CMA/2023/16/Add.1, Decision 5/CMA.5, <https://unfccc.int/sites/default/files/resource/cma2023_16a01E.pdf>, Annex I, paras. 2-5.

3 At the time of writing, a further advisory opinion from the African Court on Human and Peoples Rights is still pending. Corte Interamericana de Derechos Humanos/Inter American Court of

in good faith to address climate harm, including by mobilizing adequate finance and enabling institutional arrangements needed to prevent and remedy impacts. Second, they must avoid causing or contributing to foreseeable climate-related damage, applying heightened due diligence, and using all appropriate measures to prevent significant transboundary harm. Third, they must safeguard human rights, including substantive and procedural rights, when designing and operating climate institutions. Fourth, breach of these duties amounts to an internationally wrongful act that triggers the law of State responsibility, including obligations of cessation, assurances of non-repetition, and full reparation where injury occurs. Crucially, these obligations arise under general and customary international law and bind all States, irrespective of whether they are parties to specific climate treaties.

This policy brief assesses the implications of these legal obligations for the governance and financing operations of the FRLD. It focuses on three areas where these implications are most immediate: the provision of loss and damage finance; safeguards and due diligence (i.e. the governance standards the Fund must apply); and the legal consequences that arise when States fail to meet their obligations, including through underfunding or obstructing access to the FRLD. In doing so, the analysis evaluates whether the current governance and legal architecture of the Fund align with the duties as enshrined in international law and clarified by the Courts.

The goal of this policy brief is thus to identify the legal implications for the Fund and propose concrete adjustments that increase its ability to operate consistent with international law. The method combines doctrinal legal analysis of the advisory opinions with an institutional review of the governing instrument of the FRLD and associated COP/CMA decisions. It also draws on the political practice of States within the UNFCCC, the normative content of the climate finance regime, and relevant human rights obligations.

Furthermore, it adopts a critical gender lens grounded in the premise that loss and damage is not gender-neutral but is produced and exacerbated through intersecting structures of inequality and discrimination. Accordingly, climate finance mech-

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Human Rights (2025), 'Emergencia Climática y Derechos Humanos Opinión Consultiva OC-32/25 de 29 de MAYO DE 2025' (Corte Interamericana de Derechos Humanos IACtHR 2025) 231 <https://www.corteidh.or.cr/docs/opiniones/seriea_32_esp.pdf>; International Court of Justice (ICJ) Advisory Opinion (2025), 'Obligations of States in respect of Climate Change', 23 July 2025, <https://icj-web.leman.un-icc.cloud/sites/default/files/caserelated/187/187-20250723-adv-01-00-en.pdf>; International Tribunal for the Law of the Sea (2024), 'Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law', Case No. 31, Advisory Opinion of 21 May 2024, <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf>.

anisms should recognize these structural drivers and incorporate measures that reduce disproportionate burdens on women, girls, and LGBTIQ+ people, particularly where gender-based inequalities intersect with race/ethnicity, rurality, poverty, disability, age, and/or migratory status.

The analysis proceeds in four steps. First, we situate the FRLD within the broader body of international law that governs climate action, outlining the core principles of cooperation, prevention, the no-harm rule, and reparation. Second, we examine the recent advisory opinions from ITLOS, the IACtHR and the ICJ to clarify the legal standards they articulate and the obligations they clarify for States. Third, we apply these standards and obligations to the FRLD, analyzing how they translate into concrete requirements for the Fund's financial model, governance, safeguards, and operational design. Fourth, we identify the adjustments needed for the Fund to function in a manner consistent with international law, as a legally coherent, rights-respecting mechanism capable of addressing the scale of climate harm unfolding now and in the future. Finally, we conclude by reflecting on the implications of this rapidly consolidating jurisprudence for the future of loss and damage finance and for States' ability to meet their responsibilities in an era of accelerating climate harm.

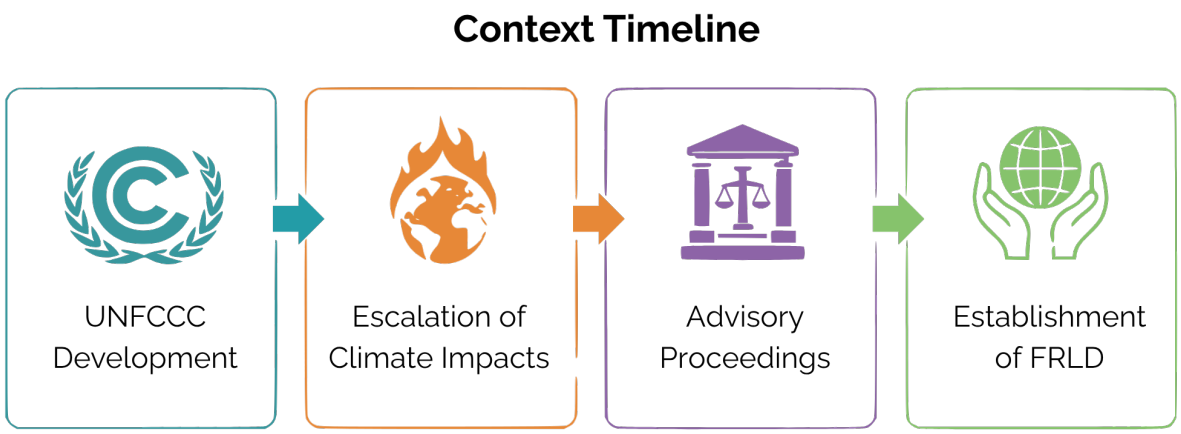

Figure 1. Context Timeline of Legal and Institutional Developments Leading to the FRLD.

2. Legal Foundations

International cooperation and financing obligations are enshrined in international human rights law. Article 2.1 of the International Covenant on Economic, Social and Cultural Rights establishes that States have to take steps to fulfill those obligations "individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization" of these rights.[4] Climate institutions and climate finance must therefore operate within a normative framework that includes equality, participation, access to information, and protection against harm, including environmental and social safeguards ensuring that "no project negatively affects human rights and the environment and to guarantee access to information and meaningful consultation with those affected by such projects. They shall also respect the free, prior and informed consent of Indigenous Peoples".[5]

Human rights doctrine recognizes that climate impacts worsen structural inequalities and patterns of discrimination, including along racial, gendered, disability-related and socioeconomic lines. When climate shocks undermine livelihoods, dismantle subsistence systems, or destabilize informal economies or disrupt support networks, burdens are disproportionately absorbed by those with least access to political power, income security, land, social protection and care infrastructure, including "Indigenous Peoples, peasants, migrants, children, women and girls, persons with disabilities, older persons, people living in small island developing states and least developed countries and certain racial and ethnic groups".[6] United

4 UNGA, 'International Covenant on Economic, Social and Cultural Rights' (1966) art 2.1 <https://www.ohchr.org/sites/default/files/cescr.pdf>.

5 Committee on Economic, Social and Cultural Rights, 'General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights' (2023) <https://brill.com/view/journals/hrlr/12/1/article-p112_005.xml> accessed 4 December 2025 para 58.

6 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' (Human Rights Council 2024) Report of the Secretary-General A/HRC/57/30 <https://primarysources.brillonline.com/browse/human-rights-documents-online/promotion-and-protection-of-all-human-rights-civil-political-economic-social-and-cultural-rights-including-the-right-to-development;hrdhrd99702016149> accessed 4 December 2025 para 8. On the racial dimension of climate harm and climate action, see also UN Human Rights Council Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E Tendayi Achiume – Global extractivism and racial equality UN Doc A/HRC/41/54 (2019) para 42. See also L Sealey-Huggins 'The climate crisis is a racist

Nations human rights treaty bodies have collectively affirmed that States "must cooperate in good faith in the establishment of global responses addressing climate-related loss and damage"[7] and that climate action must be compatible with existing human rights obligations. For example, the Committee on the Rights of the Child has been explicit that inadequate climate finance, especially for adaptation and loss and damage, produces a discriminatory effect on children living in high-risk settings, and that financing should be informed by the documented needs of communities, prioritizing grants where debt instruments would impair realization of children's rights.[8]

Seen through this lens, the legal foundations of loss and damage finance extend beyond resource mobilization. They arise from binding rules requiring States to co-operate, to prevent foreseeable harm, to avoid discriminatory effects, and – where harm occurs – to provide reparation. These principles animate the sub-sections that follow: the duty to cooperate in good faith; the no-harm rule and the duty to prevent significant transboundary harm; customary and treaty-based obligations under environmental, development and human rights law; and the principle that breach of these duties triggers reparations.

2.1 The Duty to Cooperate

International law provides a well-defined set of rules that govern how States must act when confronted with global environmental risks, and these rules form the legal baseline against which the FRLD must be assessed. Three principles in particular – cooperation, prevention, and the obligation not to cause harm – have evolved from broad political commitments into binding standards of conduct. Together with the legal consequences of breaching international obligations, they create a coherent normative framework that structures States' duties in the climate context.

The duty of states to cooperate as a general principle of international law is rooted in the United Nations Charter and reaffirmed in the Stockholm and Rio Declarations, and is near omnipresent in subsequent multilateral environmental agreements, in-

crisis: structural racism, inequality and climate change' in A Johnson, R Joseph-Salisbury & B Kamunge (eds) The fire now: anti-racist scholarship in times of explicit racial violence (2018) Zed Books, London 103.

7 UN, 'Statement on Human Rights and Climate Change' (International Human Rights Instruments 2020) HRI/2019/1 <https://docs.un.org/en/HRI/2019/1ara. 17.

8 'General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change: Committee on the Rights of the Child' (2023) 12 International Human Rights Law Review 322 para 113.

cluding the UNFCCC and Paris Agreement.[9] What emerged as a general expectation of good-faith engagement has developed into a concrete legal requirement that constrains States' conduct in situations involving collective environmental risks. In the climate regime, under the UNFCCC and Paris Agreement, this duty is expressed through obligations of support, including finance, capacity-building, technology transfer, and sustained collective ambition.[10] Although these obligations are differentiated in line with equity and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), their differentiated character does not diminish their legal force. The climate system's global character means that cooperation is not optional; rather it is central to how the climate regime achieves its objective of preventing dangerous anthropogenic interference with the climate system. As will be examined below, the ICJ affirmed that the duty to cooperate arises under general and customary international law and binds all States, meaning that non-participation in climate treaties does not relieve States of responsibility. Non-party States that do not engage in treaty-equivalent cooperation thus bear the burden of demonstrating conformity with their customary obligations.[11]

9 UN Charter arts. 1(3) and 56, 74; Stockholm Declaration (1972), Principles 22 and 24; Rio Declaration (1992), Principles 7 and 27; Convention on Long-Range Transboundary Air Pollution 1979; Vienna Convention for the Protection of the Ozone Layer of 1985; UNFCCC, to name a few. For relevant commentary, see R Wolfrum," International Law of Cooperation" in Max Planck Encyclopedia of Public International Law (MPEPIL), 34 (online ed.). Oxford University Press, 2008, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1427; and Neil Craik, 'The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect', Yearbook of International Environmental Law, Vol. 30, No. 1 (2019), pp. 22–44

10 For example, United Nations (1992), 'United Nations Framework Convention on Climate Change',arts.3 & 4,<https://unfccc.int/resource/docs/convkp/conveng.pdf>; United Nations (2015), 'Paris Agreement', arts. 7(13),9-11, <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>.

11 ICJ (2025) para. 315.

Figure 2. Dimensions of the Duty to Cooperate

2.2 The Duty to Prevent Significant Harm to the Environment

Closely connected is the duty of states to prevent significant harm to the environment (also known as the 'no-harm rule'), a cornerstone of customary international law, in particular as it relates to the environment.[12] Specifically, States must prevent, reduce, and control activities their jurisdiction or control that cause significant transboundary harm. [13] Traditionally applied in pollution and resource-use cases, the principle applies equally to the climate.[14] To put it simply, greenhouse gas emissions create foreseeable and quantifiable risks for other states, triggering the duty to prevent harm. Importantly, the content of this obligation is not static: the better the risks are understood and the greater the potential for irreversible damage, the higher the standard of diligence required. Today, given the overwhelming scientific consensus on climate risks, the threshold for state action is exceptionally stringent.[15]

12 Philippe Sands, "Principles of International Environmental Law. (2nd Ed) (Cambridge: Cambridge University Press, 2003), 239.

13 Trail Smelter Arbitration (United States v Canada), Award of 16 April 1938 and 11 March 1941; ICJ, Corfu Channel (Merits), Judgment, 1949; ICJ, Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, 2010, para. 193.

14 ICJ AO (2025), paras 132–139, 273–279.

15 ITLOS AO (2024), paras. 239–242 (due diligence as variable and stricter where risk is grave and foreseeable). ICJAO (2025), due diligence and heightened standard in climate context, paras 135–139 (general), and the more detailed treatment of due diligence and related elements, paras 274–300 (risk, due diligence elements).

2.3 Customary International Law and Treaty Based Obligations

Customary international law interacts with treaty obligations to produce a more granular set of duties, as illustrated earlier in the example of the duty to cooperate. Under the UNFCCC and Paris Agreement, States must take mitigation and adaptation measures, mobilize finance, prepare and maintain progressively ambitious nationally determined contributions (NDCs), report transparently, and cooperate to enhance implementation. Outside the climate treaties, other regimes reinforce these duties. The International Covenant on Economic, Social and Cultural Rights obliges a State to protect rights threatened by climate change impacts, including the rights to health, water, food, housing, and cultural life and to do so by using all the means at its disposal to protect the climate system in accordance with its capabilities and available resources – individually and through international cooperation. Regional instruments such as the Aarhus Convention[16] and the Escazú Agreement[17] impose specific further procedural obligations: States must ensure access to information, public participation, and access to justice in environmental matters. These procedural guarantees are inseparable from climate governance because the absence of transparent, participatory structures and public accountability often amplifies the harm experienced by groups made vulnerable by inequality, discrimination and disenfranchisement.

2.4 Reparations

Reparations form the final pillar in this legal architecture. It is not a political gesture nor a discretionary expression of solidarity; it is a legal consequence that arises when a State breaches its obligations and causes harm. The law of state responsibility requires full reparation, which may take the form of restitution, compensation, satisfaction, cessation and guarantees of non-repetition.[18] In the climate context, as will be explored below, the advisory opinions reiterate that these legal conse-

16 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, entered into force Oct. 30, 2001, 2161 U.N.T.S. 447.

17 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), Mar. 4, 2018, entered into force Apr. 22, 2021, UNTS No. 56654.

18 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), art. 30-31, art. 34–39, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, at 43 (Dec. 12, 2001). See also PCIJ Factory at Chorzów (Merits), Judgment (1928), p. 47; ICJ AO (2025), legal consequences and reparations (duty to make reparation; restitution, compensation, satisfaction), paras 444–456 (esp. 449–455 on reparation and its forms).

quences apply just as they would in any other domain of international law. A State that fails to prevent foreseeable harm, or that does not cooperate in good faith to avert damage, cannot shield itself by invoking scientific uncertainty, arguing shared responsibility, lack of capacity, or financial constraints. Prevention and cooperation therefore shape not only what States must do, but also how responsibility is attributed when they fail to fulfil their obligations.

These foundational principles are not abstract. They directly inform how climate institutions, including the FRLD, must be designed and operated. A fund established to respond to harm necessarily functions with reparatory logic. It cannot be treated as an arena for voluntary contributions or discretionary assistance; international law requires that it operates in a manner consistent with duties of cooperation, harm prevention, and human rights protection. As the next section shows, the advisory opinions from ITLOS, the IACtHR, and the ICJ sharpen these obligations further, providing a detailed map of what States must do, and what climate institutions must enable, if the international system is to meet the demands of the rapidly accelerating climate crisis.

3.Clarified State Obligations In The Advisory Opinions

The past two years have produced an unprecedented convergence of judicial authority at the highest levels on States' legal obligations in respect of climate change. Although the mandates of ITLOS, the IACtHR, and the ICJ differ, their advisory opinions collectively articulate a coherent legal framework: States must prevent foreseeable climate harm; they must act with heightened diligence in light of scientific certainty; they must cooperate meaningfully and continuously; and they must safeguard human rights, including procedural rights, when designing and implementing climate laws, policies and institutions. While the courts technically merely restated and clarified applicable rules of international law, each opinion adds specificity that is directly relevant to the FRLD's governance and operational design.

3.1 Human Rights Dimensions of Climate Obligations

ITLOS

The Tribunal situates climate harm squarely within the framework of states' obligations under the United Nations Convention on the Law of the Sea (UNCLOS). The ITLOS advisory opinion underscores that climate change already causes serious and measurable harm to the marine environment, which directly implicates the human rights of communities whose lives, food systems, livelihoods, and cultures depend on ocean health. The Tribunal affirms that obligations under UNCLOS require States to take "all necessary measures" to prevent, reduce, and control pollution of the marine environment arising from anthropogenic greenhouse gas emissions, including cumulative, transboundary, and long-range impacts.[19] Because climate impacts on the oceans such as sea-level rise, ocean acidification, and marine heatwaves, are already scientifically established and irreversible in many contexts, the Tribunal emphasizes that harm is not speculative but foreseeable. This foreseeability heightens due diligence obligations to protect affected populations[20] and brings human rights implications into the interpretation of UNCLOS since climate-driven ocean degradation exposes coastal and island populations to displacement, loss of resources, and irreversible cultural harm.

That being said, the Tribunal did not expressly engage with international human rights law in its analysis of applicable 'external rules' that inform States' obligations under UNCLOS – which some have criticized as a "missed opportunity" and "selective".[21] While UNCLOS is not a human-rights treaty, ITLOS makes clear that States'

19 ITLOS (2024), paras. 180-184,199-203

20 ibid, para. 241

21 See for example Diane A. Desierto, "Stringent Due Diligence, Duties of Cooperation and Assistance to Climate Vulnerable States, and the Selective Integration of External Rules in the ITLOS Advisory Opinion on Climate Change and International Law," EJIL:Talk! (European Journal of International Law Blog), 23 May 2024, available at: https://www.ejiltalk.org/stringent-due-diligence-duties-of-cooperation-and-assistance-to-climate-vulnerable-States-and-the-selective-integration-of-external-rules-in-the-itlos-advisory-opinion-on-climate-change-and-international-law/ (accessed on 11 December 2025), noting "the Tribunal also stopped well short of including international human rights law as part of the external rules that it would consider as applicable law in the interpretation of UNCLOS. This would have made a significant difference, in light of the fifth paragraph of the Preamble to UNCLOS, and the well-established legal nexus between human rights and environmental protection through the human right to a healthy, safe, and sustainable environment." ; and Khaled Elmahmoud, "The ITLOS Advisory Opinion: Human Rights as a Withered Branch of International Law?" EJIL:Talk! (28 May 2024), available at: https://www.ejiltalk.org/the-itlos-advisory-opinion-human-rights-as-a-withered-branch-of-international-law/ (accessed 11 December 2025).

obligations "must be interpreted consistently" with other relevant rules of international law. The Tribunal in its consideration focuses on the "extensive treaty regime addressing climate change", noting that "relevant external rules may be found, in particular, in those agreements". That being said, we posit the intention of the Tribunal was not to produce an exhaustive list. Given a close reading of applicable articles of interpretation under the Vienna Convention on the Law of Treaties (VCLT) cited by the Tribunal, and in line with the principle of systemic integration, these external rules necessarily include broader principles of international law, including human rights protections, when climate impacts threaten the lives and integrity of communities dependent on marine ecosystems.[22]

For the FRLD, this matters profoundly. A fund designed to address loss and damage cannot exclude or marginalize ocean-related loss and damage – such as the collapse of fisheries, loss of coastal livelihoods, cultural dislocation, or involuntary migration – without risking inconsistency with States' legal duties as clarified by ITLOS. The Tribunal's reasoning implies that a failure to channel adequate financial resources toward these areas may constitute a failure of cooperation and prevention. It reinforces the need for targeted funding arrangements that explicitly cover ocean-related loss and damage, displacement, collapse of fisheries, and impacts on coastal and island cultures;[23] these are areas historically neglected in climate finance, which fall squarely within the scope of States' legal obligations.

IACtHR

The IACtHR in its Advisory Opinion 32 (AO 32) goes further, explicitly recognizing the right to a healthy climate as a component of the right to a healthy environment, protecting collective rights of humanity in the present and future.[24] The IACtHR characterizes the current situation as a "climate emergency" that can only be addressed through urgent and effective climate action.[25] The Court unequivocally recognizes that the current climate crisis has been produced by the international community in a differentiated manner.[26] The lack of efficacy of mitigation and adaptation

22 For relevant discussion of the principle of systemic integration, see Patrick Toussaint, and Adrián Martínez Blanco, 'A human rights-based approach to loss and damage under the climate change regime' (2019) 20(6) Climate Policy 743–757, pp. 747-749. The principle is codified in Article 31(3)(c) of the VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331.

23 ITLOS (2024) paras. 66, 209, 410.

24 Inter American Court of Human Rights, IACtHR (2025).

25 ibid, para. 229.

26 ibid,para. 183

actions constitutes an unjust displacement of responsibility to future generations and of increased risk of the adverse effects of climate change to those most made most vulnerable.[27] According to the IACtHR, the climate debt is the sum of all the damage caused by the accumulated negative effects of carbon emissions that are imposed on the planet without proper compensation.[28]

The severity of the crisis is acknowledged by the IACtHR, stating that even if the 1.5˚C goal is achieved there will be harm, and that adverse effects suffered will be of extreme severity for people, considering the amount of persons exposed to "diseases, displacement, cultural losses, hunger, water insecurity, lack of work, poverty and, in general, undignified living conditions."[29] In this context, the Court recalls that Article 8 of the Paris Agreement recognizes the importance to address loss and damage due to adverse effects of climate change and that this response was assigned to the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM).[30]

The response to the climate emergency must be efficient and promote important transformations.[31] Efficient responses depend on the coordination of stakeholders, institutions, policies and mechanisms at all levels, specifically regarding the financing of climate actions.[32]

To address institutional shortcomings for addressing loss and damage through the financial response needed, the FRLD was created, which the Court warned requires "extraordinarily high resources" to fulfil its mandate.[33] The IACtHR further cautioned that the existing structure and functioning of the FRLD "does not have the purpose of achieving a just distribution of the climate debt based on the principle of common but differentiated responsibilities".[34] Reparations for loss and damage are a State obligation that the IACtHR recognizes as the third pillar of climate action.[35] However, the court mentions that the FRLD does not seek to provide integral reparation to climate harm, even though States can be liable for violations of obligations

27 ibid, para. 194.

28 ibid, para. 203.

29 ibid, para. 195.

30 ibid, para. 199.

31 ibid, para. 204

32 ibid, paras. 206 & 208.

33 ibid, para. 201.

34 ibid, para. 203.

35 ibid, para. 125.

under the Paris Agreement.[36] The objective of the FRLD as understood by the Court is to provide assistance by serving as a financial multilateral channel to make financial resources available to vulnerable countries to respond to loss and damage.[37]

ICJ

In contrast to the IACtHR, the ICJ adopts a more restrained approach yet reaches conclusions with significant legal consequences. The Court situates States' climate obligations at the intersection of international human rights law, environmental treaty law, and customary international law, clarifying how these bodies of law interact in the climate context. Central to the Court's reasoning is the finding that the adverse effects of climate change significantly impair the enjoyment of a wide range of human rights protected under international law – and that States have an obligation to prevent such interference.[38] The Court also emphasizes that procedural rights such as the right to access information, participation in decision-making, and access to justice form integral components of States' climate obligations.[39]

The ICJ holds that the full enjoyment of human rights cannot be ensured without protection of the climate system and other parts of the environment. To guarantee the effective enjoyment of human rights, States are therefore required to take measures to protect the climate system.[40] These measures may include mitigation and adaptation actions, the adoption of regulatory standards and legislation, and the regulation of private actors whose activities contribute to climate harm. The Court further strengthens this conclusion by recognizing the human right to a clean, healthy and sustainable environment as inherent in the enjoyment of other human rights.[41]

Equally significant is the ICJ's observation that States must take their human rights obligations into account when implementing their climate obligations and must likewise take their climate and environmental obligations into account when implementing their human rights duties.[42] This integrated approach forecloses attempts to compartmentalize climate governance as technically or politically distinct from

36 ibid, para. 202.

37 ibid, para. 200.

38 ICJ (2025) paras. 372-386.

39 ICJ (2025) para. 130.

40 ICJ (2025) para 403.

41 ICJ (2025) paras 387-393.

42 ICJ (2025) para 404.

human rights protection.

It also forecloses attempts to confine these obligations to States that are parties to the climate treaties, as the Court clarifies that core duties of prevention, cooperation, and human rights protection arise under general and customary international law and therefore bind all States, irrespective of participation in the UNFCCC or the Paris Agreement. Non-participation does not extinguish responsibility where conduct contributes to foreseeable climate harm.

For loss and damage finance, the implications are straightforward. If the effective enjoyment of human rights depends on the protection of the climate system, and if States are legally required to take measures to secure that protection, then financial measures addressing climate harm form part of the means through which States comply with their obligations. Mechanisms established to respond to loss and damage therefore operate within the scope of States' legal duties, including their obligations under international human rights law. Their design and operation must be assessed not only against political commitments under the climate regime, but against the combined requirements of international human rights law, environmental treaty law, and customary international law as clarified by the Court.

Analysis

The three advisory opinions connect climate harm with violation of a broad range of human rights, including to life, health, food, water, culture, and self-determination.[10] They emphasize that procedural rights such as access to information, participation, and remedy are integral to climate decision-making. They also clarify that where multiple states jointly contribute to harm, responsibility may be shared, and victims must not be left without remedy. Taken together, the three opinions establish that human rights are not peripheral considerations; they define the normative limits of acceptable climate governance. Any institution, including the FRLD, that fails to integrate these rights risks operating below the standards that international law demands which can carry legal responsibility.

3.2 Reinforced Due Diligence

ITLOS

The Tribunal provides the most detailed articulation of due diligence in the climate context. Drawing on its earlier jurisprudence, ITLOS reiterates that due diligence is a "variable concept" whose content depends on evolving circumstances, includ-

ing scientific and technological knowledge, applicable international standards, the degree of risk, and the urgency involved.[43] Because states have long been aware of the severe and escalating risks of climate change, the Tribunal considers the current standard to be strict, requiring more than general policy commitments or deferred action.

Crucially, the Tribunal recalls that the standard of diligence becomes more exacting as activities become riskier, with risk assessed in terms of both the foreseeability of harm and its magnitude. Applied to marine pollution from anthropogenic greenhouse gas emissions, the Tribunal concludes that the due diligence standard must be set at a particularly stringent level. It rejects the characterization of due diligence as a mere "best efforts" obligation and notes that, in the climate context, the level of diligence required is substantially higher than that traditionally associated with obligations of conduct.[44]

Relying on the IPCC's 2023 Synthesis Report, the Tribunal underscores that climate risks and associated loss and damage escalate with each increment of warming and that exceeding the 1.5˚C threshold would entail severe and potentially irreversible consequences for the marine environment.[45] On this basis, ITLOS holds that States must exercise a stringent standard of due diligence in relation to marine pollution caused by greenhouse gas emissions. While the implementation of this obligation may vary according to States' capabilities and available resources, differentiation does not dilute the obligation itself. States with greater capacity are required to do more, but even those with limited resources must take all measures reasonably available to them to prevent, reduce, and control marine pollution arising from anthropogenic emissions.[46]

The Tribunal further clarifies that due diligence under UNCLOS is inseparable from the precautionary approach. Citing the Seabed Disputes Chamber, ITLOS affirms that precaution forms an integral part of due diligence and that States fail to comply with Article 194(1) of UNCLOS if they disregard or inadequately account for climate-related risks associated with activities under their jurisdiction or control.[47] This obligation applies even where scientific evidence regarding the probability or severity of harm is incomplete. In the climate context, where risks are already well

43 ITLOS (2024) paras. 192–198

44 ibid, para. 240.

45 ibid, para. 241.

46 ibid

47 ibid, para. 242.

established, precaution reinforces rather than substitutes for stringent diligence.

Taken together, the ITLOS advisory opinion translates due diligence into a demanding and adaptive legal standard. It requires States to act on the basis of best available science, to anticipate severe and irreversible harm, and to recalibrate their conduct as risks intensify and knowledge evolves.

For the FRLD, this has concrete implications. AN FRLD must be structured so that States can meet these due-diligence duties, particularly rapid response capacity, slow-onset harm monitoring, and financial support for highly vulnerable marine-dependent communities. A Fund that is under-resourced, slow, or inaccessible undermines the ability of States to comply with their obligations under UNCLOS.

IACtHR

States have a general obligation to respect human rights, which implies that States must comply with reinforced due diligence to protect people against the human causes of climate change.[48] The obligation to guarantee the enjoyment of human rights implies that the governmental apparatus and all the structures where public power is exercised must act to protect rights. Moreover, to fulfill the obligation to protect human rights in the context of the climate crisis, according to the IACtHR, encompasses the obligation of States to protect human rights in international and national spheres of action.[49]

The duty to protect human rights in the context of the climate crisis is breached by a State when a standard of due diligence is not fulfilled. These standards have been set by international law, the law of the sea, humanitarian international law, and environmental law.[50] In International Human Rights Law, the duty to act with due diligence has been addressed in relation to the prevention of human rights violations and the progressive adoption of all appropriate measures to guarantee the enjoyment of rights.[51]

The IACtHR mentioned in AO 32, that States have an obligation "to act in accordance with a standard of enhanced due diligence to counter the human causes of climate change and protect people under their jurisdiction from climate impacts,

48 IACtHR (2025), para. 49 229

49 ibid, para.225. 50

50 ibid para 231.

51 ibid

particularly those in a more vulnerable situation."[52] According to the Court, States have specific obligations due to the special vulnerability circumstances that are faced by children, Indigenous Peoples, indigenous, tribal, afro-descendant peoples, and peasant and fishing communities as they suffer.[53] Moreover, States are also required to take differentiated measures of protection to the Economic, Social, Cultural and Environmental Rights (ESCER) of these populations.[54]

The degree of due diligence exercised has to be proportional and appropriate to the degree of climate harm, which will depend on the specific context, scientific and technological data available, international law, urgency and risk of damage occurring.[55] The fulfillment of due diligence by States is dialectic, as it is connected to scientific developments, magnitude of risks, nature of irreversible harm and how human rights are threatened.[56] Reinforced due diligence is case specific, however; the IACtHR listed some relevant aspects of State action, including international cooperation, especially regarding financing.[57]

ICJ

Similar to ITLOS, the ICJ confirms that due diligence in the climate context is stringent. It requires States to adopt all "appropriate measures" available to them, calibrated to their capabilities, responsibilities, and the severity of the risk.[58] Appropriate measures in this context refers to a State using "all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".[59]

Due diligence, as the Court explains, requires States to act with care and vigilance in light of the specific circumstances in which they find themselves, and to deploy the means available to them to avoid activities under their jurisdiction or control causing significant environmental harm to other States.[60] At its core, the Court un-

52 ibid, para. 229.

53 ibid, para. 233.

54 ibid, para. 596.

55 ibid para 232.

56 ibid para 234.

57 ibid para 234 & 236.

58 paras. 135–139, 274–282

59 (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 56, para. 101), as cited in the ICJ AO (2025), para. 281.

60 ICJ (2025) paras. 280 and 281.

derstands due diligence as requiring the adoption and effective implementation of appropriate rules and measures. These include legislative, administrative, and regulatory frameworks capable of preventing significant harm, as well as enforcement and monitoring mechanisms to ensure their effectiveness.[61]

Crucially, the Court holds that where harm is foreseeable, the standard tightens, meaning the measures expected of States become more demanding.[62] The Court further clarifies that due diligence is informed by relevant international rules and standards, including treaty obligations, customary international law, and, where appropriate, decisions adopted under the climate regime.[63]

Capabilities and available means are also relevant to the assessment of due diligence. The Court explicitly links the standard of conduct to the principle of CBDR-RC, noting that States with greater economic and institutional capacity are expected to do more to prevent climate harm.[64] At the same time, the Court is clear that limited capacity does not justify inaction or undue delay. All States must use the means at their disposal, and differences in capacity affect the intensity of required measures, not the existence of the obligation itself.[65]

Like ITLOS, the ICJ also integrates the precautionary approach into its understanding of due diligence. Where there are threats of serious or irreversible harm, lack of full scientific certainty cannot be used as a reason for postponing preventive measures.[66] In addition, due diligence entails procedural obligations, including environmental risk assessment and environmental impact assessment for activities that may significantly contribute to climate harm, as well as notification and consultation where such activities risk undermining collective efforts to address climate change.[67]

Taken together, the Court's analysis establishes a demanding standard of conduct. Due diligence in the climate context requires States to adopt and continuously adjust regulatory measures considering best available science, to act preventively and precautionarily, and to cooperate where necessary to prevent significant harm.

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61 ICJ (2025) paras. 281-282.

62 ICJ (2025) para 283.

63 ICJ (2025) paras. 287-288.

64 ICJ (2025) paras. 290-292.

65 ICJ (2025) paras. 291 and 292.

66 ICJ (2025) paras 293 and 294.

67 ICJ (2025) paras 295-299.

For loss and damage finance, the implication is straightforward. Where States rely on international mechanisms to discharge aspects of their preventive and cooperative obligations, those mechanisms must be capable of functioning effectively. Persistent underfunding, delayed disbursement, or procedural barriers that impede timely or inadequate responses to foreseeable harm may undermine States' ability to comply with the due diligence standard articulated by the Court.

Analysis

While the ICJ confirms that climate change triggers a heightened due diligence obligation – anchored in foreseeability, scientific certainty, and the scale of risk – it adopts a markedly more restrained approach than the ITLOS and the IACtHR. The Court reaffirms the classic elements of due diligence[68] but does not translate them into concrete operational duties, nor does it integrate human-rights-based reinforced due diligence in the way the regional human rights tribunal does. In contrast, ITLOS articulates detailed procedural steps (risk assessment, monitoring, emergency preparedness, technical and financial cooperation), and the IACtHR frames due diligence as inherently tied to protecting economic, social, cultural and environmental rights (ESCER), requiring special measures for groups made vulnerable and the mobilization of maximum available resources. The ICJ's relative minimalism leaves significant interpretive space: it acknowledges that obligations intensify with knowledge and risk but leaves other tribunals to elaborate the practical content. For the FRLD, this divergence underscores the need to draw on the fuller standards articulated by ITLOS and the IACtHR to ensure that the Fund's design, financing structure, and safeguards align with the substantive level of due diligence international law demands.

Taken together, these three advisory opinions elevate the due diligence standard in situations where scientific knowledge clearly establishes foreseeable risk. States must adopt measures proportionate to the scale of the threat. In the climate context, this includes supporting mechanisms designed not only to prevent or reduce reasonably predictable harm, but also to respond effectively where such harm nonetheless materializes.

This creates a direct implication for the Fund: the way finance is structured, allocated, and tied to safeguards must reflect the heightened due diligence standard clarified by the Courts. This includes not only preventive measures, but also the capacity to respond to foreseeable and escalating harm through timely, accessi-

68 ICJ (2025) paras. 135–139; 274–282

ble, and adequately resourced financial support. Funding arrangements that fail to reach vulnerable populations, or that create procedural or financial barriers, may themselves constitute a failure of due diligence by States that control or significantly influence the Fund.

3.3 The Duty to cooperate and its implications for loss and damage finance

ITLOS

The Tribunal affirms that UNCLOS imposes a specific duty to cooperate on climate matters when greenhouse gas emissions cause pollution of the marine environment.[69] The Tribunal recalls that cooperation is a "fundamental principle" of marine environmental protection, in particular as it concerns the obligation of States to protect and preserve the marine environment and to take all measures necessary to prevent, reduce and control pollution from any source.[70]

The core obligation of cooperation is set out in Article 197 of UNCLOS, which requires States to cooperate on a global and, where appropriate, regional basis in formulating and elaborating international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment.[71] ITLOS characterizes this obligation as one of conduct, not result: States are not required to achieve a specific regulatory outcome, but they must participate meaningfully, continuously and in good faith in cooperative processes aimed at countering marine pollution.[72]

The Tribunal further specifies that UNCLOS requires States to participate in relevant international fora, including those operating under the UNFCCC, where this is necessary to address marine pollution from GHG emissions, "as well as through various international organizations, including those without a specific law of the sea mandate". [73]

In its conclusion, ITLOS synthesizes these elements and finds that UNCLOS imposes specific obligations on States to cooperate directly or through competent

69 ITLOS (2024), paras. 295.

70 UNCLOS Part XII, articles 192 and 194; ITLOS (2024) paras. 296-299.

71 ITLOS (2024) paras. 300-302.

72 ibid, paras. 306-309..

73 ibid, paras. 318 and 319.

international organizations, continuously, meaningfully and in good faith, to prevent, reduce and control marine pollution from anthropogenic GHG emissions.[74] Cooperation must also encompass the development of regulatory standards, the mobilization and exchange of scientific knowledge, and the identification of effective remedies.

For loss and damage finance, the implication is as follows: Where international cooperation is legally required to prevent and respond to foreseeable harm, States must ensure that the institutional arrangements through which cooperation is channeled can function effectively. Financial cooperation is therefore not discretionary. If multilateral mechanisms such as the FRLD are inadequately resourced or structurally incapable of responding to foreseeable marine-related loss and damage, this may undermine States' compliance with their duty to cooperate under UNCLOS.

IACtHR

The IACtHR in its Advisory Opinion 32 unanimously agreed that States are "obliged to cooperate in good faith to advance respect for, guarantee and progressive development of human rights threatened or affected by the climate emergency".[75] The IACtHR analyzes the duty to cooperate in environmental issues by recalling Principle 24 of the Stockholm Declaration of 1972, which addresses the duty to cooperate in the effective elimination of adverse effects of activities to the environment and Principle 7 of the Rio Declaration of 1992 that mentions the duty to cooperate in re-establishing the health and integrity of the planet's ecosystems.[76] Furthermore, the Court states that the Rio Declaration in Principle 7 addresses in a joint manner the duty to cooperate with the principle of common but differentiated responsibilities. Principle 7 mentions the recognition by developed countries of their responsibility in view of "the pressures their societies place on the global environment and of the technologies and financial resources they command."[77] The Court mentions that cooperation is a universal and regional legally binding obligation, that is essential for the implementation and achievement of global goals, as those previously men-

74 In particular through UNCLOS articles 197, 200 and 201, read together with articles 192 and 194, ITLOS (2024) para. 321.

75 IACtHR (2025), para. 229.

76 IACtHR (2025), para. 247; UNGA, 'Rio Decla-ration on Environment and Development UN Doc A/CONF.151/26', vol 1 (United Nations General Assembly 1992) Principle 7; United Nations,'Report of the United Nations on the Human Environ-mento A/CONF.48/14/Rev.1' (United Nations 1972) <https://undocs.org/en/A/CONF.48/14/Rev.1> accessed 9 July 2020.

77 UNGA, 'Rio Declaration on Environment and Development UN Doc A/CONF.151/26' (n 76) Principle 7.

tioned by Principles 7 and 24.[78]

Good faith is a core element of the duty to cooperate which requires a coherent, diligent, and loyal fulfilment of agreements. The IACtHR, states that in the context of the climate crisis States are obliged to fulfill their duty of international cooperation in good faith.[79] Furthermore, in circumstances related to severe climate disasters the duty to cooperate is tightly linked to equity, as "it requires the international community to take into account notions of justice in the establishment and application of international norms" and to the principle of common but differentiated responsibilities.[80]

The Court agreed by majority that States are under the general obligation to ensure the progressive development of economic, social, cultural and environmental rights (ESCER), and therefore "must allocate the maximum available resources to protect individuals and groups who, due to their vulnerable situations, are exposed to the most severe impacts of climate change.[81] Article 26 of the American Convention of Human Rights generates two types of obligations regarding the protections of rights, an obligation to take progressive measures and another to take immediate measures.[82] These derivative obligations of Article 26, both emphasize the need for effective, adequate and intentional measures that at different timeframes or circumstances allow the full and effective enjoyment of ESCER rights.

ICJ

The ICJ mentioned that international cooperation is essential for climate change governance and that the customary duty to cooperate for the protection of the environment is reflected in the instruments of the climate regime.[83] The Court established that the duty to cooperate may be found in the UNFCCC preamble and in several articles of the convention.[84] According to the ICJ, the Paris Agreement established an obligation to cooperate regarding loss and damage through Article 8.[85]

78 IACtHR (2025), para. 251.

79 ibid para 253

80 ibid, para. 253 & 258.

81 ibid, para. 230.

82 ibid, para. 240.

83 ICJ (2025), para. 215.

84 ibid para 216.

85 ibid, para. 260.

The ICJ clearly states that the duty to cooperate is an obligation of conduct that can be assessed against the standard of due diligence. It mentions that "[g]ood faith co-operation" entails in the climate regime context "the guidance provided by the COP decisions pertaining to financial transfers, technology transfers and capacity-building" and "guidelines, frameworks and mechanisms adopted by COP decisions aid in the effective implementation of the UNFCCC's provisions"[86] This would specifically link to the relationship between the parties to the UNFCCC and Paris Agreement and the FRLD.

The ICJ mentioned that States are free to choose different means of cooperating, as long as such means "are consistent with the obligations of good faith and due diligence."[87] However, the principal means of cooperation under the Paris Agreement are financial assistance, technology transfers, and capacity-building. [88]

The ICJ has clarified that cooperation in the climate context includes mobilizing adequate financial resources.[89] The obligation is one of conduct, not result, but "adequate" cannot be interpreted narrowly. Specifically, the Court rejects interpretations that allow States to rely on domestic political constraints or budgetary preferences to evade their cooperative duties.[90] Where a State has significantly contributed to climate change or has greater capacity, its financial obligations intensify. For the FRLD, this means its core financing model must reflect legal obligations of States to contribute, particularly those with historical or ongoing responsibility. Voluntary pledges cannot be the sole basis of tje financial architecture if the Fund is to align with the clarified duty to cooperate.

Analysis

It is crucial to note here that the advisory opinions collectively reject the notion that the duty to cooperate is exhausted by formal participation in treaty processes or by mere engagement in multilateral fora. The ICJ makes clear that the obligation to cooperate in the climate context is grounded in general and customary international law, and that treaty-based cooperation under the UNFCCC and Paris Agreement represents one modality through which this obligation is typically discharged.[91]

86 ibid, para. 218.

87 ibid, para. 261.

88 ibid, para. 261

89 ibid, para. 262, 265, 457(3)A(h).

90 ibid, paras. 274-282.

91 ICJ (2025), para. 315.

Where a State does not cooperate in a manner equivalent to treaty-based cooperation, the Court places the burden on that State to demonstrate that its policies and practices nonetheless conform to its customary obligations. Cooperation is therefore assessed by reference to conduct and effect, not institutional membership. While ITLOS does not expressly deal with the obligations of non-parties, the Tribunal similarly underlines that the duty to cooperate is grounded in general international law.[92]

The IACtHR focuses its analysis on the obligations of the Member States of the Organization of American States (OAS). The United States, while not a party to the American Convention on Human Rights or the core climate treaties, is an OAS Member and thus remains bound by obligations articulated by the IACtHR insofar as they reflect general international law and applicable human rights norms.[93] Non-participation in climate treaties therefore does not, in itself, relieve non-parties such as the United States of their cooperation duties to prevent climate harm.

Read together, these three opinions establish that cooperation in the climate context entails sustained, effective, and adequately resourced engagement, including through financial mechanisms designed to prevent and remedy harm. Withdrawal from, or non-participation in, climate treaty institutions do not extinguish these obligations. On the contrary, where States decline to engage through established cooperative frameworks, they must demonstrate that alternative forms of cooperation meet the substantive standards required by customary international law.

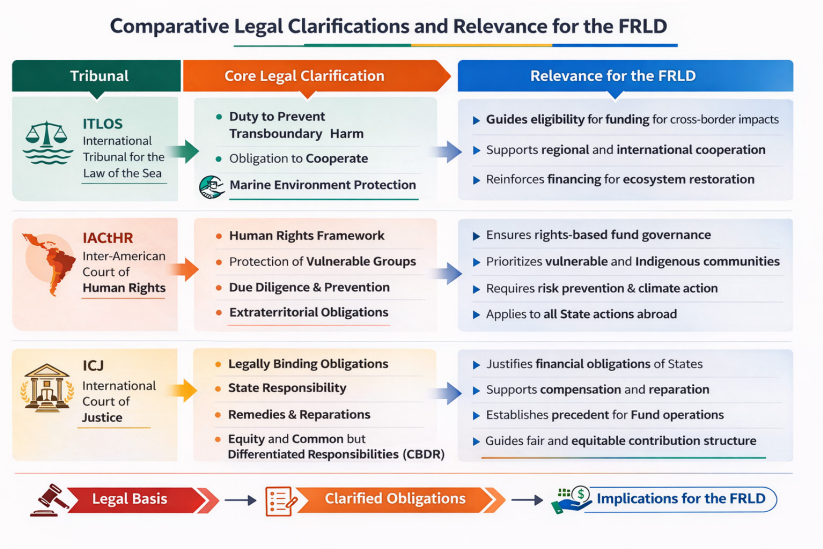

Figure 4. Comparative jurisprudential clarifications and relevance for the FRLD.

92 ITLOS (2024) para. 296.

93 IACtHR (2025), para. 41.

4. Assessing the FRLD Against International Legal Obligations Clarified by the Courts

The advisory opinions of the ITLOS, the IACtHR, and the ICJ collectively alter the legal frame within which the FRLD must be assessed. Read together, they clarify that loss and damage finance is not an act of political discretion or voluntary solidarity, but a mechanism through which States discharge binding obligations arising under international law. These obligations flow from duties of cooperation, prevention of foreseeable harm, protection of human rights, and, where harm has occurred, reparation.

Under this jurisprudence, the FRLD cannot be evaluated solely by reference to internal climate regime benchmarks or political expectations. Its adequacy must be assessed against general international law, including human rights law, environmental treaty law, and customary rules on State responsibility. The design, capitalization, access modalities, safeguards, and governance of the Fund are therefore legally relevant. Where deficiencies in these elements impede States' ability to prevent harm, cooperate effectively, or provide remedies, such deficiencies may entail international responsibility.

The three advisory opinions collectively dismantle any residual fiction that loss and damage finance is discretionary or based on the goodwill of developed countries and that the governance and allocation of its funding can be divorced from human rights including gender equality. Read together, they establish that climate finance, and specifically loss and damage finance, is the institutional expression of binding state duties of prevention, cooperation, human rights protection, and reparation enshrined in international law. Understood in this light, the FRLD is not a mere technical or political instrument. It is the mechanism through which States discharge their legal obligations. Its design, financing logic, and operational modalities must therefore reflect this juridical character. A failure to do so risks rendering the Fund incompatible with international law.

ITLOS, the IACtHR and the ICJ converge on a core proposition: States must mobilize sufficient resources to prevent foreseeable harm and to respond where injury occurs. ITLOS explicitly links climate impacts to obligations to take "all necessary

measures" and stresses that foreseeability raises the standard of diligence required of States. The ICJ confirms that obligations under the UNFCCC and Paris Agreement include mobilizing financial support consistent with capacity and contribution, while the IACtHR goes further by warning that the FRLD requires "extraordinarily high resources" to fulfil its mandate and by expressing concern that its structure does not ensure a just distribution of climate burdens.

These findings have direct implications for the Fund's financing model. Reliance on voluntary pledges, ad hoc contributions, or marginal capitalization increases cannot be treated as legally neutral design choices. Where States are under a duty to cooperate to prevent and respond to foreseeable harm, financial arrangements that are predictably inadequate risk undermining compliance with that duty. This risk is amplified when the gender and intersectional dimensions of loss and damage are systematically ignored and thus excluded from recognition and support. Underfunding the FRLD, delaying replenishment, or failing to establish and implement a credible long-term resource mobilization strategy may therefore constitute failures of cooperation rather than mere political shortcomings

The advisory opinions also clarify that differentiated responsibilities intensify, rather than dilute, financial obligations. States with greater historical responsibility or greater capacity are expected to do more. For the FRLD, this implies that its core financing logic must reflect differentiated legal obligations, not simply aggregate political consensus. A financing architecture grounded solely in voluntary contributions sits uneasily with the clarified duty to cooperate as articulated by all three courts.

4.1 Financing Structure, Prevention and No Harm

The UNFCCC preamble calls for the "widest possible cooperation" of all States and their participation "in an effective and appropriate international response" to climate change, in accordance with "their common but differentiated responsibilities and respective capabilities and their social and economic conditions".[94] The UNFCCC principles also state that developed countries have to take the lead to combat the adverse effects of climate change and that State parties have to consider the "specific needs and special circumstances of developing country Parties" that are particularly vulnerable to the adverse effects of climate; it acknowledges that efforts to address climate change can be carried out cooperatively by parties; and that State parties have to cooperate to promote a supportive economic system that enables

94 United Nations (1992), 'United Nations Framework Convention on Climate Change' <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

addressing the problems of climate change.[95]

Furthermore, under Article 4.8 of the UNFCCC, State parties have taken a specific commitment to "give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change (..)."[96] This commitment is the anchor that started the development of the existing loss and damage mechanisms of the climate regime.[97]

The Paris Agreement's objective is to enhance the implementation of the UNFCCC in a way that reflects "equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".[98] Article 8 of the Paris Agreement recognizes loss and damage associated with the adverse effects of climate change and establishes a cooperative and facilitative framework for addressing it. While it was not designed to create obligations of liability or to provide a legal basis for the remedy of harm, Article 8 does reflect an agreed obligation to cooperate with respect to loss and damage within the climate regime.[99]

In this respect, the ICJ also made clear that this specific obligation agreed in Article 8 of the Paris Agreement did not exclude the application of State responsibility regarding loss and damage due to the adverse effects of climate change.[100] For example, the FRLD, which is an operating entity of the UNFCCC and Paris Agreement Financial Mechanism and created for financial support based on Article 8, in its current structure is clearly limited to providing complementary and additional support, which would be additional to what must be provided under State responsibility.[101] The ICJ clarifies the legal consequences arising from breaches of State obligations with regard to loss and damage associated with the adverse effects of climate change are "to be determined by applying the well-established rules on

95 UNFCCC (1992), art. 3.

96 ibid, art. 4.8.

97 Adrián Martinez, María Paula Calvo and Carol Fernández, 'The Third Pillar: Repairing the Damage' 33 <https://larutadelclima.org/sdm_downloads/the-third-pilar-repair-the-harm/>.

98 United Nations (2015), 'Paris Agreement', art.2 <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>

99 ICJ (2025), para. 260.

100 ibid, para. 415.

101 ibid, para. 415.

State responsibility under customary international law". This indicates that States may incur liability for loss and damage notwithstanding Article 8 and may therefore be required to provide reparations. The work under Article 8 represents an opportunity created by States to operationalize cooperation in response to loss and damage, without displacing obligations arising under general international law. Where climate harm results from breaches of international obligations, duties of reparation may still arise under the law of State responsibility. Such reparations may be pursued through litigation, or addressed proactively by States through the creation of new governance mechanisms or the reform of existing ones, whether within or outside the climate regime.

The Funding Arrangements, which can be understood as a mosaic of funding instruments and institutions, were given structure by Decisions 1/CP.28 and 5/CMA.5 Annex 2 and the focus on "providing and assisting in mobilizing new and additional resources while complementing sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement."[102] The Funding Arrangements are meant "to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources."[103]

A key element of the Funding Arrangements is the annual High-Level Dialogue that is also operationalized by the FRLD. In this dialogue, some 30 high-level representatives of entities engaged in responding to loss and damage and other key stakeholders, including from civil society, Indigenous Peoples and philanthropy participate.[104] This dialogue provides recommendations to enhance complementarity and coherence in the implementation of new funding structures, institutions, and processes both inside and outside of the UNFCCC.

The FRLD was created in 2022, as part of the Funding Arrangements of the UNFCCC and the Paris Agreement for "responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and dam-

102 UNFCCC, '1/CP.28 Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4'; UNFCCC, '5/CMA.5 Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2-3 of Decisions 2/CP.27 and 2/CMA.4' Annex II para 3.

103 UNFCCC, '5/CMA.5 Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2-3 of Decisions 2/CP.27 and 2/CMA.4' (n 102) Annex II para 1.

104 ibid Annex II para 14.

age."[105] The FRLD acts as a platform to facilitate coordination and complementary under the funding arrangements.[106]

The FRLD is created as an operating entity under the Financial Mechanism of the UNFCCC and the Paris Agreement, that is "accountable to and function[s] under the guidance" of State parties, which serves as the basis to extend State responsibility to the operations of the FRLD.[107] At the moment of its operationalization at COP28 , the FRLD received pledges for only USD 661 million.[108] The FRLD was constituted as a means of cooperation for providing assistance to developing countries suffering from loss and damage. The FRLD objective also recognizes the "urgent and immediate need for new, additional, predictable and adequate financial resources to assist" countries suffering from loss and damage, and that the fund is to be a channel for multilateral finance assistance.[109] Furthermore, the FRLD operation is defined in terms of transparency and accountability guided by efficiency and effectiveness and sound financial management, which are also elements that serve to analyze State parties' compliance with reinforced due diligence.[110] As an operating entity of the Financial Mechanism of the UNFCCC and Paris Agreement, the FRLD is accountable to State parties as per Decisions 1/CP.28 and 5/CMA.5, which then helps to establish a possible path to demand State responsibility or a claim of human rights infringements.[111] As the ICJ stated, good faith and due diligence in cooperation under the climate regimen can be assessed, and in this case, could be reflected through the decisions made by State parties that are members of the

105 UNFCCC (2022), 'Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage,' FCCC/CP/2022/10/Add.1. Decision 2/CP.27, <https://unfccc.int/sites/default/files/resource/cp2022_10a01_adv.pdf#page=11>; UNFCCC (2022), 'Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage', FCCC/PA/CMA/2022/10/Add.1, Decision 2/CMA.4, <https://unfccc.int/sites/default/files/resource/cma2022_10a01_adv.pdf#page=13>.

106 UNFCCC (2023), 'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4', FCCC/PA/CMA/2023/16/Add.1. Decision 5/CMA.5, Annex II, para. 8, <https://unfccc.int/sites/default/files/resource/cma2023_16a01E.pdf>

107 ibid, para. 5.

108 ibid, para. 14.

109 ibid, Annex I 'Governing Instrument of the Fund', para. 3.

110 ibid, Annex I, para. 5.

111 UNFCCC (2023), 'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4', FCCC/CP/2023/11/Add.1, Decision 1/CP.28, <https://unfccc.int/sites/default/files/resource/cp2023_11a01E.pdf>; UNFCCC (2023), Decision 5/CMA.5.

FRLD Board in guiding the operations of the FRLD, as well as through the guidance provided by State parties to the UNFCCC and Paris Agreement to the FRLD annually.[112]

The FRLD was further operationalized through Decisions 6/CP.29 and 12/CMA.6, which detail the arrangements between State parties of the UNFCCC and Paris Agreement and the FRLD Board specifically "to ensure that the Fund is accountable to and functions under the guidance of the COP and the CMA, consistently with the Governing Instrument of the Fund, and receives guidance from the COP and the CMA on its policies, programme priorities and eligibility criteria."[113] The Board has to take appropriate actions in response to the guidance received and is also responsible for the strategic direction of the Fund and its governance or operational modalities.[114] The FRLD Board reports annually to State Parties in detail of its activities, including regarding its long-term fundraising and resource mobilization strategy.[115] State parties have to periodically review the Governing Instrument of the FRLD based on "the results of the independent evaluation of the performance of the Fund".[116]

The FRLD is an extension of State power in the international sphere and exists to fulfil States' duty to cooperate on responding to loss and damage. While the FRLD is governed by a board, its accountability and functions are dependent on annual guidance and oversight provided by State parties of the UNFCC and Paris Agreement.[117] Therefore, in theory, in the event of inadequate performance of the FRLD, any responsibility for harm generated or for breaches of human rights obligations remains attributable to State parties.[118] It is also important to recall that where human

112 ICJ (2025), para. 218.

113 UNFCCC (2024), 'Arrangements between the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and the Board of the Fund for responding to Loss and Damage', FCCC/CP/2024/11/Add.1, Decision 6/CP.29, para.1, <https://unfccc.int/sites/default/files/resource/cp2024_11a01E.pdf>; UNFCCC (2024), 'Arrangements between the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and the Board of the Fund for responding to Loss and Damage,' FCCC/PA/CMA/2024/17/Add.2, Decision 12/CMA.6, para.1, <https://unfccc.int/sites/default/files/resource/cma2024_17a02_adv_revised.pdf>.

114 UNFCCC (2024), Decision 6/CP.29, paras. 7 & 8.

115 ibid, paras. 14 & 15.

116 FRLD, 'Decisions of the Board - Second Meeting of the Board' (FRLD) FLD/B.2/17 para 16 <https://www.frld.org/sites/default/files/FLD_B2_17_Compendium%20of%20decisions_final%20%281%29%20%281%29.pdf>; UNFCCC (2023), Decision 5/CMA.5, Annex I, paras. 64 &66.

117 UNFCCC (2023), Decision 1/CP.28, Annex I, para.11.

118 Gonzalo Sánchez de Tagle, 'The Objective International Responsibility of States in the Inter-American

rights infringements are established, responsibility may extend to state representatives involved in the decision making.[119] In this context, it is important to recall that while the FRLD is institutionally governed by States parties to the UNFCCC and Paris Agreement, the underlying duties of cooperation and due diligence that it is intended to operationalize arise under general international law and therefore apply also to non-parties to the climate treaties.

The Governing Instrument of the FRLD states that the Fund will have a periodic replenishment every four years but also receive financial inputs on an ongoing basis.[120] It is important to recall that in 2023, the FRLD started its work with USD 661 million in pledges, and according to the report of the Fund to COP30, by the end of 2025 the total sum of pledged financial resources was USD 817.01 million.[121] Of these, as of early February 2026, only USD 590.48 million were converted into signed contribution agreements, with just USD 439.37 million in payments received.[122]

Furthermore, the FRLD Board is supposed to develop a long-term fundraising and resource mobilizations strategy, in order to comply with the mandate of ensuring "new, additional, predictable and adequate financial resources from all sources of funding."[123] The FRLD was supposed to have its "resource mobilization strategy with the objective of escalating the contribution of the FRLD to responding to loss and damage" by the end of 2025 due to the "the urgent and immediate need for new, additional, predictable and adequate financial resources."[124] However, the Fund

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Human Rights System' (2015) 7 Mexican law review 115.

119 Office of the Prosecutor, 'POLICY ON ADDRESSING ENVIRONMENTAL DAMAGE THROUGH THE ROME STATUTE' <https://www.icc-cpi.int/sites/default/files/2025-12/2025-enveng.pdf> accessed 9 February 2026; Wayne Sandholtz and Nicolás Albertoni, 'Choosing Remedies: Law and Politics in the InterAmerican Court of Human Rights' (2024) 34 <https://tlcp.law.uiowa.edu/sites/tlcp.law.uiowa.edu/files/2025-02/Sandholtz%20Final%20%285%29.pdf> accessed 9 February 2026; Corte Interamericana de Derechos Humanos IACtHR, 'CASE OF GOMES LUND ET AL. ("GUERRILHA DO ARAGUAIA") V. BRAZIL' <https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf> accessed 9 February 2026; Adam Branch and Liana Minkova, 'Ecocide, the Anthropocene, and the International Criminal Court' (2023) 37 Ethics & International Affairs 51.

120 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 55.

121 UNFCCC (2025), 'Report of the Fund for Responding to Loss and Damage and Guidance to the Fund for Responding to Loss and Damage', FCCC/CP/2025/L.10, Decision -/CP.30, para. 6 (Advanced unedited version), <https://unfccc.int/documents/655044>

122 'Fund for Responding to Loss and Damage (FRLD)' (World Bank, 22 January 2026) <https://fiftrustee.worldbank.org/en/about/unit/dfi/fiftrustee/fund-detail/frld> accessed 22 January 2026.

123 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 56.

124 FRLD (2025), 'Decision of the Board - Fifth Meeting of the Board', Board document FRLD/B.5/13, Decision B.5/D.4 <https://www.frld.org/sites/default/files/FRLD_B.5_13_Decisions_of_the_fifth_meeting_of_

Board's Decision B.7/D7 delayed the elaboration and approval of such a strategy by the Board until mid-2026, a delay, which can be seen as a sign of weak progress toward the FRLD's full operationalization, that State parties to the UNFCCC and Paris Agreement noted with concern during COP30.[125] At COP30, State parties "requested" the FRLD Board to expedite the adoption of the resource mobilization strategy. The absence of adequate funding and the delays in approving the long-term resource mobilization strategy and plan to mobilize financial resources raise concerns regarding the effectiveness and diligence of the FRLD's functioning, despite the well-established understanding of the urgent need for immediate and predictable financial support.

In 2024, the Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same of the United Nations Secretary General, had already found that the amount of pledges received for the FRLD to date, once fully fulfilled, would only cover a fraction of the estimated annual cost of loss and damage.[126] The situation described in 2024 has not changed and the increase in pledged and committed funding in 2025 was nominal.[127] An FRLD with such low funding resources, with only marginal increases in pledging and low fulfilled of commitments during the past three years and which will only see it first formal replenishment process in 2027[128], could not possibly respond to the costs of loss and damage in the hundreds of billions suffered yearly. The duty to cooperate requires more than a one-time transfer of finance; according to the ICJ, a continuous and sustainable effort is needed. And, while cooperation has some discretion for States, it "cannot serve as an excuse for States to refrain from co-operating with the required level of due diligence."[129] The dubious financial reality of

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the_Board_Compendium.pdf>"

125 UNFCCC (2025), 'Report of the Fund for Responding to Loss and Damage and Guidance to the Fund for Responding to Loss and Damage', Decision -/CP.30, para. 9; FRLD (2025), 'Compendium of Decisions of the Board at Its Seventh Meeting' FRLD Board document FRLD/B.7/11, <https://www.frld.org/sites/default/files/FRLD_B.7_11_Compendium%20of%20decisions%20of%20the%20Board%20at%20its%20 seventh%20meeting_0.pdf>.

126 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' (n 6) para 25.

127 UNFCCC (2025), 'Report of the Fund for Responding to Loss and Damage and Guidance to the Fund for Responding to Loss and Damage', Decision -/CP.30, para. 6.

128 UNFCCC, 'Decision -/CMA.7 Report of the Fund for Responding to Loss and Damage and Guid-ance to the Fund for Responding to Loss and Damage' para 6.

129 ICJ (2025), para. 306.

the FRLD raises questions about the good faith of the structure and operation of the Fund.

Moreover, State parties to the Paris Agreement have acknowledged, that there are important gaps in current climate finance efforts to respond to the increased scale and frequency of loss and damage in their efforts to set new climate finance commitments for the period post-2025.[130] The New Collective Quantified Goal on Climate Finance (NCQG) adopted in 2024 clarified that a "significant increase of public resources should be provided through the operating entities of the Financial Mechanism" and to at least triple annual outflows to a number of UNFCCC funds, including those under its Financial Mechanism, from a base level set in 2022 by 2030.[131] While the NCQG does not formally establish funding for loss and damage as the third finance pillar in addition to funding for mitigation and adaptation, the commitment to triple funding through UNFCCC funds must be read to include the FRLD. It is important to recall that the FRLD is an entity entrusted with the operation of the Financial Mechanism of the Convention, also serving the Paris Agreement, to which such a mandate to increase funding, albeit from low base levels, would also apply.[132]

The CMA.7 Decision provides guidance to the FRLD, by recalling Decision 1/CMA.6 adopting the NCQG, which it "requests the Board to take into account", and which should thus imply a significant increase of existing pledges to replenishment goal and a triplication of outflows.[133] In contrast, the workplan of the FRLD Board for 2026 while referring to 1/CMA.6, as a decision that was considered, made no direct reference to the increase of pledged funds[134]. Considering that there are already USD 250 million committed for the start-up financing phase for the FRLD under the Barbados Implementation Modalities (BIM), which could see additional funding added in early 2026 resources permitting, at minimum a tripling of outflows would mean USD 750 million, but of course this would be extremely low and insufficient if this would reflect the FRLD's funding delivery until 2030. Every year the finance needed to address loss and damage finance is said to add up to USD 400 billion, indicat-

130 UNFCCC (2024), 'New collective quantified goal on climate finance', FCCC/PA/CMA/2024/17/Add.1, Decision 1/CMA.6, para. 19, <https://unfccc.int/sites/default/files/resource/cma2024_17a01E.pdf>.

131 ibid, para. 16.

132 UNFCCC (2023), Decision 5/CMA.5, para.5.

133 UNFCCC (2025), 'Report of the Fund for Responding to Loss and Damage and Guidance to the Fund for Responding to Loss and Damage', Decision -/CMA.7, para. 16.

134 Heinrich Böll Foundation Washington, DC 'UNPACKING FINANCE FOR LOSS AND DAMAGE' (Heinrich Böll Foundation Washington, DC' 2021) <https://us.boell.org/sites/default/files/2021-04/Unpacking%20finance%20paper%201%20%28final%29.pdf> accessed 30 January 2026.

ing the scale of the current gap between financing committed for addressing loss and damage and finance needs.[135] With the level of currently pledged funds to the FRLD at just USD 817.01 million, even if all of it was made available to the FRLD speedily and the FRLD's outflow was rapidly scaled up, it could barely register if measured with the actual financial demand for cooperation on loss and damage response. It is thus clear that the CMA 6 mandate under the NCQG as applicable now to the FRLD, while establishing a firm procedural link to the FRLD and financing to address loss and damage, is deficient and will not be sufficient to fulfill the due diligence obligation of parties as reinforced by the advisory opinions, even though, its implementation would already require far more cooperation than what States, in particular developed countries, have demonstrated so far a willingness for.

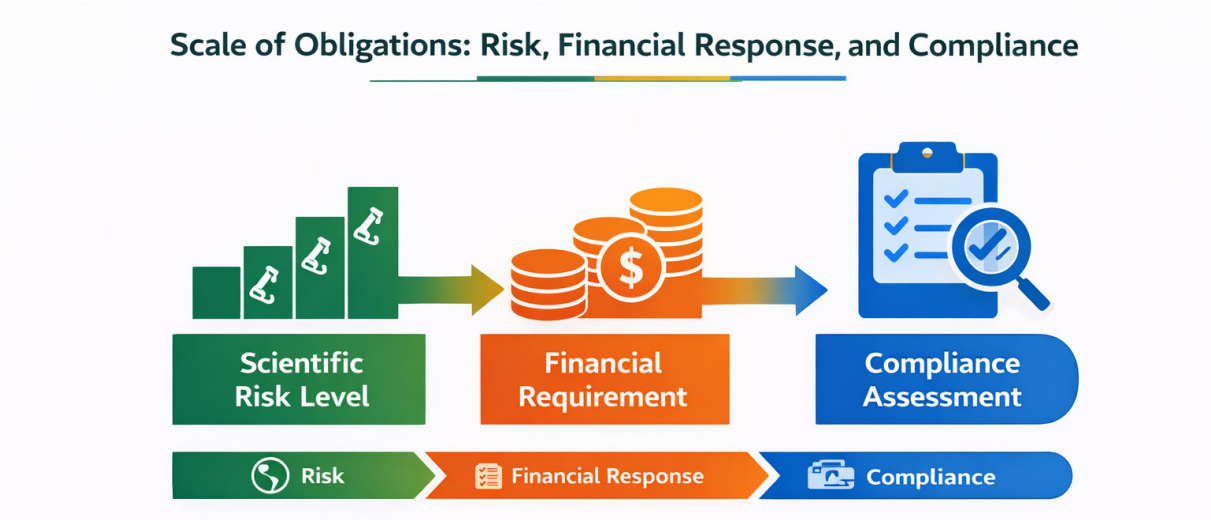

Figure 5. Conceptual scale linking scientific risk levels to financial requirements and compliance assessment under clarified legal obligations.

4.2 Due Diligence and Operational Modalities

The advisory opinions collectively elevate due diligence to a demanding standard in the climate context. ITLOS articulates due diligence as a stringent, risk-sensitive obligation informed by best available science, the magnitude and irreversibility of harm, and the urgency of action. The IACtHR frames due diligence as enhanced where human rights are at stake, requiring States to organize their institutional apparatus to protect rights, adopt differentiated measures for groups made vulnerable, and allocate maximum available resources. The ICJ, while more restrained,

135 Heinrich Boll Stiftung North and America, 'UNPACKING FINANCE FOR LOSS AND DAMAGE' (Heinrich Boll Stiftung North America 2021) <https://us.boell.org/sites/default/files/2021-04/Unpacking%20finance%20paper%201%20%28final%29.pdf> accessed 30 January 2026.

confirms that due diligence requires States to adopt and continuously update appropriate regulatory, institutional, and cooperative measures in light of evolving scientific knowledge and foreseeable risk.

Applied to the FRLD, these standards translate into institutional requirements. Where States rely on an international fund to discharge key aspects of their preventive and cooperative obligations, that fund must be capable of functioning effectively. Procedural delays, restrictive access criteria, inadequate capitalization, or exclusion of slow-onset and irreversible harms may undermine States' ability to meet their due diligence obligations under international law.

In this sense, a fund's procedural and financial architecture is not merely administrative; it forms part of the legal infrastructure through which States demonstrate compliance with their international legal obligations. The FRLD's speed, accessibility, scope of coverage, and capacity to address both rapid-onset events and slow-onset processes are legally salient. If foreseeable loss and damage remain unaddressed due to institutional bottlenecks or resource constraints, this very failure may be attributable not merely to the Fund but to the States that design, guide, and undercapitalize it, on whose shoulders these international legal obligations rest.

The Financial Arrangements, of which the FRLD is a key element, were created under the acknowledgement that there was an "urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change."[136] Parties and relevant institutions could also develop and implement "additional funding arrangements for improving sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement to address gaps in the speed of disbursement of, eligibility for, adequacy of and access to finance, especially prearranged finance."[137] Moreover, State parties have to made available a wide variety of sources to "support and complement the new and existing arrangements, including sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement", with the purpose that these arrangements target "people and communities in climate-vulnerable situations (including women, children, youth, Indigenous Peoples, and climate-induced migrants and refugees in developing countries that are particularly

136 UNFCCC (2022), Decision 2/CMA.4, para. 1.

137 UNFCCC (2023), Decision 5/CMA.5, Annex II, para. 17.

vulnerable to the adverse impacts of climate change)".[138] Therefore, under the State parties' obligation to cooperate, people and communities have to be provided with new and additional funding to respond to loss and damage through the Funding Arrangements, with the FRLD as a main platform of action. These elements help define the nature of the enhanced due diligence that State parties must achieve regarding financial resources for loss and damage cooperation, as recognized in the inception of the Funding Arrangements.[139] This is a baseline commitment agreed by State parties that measures the achievement of enhanced due diligence of their existing cooperation obligations through the FRLD specifically or in general through the broader Funding Arrangements.

The FRLD has to "provide finance for addressing a variety of challenges associated with the adverse effects of climate change, such as climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery".[140] The modalities of the financial assistance are describe as "streamlined and rapid approval process with simplified criteria and procedures, while also maintaining high fiduciary standards, environmental and social safeguards, financial transparency standards and accountability mechanisms"[141]. These modalities reinforce the notion of urgent and immediate need to provide resources as mentioned in the creation of the Financial Arrangements, and enabling the fulfillment of human right protection obligations.[142] These elements further define the manner in which this Fund should assist State parties in fulfilling their obligation to cooperate in assisting developing countries with regard to responding to and addressing loss and damage.

It is also important to recall that while the FRLD has an international legal personality and capacity with privileges and immunities, this does not exempt State parties from their responsibilities derived from the lack of performance of this fund, to fulfil existing international or human rights obligations.[143] In the preamble of Decisions 1/CP.28 and 5/CMA.5 which approve the Governing Instrument of the FRLD, there is an acknowledgement of State parties' duty towards human rights and vulnerable populations (reiterating language of the preamble of the Paris Agreement) that

138 ibid Annex II para 18

139 UNFCCC (2022), Decision 2/CP.27, para. 2

140 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 6.

141 ibid, Annex I, para. 41.

142 UNFCCC (2022), Decision 2/CMA.4, para. 1; UNFCCC (2023), Decision 1/CP.28, para.1.

143 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 10; UNFCCC (2023), Decision 1/CP.28, Annex I, para. 10.

should serve as an anchor to the legal obligations under existing human rights laws of the Fund.[144]

The FRLD is meant to provide finance in the form of grants and highly concessional loans.[145] While this is an ongoing practice in public climate finance provision, its coherence with and adherence to State parties' human rights obligations can be questioned. The use of loans as a financial instrument poses a risk to the protection of human rights, as mentioned by the Committee of the Rights of the Child regarding finance on loss and damage. Furthermore, if the FRLD, which is tasked to fulfill the duty to provide assistance to countries suffering from loss and damage by providing "complementary and additional support"[146], but it relies on financial instruments which generate an additional economic burden, limit fiscal space and disrupt recipient countries' flexibility to fulfill their own human rights obligations and increases the risk of their vulnerable populations, then the structure may not necessarily pass the good faith assessment. Furthermore, one could question the nature of the Fund as an instrument, in terms of its complementarity and additional support, if we understand addressing climate harm as the core obligation of State responsibility and reparations. Why would a vulnerable country that has endured the consequences of an illicit harm caused by the adverse effects of climate change, enter a cooperation relationship in which the resource mobilization comes from those harmed in the form of debt payments, with a potential benefit to those that committed an international wrongful act. The use of loans as financial instruments appears to reverse the burden of cooperation and therefore seems ill fitted to satisfy the requirement of good faith in cooperation.

The resource allocation system of the FRLD is meant to prioritize the needs of developing countries that are particularly vulnerable, take into account the scale of the impacts related to national circumstances, and set a minimum allocation floor for least developed countries and small island developing states, but without determining how that floor is to be set.[147] This allocation rational under the fund as a complementary cooperation mechanism differs from what a remedy mechanism would implement. According to the ICJ, any State is in "principle entitled to the same remedies as other injured States".[148]

144 UNFCCC (2022), Decision 2/CMA.4; UNFCCC (2023), Decision 5/CMA.5. 131

145 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 58.

146 ibid, Annex I, para. 7.

147 ibid, Annex I, para. 60

148 ICJ (2025), para. 109.

As the FRLD pursues its start-up funding phase under the Barbados Implementation Modalities (BIM) and defines the start-up funding criteria (with a full allocation framework for the permanent operation still to be developed), as a first practice for the start-up financing the allocation floor has been set to "50 per cent for small island developing states (SIDS) and the least developed countries (LDC)" of the USD 250 million available for intervention in 2026 and beyond.[149] This poses a challenge as it structurally limits the already extreme low amount of resources to only certain types of rightsholders, and excludes vulnerable populations of existing hotspots of high risk that are not located in SIDS or LDCs.[150] Responses to loss and damage, including those complementary or voluntary, have to "take into account impacts on disproportionately affected groups" and use human rights as "guardrails".[151] The current structural limitation does not respond to the obligation to cooperate nor the real need of populations in situations of vulnerability or countries suffering from climate harm, but accommodates an artificial prioritization made by State parties and effectively serving to cement the low financial performance of the FRLD and the expectation of a reduced financial scale more permanently.

The Governing Instrument of the FRLD created various modalities to access financial resources that include "(a) Direct access via direct budget support through national Governments, or in partnership with entities whose safeguards and standards have been judged functionally equivalent to those of multilateral development banks; (b) Direct access via subnational, national and regional entities or in partnership with entities accredited to other funds, such as the Adaptation Fund, the Global Environment Facility and the Green Climate Fund; (c) International access via multilateral or bilateral entities; (d) Access to small grants that support communities, Indigenous Peoples and vulnerable groups and their livelihoods, including with respect to recovery after climate related events; (e) Rapid disbursement modalities, as appropriate."[152] The FRLD Board foresee the implementation of the BIM as a startup phase meant to "serve as the initial period to test and refine operational approaches that are to be developed and implemented in parallel with the longer-term operational

149 FRLD, 'Decisions of the Board Seventh Meeting of the FRLD' (FRLD) FRLD/B.7/11 8; FRLD, 'Decisions of the Board Fifth Meeting of the FRLD' 7 <https://www.frld.org/sites/default/files/FRLD_B.5_13_Decisions_of_the_fifth_meeting_of_the_Board_Compendium%20%281%29%20%281%29.pdf>.

150 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' (n 6) para 7 & 8.

151 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' (n 6) para 27 & 31.

152 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 49..

policies and procedures".[153] The BIM is seen as a process to create lessons learnt and generate evidence to refine how the FRLD will function in the long-term and become fully operational.

In the spring of 2025, during the inaugural High Level Dialogue, civil society and community actors urged the FRLD to depart from business-as--usual practices by working more directly with local actors, and further recommended that direct access for affected communities be prioritized alongside access for developing countries.[154] Also, concerns were raised about existing barriers "for grassroots organizations, including complex compliance requirements and lack of representation in governance structures, calling for simplified access procedures and inclusive governance".[155] Civil society specifically called for a defined share of resources to be channeled to the local level and to have equitable fund allocation.

However, the FRLD Board did not hear these demands and excluded from the BIM a dedicated pathway for direct access to small grants that support communities and rapid disbursement, only allowing such access as a potential part of intermediated access by implementation entities or recipient states.[156] The BIM operationalization does have to consider the "needs of climate-vulnerable communities" despite not giving communities direct access to grants nor prioritizing community grant funding.[157] The Human Rights Council had stated that direct access arrangement of funding for loss and damage "should be available to all those affected by climate change", especially considering that frontline communities receive less than 1 percent of climate finance.[158] This lack of prioritization criteria for direct access for

153 FRLD (2024), 'Decisions of the Board - Fourth Meeting of the Board', Board document FRLD/B.4/14, Decision B.4/D.3, para.17, <https://www.frld.org/sites/default/files/B.4%20Compendium.pdf>.

154 FRLD (2025), 'Report of the Board to the Conference of the Parties at Its Thirtieth Session and the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement at Its Seventh Session', FRLD Board document FRLD/B.6/4, <https://www.frld.org/sites/default/files/FRLD_B.6_4_Report_to_COP_30-CMA_7.pdf>; also at <https://unfccc.int/sites/default/files/resource/cp2025_10_cma2025_14E.pdf>.

155 ibid.

156 FRLD (2025), 'Decisions of the Board - Seventh Meeting of the FRLD', Board document FRLD/B.7/11, Decision B.7/D.5, <https://www.frld.org/sites/default/files/FRLD_B.7_11_Compendium%20of%20decisions%20of%20the%20Board%20at%20its%20seventh%20meeting%20%281%29_0.pdf>

157 FRLD (2025), 'Decisions of the Board - Fifth Meeting of the Board', FRLD Board document FRLD/B.5/13, Decision B.5/D.4, para. 19, <https://www.frld.org/sites/default/files/ FRLD_B.5_13_Decisions_of_the_fifth_meeting_of_the_Board_Compendium.pdf>"

158 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' para 32..

affected communities by the BIM was not addressed nor corrected by State parties in their response to the FRLD report of activities received during CMA7 or COP30.[159]

From a human-rights-based perspective, the exclusion of a dedicated Fund-based community access window or modality is questionable, as the legal means exist to provide resources to those directly affected. However, the FRLD Board chose not to develop the structural setup to enable direct financial support to frontline communities but to prioritize testing out direct budget support to recipient countries' national budgets instead. Given the low scale of available resources, the fact that many specific population groups which are made vulnerable through discrimination and marginalization are highly affected and the existing legal obligation to provide support in a way that guarantees compliance with human rights obligations, it is difficult to understand the decision-making priorities of the FRLD Board, especially since the BIM is a testing exercise.

The BIM adopted a project/program cycle to finance activities responding to economic and non-economic loss and damage with country-led and country-owned approaches.[160] This conventional project-based model of climate has been criticized in the UNGA Analytical Study on Impacts of Loss and Damage as "unsustainable as well as unsuitable in the context of loss and damage due to the unpredictability of extreme weather events the incremental nature of slow-onset hazards and cascading and compounding climate risks."[161] This study had called for a different type of climate finance for loss and damage, one that advanced climate justice through wide-ranging remedies for the root causes of climate change including its "structural, temporal, collective and transboundary dimensions."[162] Furthermore, the study recommended the application of a human rights-based approach, an increase in inclusive and universally accessible social protection measures and that developed countries provide increased financial resources. On all of these points, the start-up funding phase of the FRLD through the BIM is lacking as it did not adequately implement these recommendations, beyond the FRLD's consideration of national circumstances, by deciding that "access to the resources of the Fund shall be country-led and that national authorities/focal points play a central role in

159 UNFCCC (2025), 'Report of the Fund for responding to Loss and Damage and Guidance to the Fund for responding to Loss and Damage', Decisions -/CP.30 and -/CMA.7 (Advanced unedited version).

160 FRLD (2025), 'Decisions of the Board - Seventh Meeting of the Board', Board document FRLD/B.7/11,- Decision B.7/D.3.

161 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' para 36.

162 ibid, para.36

ensuring country ownership."[163] Civil society has also "expressed alarm about the direction of travel of the FRLD towards becoming a typical fund. They considered that current funding criteria and World Bank modalities are incompatible with the objectives of the FRLD".[164]

4.3 Human Rights, Gender Responsiveness and Safeguards

In Decisions 1/CP.28 and 5/CMA.5 which operationalize the Funding Arrangements, including the FRLD, State parties reiterated their human rights obligations and centered the work of the arrangements on the obligation to cooperate.[165] However, the Analytical Study on the Impact of Loss and Damage by the United Nations Secretary General, after analyzing the United Nations Framework Convention on Climate Change (UNFCCC) loss and damage mechanisms, stated that while important, those mechanisms were "not currently designed or intended, in and of themselves, to fulfil the human rights obligations of States to provide effective remedies for climate harms."[166] The advisory opinions analyzed clarify that climate action, and, by extension, climate finance, must operate within a rights-based framework. This framework requires procedural principles and guarantees that are central to substantive equality and non-discrimination: effective participation, access to information, transparency, accountability, and access to justice. From a gender perspective, these guarantees are essential to determine which losses and damages become eligible, which are documented and can be sustained as claims, and who is able to activate pathways to support—especially in contexts of structural inequality that tend to render non-economic harms and populations that have been historically discriminated against and marginalized, including women and gender-diverse people, invisible.

163 FRLD (2025), 'Decisions of the Board - Seventh Meeting of the Board', Board document FRLD/B.7/11, Decision B.7/D.3, para. 19.

164 FRLD (2025), 'Report of the sixth meeting of the Board of the Fund for responding to Loss and Damage', FRLD Board document FRLD/B.6/7, para. 49, <https://www.frld.org/sites/default/files/FRLD_B6_7_Meeting%20report_0_1.pdf>.

165 UNFCCC (2023), Decision 5/CMA.5, Annex II.

166 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' para 25.

The ICJ recalls the preambular language of the Paris Agreement according to which climate action should respect, promote, and consider gender equality and the empowerment of women; it also recognizes that the adverse effects of climate change may negatively affect the enjoyment of women's rights. In addition, the ICJ incorporates the interpretive standard of the CEDAW Committee (General Recommendation No. 37), which requires that mitigation and adaptation measures be designed and implemented in accordance with human rights principles, including substantive equality and non-discrimination; participation and empowerment; accountability and access to justice; transparency; and the rule of law .

The ICJ in interpreting the climate treaties reiterated the applicability of the VCLT regarding the principles of harmonious and integrated interpretation, which supports the application of the reference to gender equality in the preamble of the Paris Agreement to all the articles contained in the agreement. Furthermore, the ICJ recognized that equity as mentioned in Article 3 of the UNFCCC is part of the guiding principles, which "permeate all three climate change treaties" and which also "guide the interpretation of the treaty obligations".[167] Gender equality can be understood as an expression of the guiding principle of equity which then can be interpreted as applying across all climate treaties. This implies that the lack of mention of gender equity in some sections of the Paris Agreement cannot be interpreted as a lack of applicability or that this mandate might be excluded in in the agreement's implementation. On the contrary, the explicit mentioning of gender equality in the Paris Agreement preamble reinforces the duty to implement and interpret this mandate in all measures of the agreement in light of the principle of equity as per Article 3 of the UNFCCC.[168]

In ITLOS, the reference is more limited and appears mainly through the Paris Agreement standard, according to which adaptation measures should follow a gender-responsive, participatory, and fully transparent approach, considering vulnerable groups, communities, and ecosystems[169]. This reference serves as an anchor, but it is not developed as a cross-cutting lens throughout the remainder of the opinion.

The IACtHR, for its part, is structured more clearly and in greater depth through a gender and intersectional lens, recognizing that women, girls, and adolescents face heightened risks due to the interaction of multiple vulnerability factors, and

167 ICJ (2025), para. 178.

168 UN (1992), 'United Nations Framework Convention on Climate Change'

169 ITLOS (2024) para. 393

that climate impacts can deepen existing inequalities and widen gender gaps.[170] In that context, it establishes that States have an obligation to incorporate a gender and intersectional perspective in all actions undertaken in response to the climate emergency, and it identifies relevant differentiated impacts (including risks of gender-based violence and disproportionate care-related burdens). It also refers to the rights and situation of women and diverse populations, including women human rights defenders, rural women, Indigenous women, Afro-descendant women, and LGBTQI+ people.[171] This framing matters for finance: it makes clear that "who is harmed" and "who can access remedy" are shaped by power relations, including violence, racism, and the care economy, not by climate hazards alone.

Significantly, none of the opinions develops the relationship between gender and climate finance exhaustively as a standalone axis. However, the shared standards they articulate—rights, equality, and procedural guarantees—support the conclusion that financing mechanisms cannot be designed on formally gender-neutral assumptions. A "neutral" design tends to fail to identify differentiated impacts and to inadequately remedy harms that often manifest as non-economic losses or as structural barriers to access due to increased care burdens, security risks, exposure to violence in displacement and recovery contexts, health impacts (including sexual and reproductive health), and livelihood losses under conditions of exclusion that many women and gender-diverse people face. In legal terms, this can undermine the reinforced due diligence standard consolidated by the opinions, precisely because it produces foreseeably exclusionary or discriminatory outcomes.

In this context, the Belém Gender Action Plan adopted at COP30 strengthens and operationalizes the gender agenda with respect to implementation and means of implementation, including explicit finance-related dimensions, for example: aligning climate finance providers with the plan; promoting tools such as gender-responsive budgeting; facilitating access for grassroots women's organizations, Indigenous Peoples, and local communities; and improving the gender-responsiveness of funds through exchanges of practice, dialogues, and workshops[172]. This Plan should be used as an instrument to demand measurable gender outcomes and enforceable access provisions throughout the UNFCCC climate funds, including in the FRLD, not merely "gender language" in strategic documents.

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170 IACtHR (2025), paras. 598 & 614.

171 IACtHR (2025)..

172 UNFCCC (2025), 'Belém gender action plan'. Bonn: UNFCCC. Decision -/CP.30 (Advance unedited version), <https://unfccc.int/sites/default/files/resource/COP30_14_Gender_AUV.pdf>.

For the FRLD, the implication is clear: integrating a gender perspective, which must be an intersectional one, cannot be reduced to a programmatic statement. It requires operational, verifiable, and transformative policies, mechanisms and approaches that translate equality and non-discrimination standards into concrete rules on access, safeguards, transparency, accountability, and reparation. This implies assessing the Fund's performance not only through aggregate volumes or macroeconomic estimates, but also through its distributive, recognition, and procedural effects—whether finance reaches those facing multiple vulnerabilities; whether it lowers barriers to access and evidence; whether it avoids producing foreseeable exclusions; and whether it contributes to narrowing gender gaps and advancing climate and gender justice. The Fund's "effectiveness" must be assessed by whether it shifts power and removes barriers for those who have suffered harm, not only by how much it disburses. The FRLD Governing Instrument provides actually a very clear gender mandate, even if it does not reference human rights explicitly, by asking the Fund in its operations to maximize the impact of its funding by taking "a culturally sensitive and gender-responsive approach".[173] It has yet to operationalize this mandate in its procedures and modalities, including under the BIM.

The FRLD has to ensure "that best practice environmental and social safeguard policies are applied to its activities."[174] Furthermore, the FRLD has the mandate to develop a mechanism for environmental and social safeguards and fiduciary principles and standards.[175] The Fund must also create procedures for monitoring and evaluation, financial accountability and external audits. Moreover, regarding access to funding, the FRLD has to develop simple procedures and criteria to screen funding entities regarding international safeguards and standards.[176] The FRLD through Decision B.2/D.5, has adopted an interim statement on conflict of interest and ethics under the name of "Basic Standard of Conduct".[177] This code of conduct applies to Board members, alternate members and advisers, and includes considerations of conflict of interest.[178] The Basic Standard of Conduct references principles such as ethics, integrity, tolerance, respect for cultural differences, nondiscrimination, and compliance with the laws of the jurisdictions in which Board members oper-

173 UNFCCC (2023), Decision 1/CP.28, Annex I, para. 5..

174 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 68.

175 ibid Annex I para 22(f).

176 ibid Annex I para 50.

177 FRLD (2024), 'Decisions of the Board - Second Meeting of the Board', FLD Board document FLD/B.2./17, Decision B.2/D.5, para. 12, <https://www.frld.org/sites/default/files/FLD_B2_17_Compendium%20of%20decisions_final.pdf>

178 ibid Annex I para 5.

ate; however, it does not explicitly incorporate a rights-based approach into their work.[179]

The FRLD does not have its own independent grievance redress mechanism to address complaints related to activities financed by the Fund. Instead, it uses the mechanisms of the Fund's implementing entities. The Fund will take action based on the recommendations or findings of those external mechanisms.[180] The Fund has to ensure that high-integrity fiduciary principles and standards are applied to its activities and relies for application, oversight and implementation of these, similarly as for environmental and social safeguards, primarily on its implementing entities.[181] It is important to note that grievance mechanisms are only meaningful if they are genuinely accessible to affected populations and take into account language, literacy, non-discrimination, confidentiality, and protection.

The three advisory opinions have elevated the legal relevance of safeguard systems within climate finance mechanisms. The ICJ recognizes that climate-related state conduct interferes with rights to life, health, food, water, housing, culture and self-determination, and emphasizes that procedural rights to information, participation, and access to justice are integral components of climate obligations. The IACtHR embeds climate obligations in a rights-based framework requiring protection of individuals in situations of vulnerability and differentiated measures for children, Indigenous Peoples, fishing and peasant communities, and Afro-descendant populations. ITLOS, while not explicitly engaging in human rights treaties, underscores that obligations under UNCLOS must be interpreted consistently with other relevant rules of international law, which include human rights law. In this context, the Fund's safeguards cannot be construed as optional "good practice" policy add-ons. They form part of the legal infrastructure through which States demonstrate compliance with their legal obligations anchored in international human rights law. Environmental and social safeguards, participatory mechanisms, access to information, Free, Prior and Informed Consent (FPIC) where applicable, and accessible grievance procedures are therefore legally relevant to the assessment of the FRLD's adequacy. In this sense, the Fund's safeguard architecture can be considered inseparable from States' human rights obligations.

Some might argue that the FRLD institutional set-up through a hosting agreement for its independent Secretariat under the World Bank, might provide it with the

179 ibid Annex I para 1-3.

180 UNFCCC (2023), Decision 5/CMA.5, Annex I, para. 71.

181 ibid Annex I para 67

World Bank's immunity but this protection is not without limit.[182] The legal case of of Jam v. International Finance Corporation (IFC) has already proven in court that absolute immunity as claimed by the World Bank does not hold regarding human rights related issues or harm.[183] Therefore, the fact that the FRLD has outsourced the function to address complaints related to activities financed by the Fund to an implementing entity's grievance redress mechanism, and that this third party is tasked with taking actions is unlikely to exempt the FRLD or States from responsibility for human rights violations. The absence of a dedicated Fund-level grievance mechanism, limited community access modalities, or procedural arrangements that privilege intermediaries over direct access by affected populations may be difficult to reconcile with the standards articulated by the Courts. Where safeguard systems are weak, inaccessible, or outsourced without meaningful oversight to independent grievance mechanisms, States risk failing to protect human rights implicated by climate harm.

At the first meeting of the FRLD Board, interim arrangements for observer participation in board proceedings were established, pending the full development of permanent procedures, which allowed "one representative from each of the nine observer constituencies of the United Nations Framework Convention on Climate Change to observe the proceedings of open sessions of the Board meeting in the room."[184] Board members argued for the participation of observers in the development of the additional rules of procedure, but "some cautioned against equating such views with members and alternate members of the Board".[185]

At the second meeting, observers noted the inadequacy of these interim arrangements and asked for improvements, such as "to amend the current practice of inviting observers to participate in the meeting after decisions are taken, which undermines their meaningful participation; to expand the active observer representation

182 World Bank, 'Hosting Arrangements for the Secretariat of the Fund for Responding to Loss and Damage' <https://documents1.worldbank.org/curated/en/099102524142518821/pdf/TF069040-20e1141d-5b69-41e6-ba89-c998a93f98ab.pdf>.

183 Joe Athialy, 'The World Bank, the Inspection Panel and Immunity' in Daniel D Bradlow and others (eds), Perspectives on Accountability at International Financial Institutions (Brill | Nijhoff 2025) <https://brill.com/view/book/9789004729735/BP000026.xml> accessed 31 January 2026.

184 FRLD (2024), 'Report of the Second Meeting of the Board of the Fund for responding to Loss and Damage', FRLD Board document FLD/B.2/18, para. 10 <https://www.frld.org/sites/default/files/ReportB2_FLD_Board_final%20%281%29.pdf>.

185 FRLD (2024), 'Report of the First Meeting of the Board of the Fund for responding to Loss and Damage', FRLD Board document FLD/B.1/12, para. 13, <https://www.frld.org/sites/default/files/ReportB1_Board_final.pdf>

beyond the UNFCCC observer constituencies; and to ensure that each group be allowed two active observers and two alternates" and to provide "three seats for representatives of Indigenous Peoples organizations as active advisory board members" for the development of the Fund's long-term policy on active observers and observer participation.[186] At the fourth meeting, observers expressed concern with the FRLD Board's selective willingness to include for example private sector representatives as active observers.[187] The private sector is not identified in the Governing Instrument as active observer.[188] Meetings of the FRLD Board are open to the attendance of active observers and other observers.[189] Active observers may receive copies of proposed decisions when there are decisions between meetings of the Board.[190] Furthermore, active observers have to disclose conflict of interest that may exist regarding the agenda in discussion and recuse themselves from participating.[191] The arrangements for observer participation in Board proceedings and an active observer policy are still being discussed.[192]

At its fourth meeting the FRLD Board adopted a "blanket approach" for accrediting observer organizations requiring just a simple proof of accreditation by a relevant multilateral climate fund or UNFCCC.[193] The Board decided to grant a 3-year period for accredited observer organizations to the UNFCCC and other bodies, requesting to become accredited as observers to the Fund.[194]

The FRLD Governing Instrument mandates the creation of consultative forums to engage with rightsholders, the private sector and governments, a decision on

186 FRLD (2024), Board document FLD/B2/18, para. 78.

187 FRLD (2025), 'Report of the Fourth meeting of the Board of the Fund for responding to Loss and Damage', FRLD Board document FRLD/B.4/15/Rev.1, para. 83, <https://www.frld.org/sites/default/files/B.4_15_Rev.1_B4%20meeting%20report.pdf>.

188 UNFCCC (2023), Decision 1/CP.28, Annex I, para. 20.

189 UNFCCC (2024), 'Report of the Fourth Meeting of the Board of the Fund for responding to Loss and Damage', Board document FRLD/B.4/14, Annex IV, para. 31, <https://www.frld.org/sites/default/files/B.4%20Compendium.pdf>.

190 ibid Annex I para 4.

191 FRLD (2025), Board document FRLD/B.4/15/Rev.1, para. 56

192 FRLD (2025), 'Decisions of the Board - Sixth Meeting of the Board', FRLD Board document FRLD/B.6/6, <https://www.frld.org/sites/default/files/FRLD_B6_6_Decisions%20of%20the%20Board_sixth%20meeting%20of%20the%20Board_9-11%20July%202025_6.pdf>.

193 FRLD (2025), Board document FRLD/B.4/15/Rev.1, para. 62.

194 FRLD (2024), Board document FRLD/B.4/14, Annex IV, para. 26.

which is still pending.[195] The Board agreed that it can create new mechanisms for participation and input "in the design, development and implementation of the activities financed by the Fund."[196] It is important to highlight that participation of rights-holders and affected populations is placed on equal terms with that of the private sector and governments, despite the asymmetries in power, legal rights and the nature of the actors. The effective participation entitlement of a rightsholder in accordance with human rights treaties and therefore the prioritization of inputs by population groups made vulnerable due to the climate harm suffered, makes it arguably improper to place the input of these rightsholders at the same level as a for-profit business entity or a state.

4.4 Legal Consequences of Breach

The advisory opinions converge on a decisive point: States' failure to prevent foreseeable climate harm, failure to cooperate in good faith, or failure to safeguard affected populations, is not simply a policy shortcoming but an internationally wrongful act under international law. The ICJ confirms unequivocally that breaches of climate-related obligations under the UNFCCC, the Paris Agreement, and relevant rules of customary international law fall within the scope of the law of State responsibility.[197] As clarified by the Court, States that are not a party to the climate change treaties are still subject to international law related to responsibility, due diligence and wrongful international acts regarding activities that harm the climate. Where such breaches occur, States are subject to the full suite of legal consequences articulated under general international law, particularly the International Law Commission's (ILC) Articles on State Responsibility: duty to continue performing the obligation that was breached; cessation of the wrongful conduct or omission; assurances and guarantees of non-repetition; and full reparation, including restitution, compensation, and satisfaction.[198]

The ICJ also clarifies that where multiple States contribute to climate harm, responsibility may be shared, and injured parties cannot be left without remedy solely because attribution involves multiple sources.[199] A material contribution to foreseeable harm may suffice to trigger responsibility, with attribution to be determined case by case. This clarification has direct implications for how the FRLD treats causation,

195 ibid Annex IV para 28.

196 FRLD (2025), Board document FRLD/B.4/15/Rev.1, para. 29.

197 ICJ (2025) paras. 407-420.

198 ILC ARSIWA Articles 28-36; ICJ (2025) paras. 444-455.

199 ICJ (2025) para. 430, see also 425-432 for the Court's broader discussion on attribution.

proof, and access to compensation or assistance. The Court further emphasizes that the wrongful act in question is not the emission of greenhouse gases per se, but the breach of conventional and customary obligations to protect the climate system from significant harm, including failures to regulate fossil fuel production and consumption, licensing, or subsidies.[200] This clarification has direct relevance for loss and damage, as it forecloses arguments that diffuse causation or collective action problems absolve States of legal accountability.

The IACtHR reinforces this conclusion through a human rights lens. It holds that non-compliance with obligations aimed at protecting the global climate system necessarily gives rise to State responsibility, triggering duties to end the violation, prevent its repetition, and provide integral reparation for harm suffered.[201] Crucially, the Court frames reparation as benefiting both present and future humanity and recognizes that where climate harm results in the violation of individual or collective rights, the duty to provide full reparation arises as a matter of law. In this context, the Court explicitly observes that the FRLD "does not seek to ensure full reparation of the damage" nor does it "have the purpose of achieving a just distribution of the climate debt based on the principle of common but differentiated responsibilities."[202] By extension, it is clear that the FRLD cannot be treated as a substitute for responsibility grounded in international law.

The ICJ links reparation to climate harm through traditional forms – restitution, compensation, satisfaction – while recognizing that the appropriate measure and attribution may be determined case by case.[203] In parallel, the IACtHR treats integral reparation as a distinct pillar of climate action rather than a residual afterthought, noting that the FRLD does not itself satisfy States' reparation obligations.[204] The Tribunal's concern that the Fund does not achieve equitable distribution of climate burdens implies that its operation, in its current form, cannot exhaust or displace State responsibility. If the Fund fails to address real losses or remains under-resourced, affected states and communities retain recourse to legal avenues beyond the climate regime.[205]

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200 ICJ (2025), para. 427.

201 IACtHR (2025), paras. 556-559.

202 ibid, paras. 202 & 203.

203 ICJ (n 83) paras 420–428.

204 Corte Interamericana de Derechos Humanos IACtHR (n 24) paras 242–247, 262–264

205 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.Paras 32–36.

Ultimately, the ICJ and IACtHR opinions articulate distinct but complementary approaches to reparation in the climate context. The ICJ situates reparation within the orthodox framework of State responsibility, confirming that where climate obligations are breached, reparation may take traditional forms – restitution, compensation, and satisfaction – determined case by case in accordance with general international law. At the same time, the ICJ in acknowledging "the fact that the fund for responding to loss and damage is limited to 'provid[ing] complementary and additional support' confirms the intention of the parties not to base the contributions of funds on State responsibility".[206] By contrast, the IACtHR adopts a more explicitly reparative framing, identifying reparation for climate-induced loss and damage as a third pillar of climate action alongside mitigation and adaptation, anchored in the duty of cooperation.[207] In this view, reparation is not a residual consequence of breach, but a constitutive element of States' climate obligations, particularly where climate harm results in violations of individual or collective rights. By contrast, ITLOS expressly confined its analysis to primary obligations under UNCLOS and declined to engage in a full treatment of responsibility or liability.[208] Read together, the opinions confirm that while the climate regime's institutional mechanisms emphasize cooperation rather than liability, they do not foreclose recourse to reparation under general international law where real losses remain unaddressed or inadequately remedied.

The advisory process also exposes a doctrinal shift. For three decades, developed countries resisted liability and compensation by invoking Paragraph 51 of the decision adopting the Paris Agreement to argue that loss and damage lay outside the law of State responsibility. The ICJ clearly rejects this reading. While the Court accepts that Article 8 of the Paris Agreement and the design of the FRLD reflect a political choice not to base financial contributions on State responsibility – limiting the Fund to "complementary and additional support" - it holds that this institutional design does not amount to a *lex specialis* excluding the general rules of State responsibility.[209] This means that in the absence of any discernible intention by States to derogate from customary law, breaches of obligations under the UNFCCC, the Paris Agreement, or other applicable rules remain governed by the general law of State responsibility. This clarification reopens the space for reparation claims. This also aligns with the declarations lodged by several small island states upon rati-

206 ICJ (2025) para. 415.

207 Corte Interamericana de Derechos Humanos IACtHR (n 24) para 125.

208 ITLOS (2024) para. 148.

209 ICJ (2025) para. 415.

fication, expressly reserving recourse to international law,[210] which the Court has recognized as evidence against a lex specialis.[211] In essence, the ICJ clarified that a political disclaimer adopted for negotiation purposes cannot extinguish pre-existing legal obligations to repair harm arising from internationally wrongful conduct. Several judges explicitly criticized the Court for avoiding the temporal dimension of responsibility.[212] By declining to clarify temporal scope, the Court leaves open legal arguments linking past extraction, accumulated emissions, present vulnerability and contemporary claims for reparation. For historically marginalized regions, this gap is not merely doctrinal. It sustains ambiguity around the responsibility of States whose industrialization and wealth accumulation underpin the climate harms now materializing elsewhere, thereby postponing, rather than resolving, the structural questions at the heart of loss and damage.

The interaction between responsibility and institutions is equally important. Because the advisory opinions affirm that breaches trigger reparation, the FRLD cannot be viewed as a substitute for State responsibility: it functions as one modality through which States may discharge aspects of their duty to cooperate and provide remedy. If the Fund is inadequately capitalized, procedurally inaccessible, or fails to address slow-onset and irreversible losses, States cannot rely on its existence as a defense. Indeed, underfunding or design defects could themselves become relevant to the finding of a legal breach where they impede the ability of vulnerable states to protect rights or prevent foreseeable harm. The UN Secretary-General has already observed that current mechanisms do not provide effective remedy for climate harms.[213]

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210 In fact, several vulnerable countries, led by small island States declared upon ratification of the Paris Agreement that it would not preclude any recourse under international law for State responsibility and principles of general international law or any claims or rights of compensation for the impacts of climate change. For relevant commentary, see MJ Mace and Rhoda Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 Review of European, Comparative and International Environmental Law 197–214, 206; and Veera Pekkarinen, Patrick Toussaint, and Harro van Asselt, 'Loss and Damage after Paris: Moving Beyond Rhetoric' (2019) 13(1) Carbon & Climate Law Review 31–49.

211 ICJ (2025) para. 419.

212 In his separate opinion, Judge Yusuf described the Court's approach as excessively formalistic and disconnected from the substance of the General Assembly's request, arguing that the Court "dodged" the question of consequences for the most vulnerable States and warning that it is impossible to address climate justice without reckoning with historical responsibility. He emphasized that the distinction between States that have predominantly contributed to greenhouse gas emissions and those that are disproportionately affected cannot be set aside without emptying the concept of justice of its meaning (Separate Opinion Yusuf, paras 4–11).

213 UNGA, 'Analytical Study on the Impact of Loss and Damage from the Adverse Effects of Climate

5. Recommendations

The advisory opinions clarify that loss and damage finance is embedded in binding legal obligations. The FRLD, which is only now beginning with a start-up financing phase while its long-term operational procedures and policies are still under development, given the short-comings already apparent under its start-up financing phase under the BIM, must therefore be assessed and adjusted as a governance mechanism through which States discharge duties of cooperation, prevention, human rights protection and reparation. The following recommendations translate those legal standards into concrete institutional and political action.

5.1 Governments

States should treat loss and damage finance as a legal obligation rather than a voluntary expression of solidarity. Contributions to the FRLD should be predictable, adequate and commensurate with foreseeable harm, taking into account differentiated historical contributions and present capacity. Reliance on voluntary, ad hoc pledges is incompatible with the continuous and meaningful cooperation required under customary international law as clarified by the ICJ and ITLOS.

Governments should ensure that guidance to the FRLD Board explicitly reflects the standards articulated by the ICJ, ITLOS and the IACtHR, including heightened due diligence, anticipatory action and protection of affected populations. Future guidance issued by the COP and CMA should explicitly reflect the legal standards articulated in the advisory opinions, including the obligation to mobilize resources commensurate with risk and vulnerability, and to ensure that institutional arrangements enable timely responses to both rapid onset and slow onset loss and damage. Political decisions that constrain the Fund's scope, slow disbursement or exclude slow onset and irreversible losses risk undermining States' compliance with international law.

States should also refrain from invoking Paragraph 51 of the decision adopting the Paris Agreement as a shield against responsibility. As clarified by the ICJ, this political disclaimer does not constitute *lex specialis* and cannot exclude the application of general rules on State responsibility. Governments should therefore anticipate

Change on the Full Enjoyment of Human Rights, Exploring Equity-Based Approaches and Solutions to Addressing the Same.' (n 6).

that failures to cooperate adequately through the FRLD may be relevant in future assessments of internationally wrongful conduct.

5.2 FRLD Board

The FRLD Board should work in developing the long-term operational policies and procedures beyond the start-up financing phase to align the Fund's governance and operational modalities with the legal standards clarified by the advisory opinions. This requires prioritizing rapid and anticipatory finance, including for slow onset processes, displacement and non-economic loss, rather than reproducing conventional project-based climate finance modalities. It further involves ensuring that the Fund is capable of responding to foreseeable harm in a timely, accessible and rights-respecting manner, including through streamlined procedures and by developing clear pathways for rightsholder of affected communities and specific population groups made vulnerable through discrimination and marginalization to directly access FRLD grant financing.

The Board should accelerate adoption of a long-term resource mobilization strategy that reflects the scale of foreseeable loss and damage. Persistent delay in capitalizing the Fund undermines the ability of States to comply with due diligence obligations and exposes the Fund to legal and political credibility risks.

Safeguards should be strengthened and explicitly grounded in a human rights-based approach. The absence of an independent grievance mechanism at Fund level and the reliance on implementing entity procedures weaken accountability and risk falling short of the procedural guarantees emphasized by the ICJ and the IACtHR. Safeguards are not optional governance features but part of the legal framework through which States demonstrate compliance.

5.3 Affected Communities and Civil Society

Affected communities and civil society actors should continue to document loss and damage in ways that connect lived impacts to States' legal obligations, including duties of prevention, cooperation and reparation. Evidence of procedural barriers such as restrictive access criteria, delayed disbursement or exclusion from participation in decision making is legally relevant and should be systematically recorded.

Civil society engagement with the FRLD should therefore focus on accountability across all Fund procedures and policies beyond the necessary focus on improving

participation. Monitoring how the Fund allocates resources, applies safeguards and responds to foreseeable harm is essential to assessing whether it enables or obstructs States' compliance with international law.

Where the FRLD fails to address real losses or remains structurally inaccessible, communities and civil society should continue to pursue complementary legal and political avenues. The advisory opinions make clear that climate institutions do not exhaust available remedies.

5.4 Future Litigants

The advisory opinions provide a consolidated legal foundation for future claims relating to loss and damage. Litigants should draw on the ICJ's confirmation that breaches of climate obligations may constitute internationally wrongful acts and that multiplicity of contributors does not preclude responsibility.

Claims should focus not only on emissions and mitigation ambition, but on failures of cooperation, prevention and of delivering adequate finance. Persistent underfunding of the FRLD, restrictive access criteria or design choices that impede timely response to foreseeable harm may be relevant in future assessments of internationally wrongful conduct.

While the temporal scope of responsibility was not spelt out by the Courts, arguments linking cumulative emissions, historical extraction and present-day loss and damage remain legally viable. Separate opinions provide doctrinal support for advancing these claims in appropriate fora.

5.5 Gender

States and the FRLD Board should explicitly integrate gender into the design and operation of loss and damage finance in accordance with the obligation articulated in the FRLD's Governing Instrument for all of its funding to take a "culturally sensitive and gender-responsive approach" beyond mere safeguards considerations.[214] Climate impacts are not gender neutral, and failure to account for differentiated harms risks violating human rights obligations and due diligence standards.

214 UNFCCC, 'Decision 1/CP.28 Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4' (n 102) Annex I para 5.

Equity, operationalized through a gender lens, is a distributive test: who receives finance, under what conditions, and whether those flows reduce—or reproduce—patterns of deprivation and gendered unpaid care burdens. In this sense, gender equality is not a narrative aspiration; it is an operational benchmark for the Fund's operational rules and policies and its allocation and evidentiary standards. Funding criteria and safeguards should ensure that women and girls in all their diversity, particularly in rural, coastal and informal economies, are prioritized as rightsholders rather than treated as passive beneficiaries.

Access modalities and evidentiary requirements should be adapted to avoid gender bias and foreseeable exclusions, and to recognize community-based, qualitative, and non-monetary evidence.

Loss and damage finance, from a gender perspective, is not a policy preference; it is a legal requirement grounded in duties to protect human rights, equality, and non-discrimination. In these terms, the Fund's effectiveness should be measured by whether it shifts power and removes barriers for those who have suffered harm. This requires a robust architecture of integrity, transparency, accountability, and remedy, including genuinely accessible grievance mechanisms and an explicit human-rights-based ethical and fiduciary framework.

Conclusion

The advisory opinions of ITLOS, the IACtHR and the ICJ mark a turning point in the legal understanding of loss and damage. They confirm that climate harm engages binding duties of prevention, cooperation, human rights protection and reparation under international law. Loss and damage finance is not discretionary. It is one of the means through which States must comply with these obligations.

The FRLD occupies a central position within this legal architecture. Its governance, capitalization, and operational design directly affect States' ability to meet the standards of due diligence, equity and effectiveness now clarified by international courts. Ultimately, the Fund's effectiveness will be measured by whether it enables States to act with the level of diligence, equity and urgency that international law demands. Underfunding, delayed operationalization and restrictive access modalities are no longer mere governance failures; they may constitute legally relevant failures of cooperation and prevention.

At the same time, the advisory opinions leave unresolved questions, particularly regarding historical responsibility. This silence does not close the door to future

claims. It preserves legal space for arguments linking past emissions, present vulnerability and contemporary demands for reparation, especially for regions shaped by colonial extraction and structural inequality.

The consolidation of climate jurisprudence through international and regional courts signals a shift from moral argument and political aspiration to legal obligation. Whether the FRLD evolves into a mechanism capable of enabling compliance with international law or remains politically constrained will shape not only the future of loss and damage finance, but the credibility of the international climate regime itself.


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